

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/01582/2017**

**THE IMMIGRATION ACTS**

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| **At: Manchester Civil Justice Centre**  **On: 21 May 2018** | **Decision & Reasons Promulgated**  **On: 11 June 2018** |
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**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**IAN+6**

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Secretary of State: Mrs Aboni, Senior Home Office Presenting Officer

For IAN: Mr Sinker, Counsel instructed by Jackson Canter Solicitors

**DETERMINATION AND REASONS**

1. The Respondent is a national of Nigeria born in 1980. Her dependents are her husband and five children. On the 24th July 2017 the First-tier Tribunal (Judge Bell) allowed her appeal on human rights grounds. The Secretary of State for the Home Department was granted permission to appeal against that decision by First-tier Tribunal Judge Froom on the 14th October 2017.

**Anonymity Order**

1. This appeal concerns the human rights of minors. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondent (Appellant at first instance) is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondents. Failure to comply with this direction could lead to contempt of court proceedings”

**Matters in Issue before the First-Tier Tribunal**

1. Before the First-tier Tribunal IAN had pursued two avenues of redress.
2. She and her husband had first asserted that they required protection and could not be returned to Nigeria because they feared serious harm there from non-state agents including family members, a priest and the devotees of an Okija shrine. It was asserted that these non-state agents had identified the male twin children of this family as suitable candidates for human sacrifice, and that they wished to perform FGM on the female children. This claim was roundly rejected by both Secretary of State for the Home Department and the First-tier Tribunal. The account advanced by IAN was found to be muddled, inconsistent and unsupported by the country background evidence. Judge Bell did not find it to be credible. There was no obligation on the United Kingdom to grant protection where IAN and her family could avail themselves of the protection of the Nigerian state, and further it was open to the family to relocate within Nigeria away from their home area.
3. The second limb of the appeal rested on Article 8 ECHR, and in particular whether it was ‘reasonable’ that the three ‘qualifying’ children of this family leave the United Kingdom, that being the operative question raised by s117B(6) of the Nationality, Immigration and Asylum Act 2002. In its assessment of that matter the Tribunal found that the father of the family suffers from various medical ailments such that would impair his ability to work: it is likely to be hard for him to be able to afford the treatment he needs in Nigeria and unable to work, he will struggle to support his family. The children all have established private lives in this country and are unlikely to have any memories of Nigeria. They do not know the relatives that they have there. The financial hardship faced by the family is likely to have a detrimental impact on their education and so their general development. Having noted these factors the Tribunal concludes [at §49]:

“I am therefore satisfied that the oldest 3 children do meet the requirements of paragraph 276ADE (iv) and are qualifying children under section 117B”.

1. The Tribunal goes on to find that success for the qualifying children will necessarily meet success for their parents, and in turn the remaining, younger, children. The appeal was thereby allowed.
2. The Secretary of State for the Home Department now appeals against that decision. The lengthy and somewhat intemperate grounds boil down to two simple points:
3. The Tribunal was wrong to invoke paragraph 276ADE(1)(iv) of the Immigration Rules, since this requires a child to have accrued seven years residence at the date of application, which these children had not done.
4. In its assessment of s117B(6) the Tribunal failed to take the public interest into account.

**Error of Law**

1. Mr Sinker very sensibly conceded ground (i). The children in question had arrived in the United Kingdom on the 7th September 2009. The applications had been made on the 11th December 2015. Paragraph 276ADE(1)(iv) reads:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are **that at the date of application**, the applicant:

…

(iv) is under the age of 18 years and **has lived continuously in the UK for at least 7 years** (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

1. The children had not reached the seven-year mark at the date that the applications were made and so the Tribunal erred in purporting to allow their appeals with reference to the Rule.
2. The parties agreed that the matter of reasonableness was nevertheless relevant to the question of proportionality ‘outside of the rule’ and the application of s117B of the 2002 Act, this being the matter raised in ground (ii). The Secretary of State for the Home Department places reliance on MA (Pakistan) [2016] EWCA Civ 706 in which Elias LJ accepted, albeit reluctantly, that in evaluating whether it is ‘reasonable’ to expect a child to leave the UK, regard must be had *inter alia* to the conduct of that child’s parents, more often than not as expressed at subsections (1)-(5) of s117B. In this decision the First-tier Tribunal does not appear to have weighed in the balance the fact that maintenance of immigration control is in the public interest, nor that the family do not appear to be financially independent, and that ‘little weight’ can be attached to a private life where it was developed whilst leave was precarious, or altogether absent. These are considerations mandated by statute, and decision makers must have regard to them. In this case the First-tier Tribunal erred in failing to take these matters into account. Whilst the factors that it did identify were pertinent and open to it on the evidence (criticisms of those findings in the grounds were not pursued before me), the reasoning on human rights was incomplete and must therefore be set aside.

**The Re-Made Decision**

1. The dates and places of birth of the children of this family are as follows:
2. H (boy) born in Nigeria on the 19th August 2007
3. W (boy) born in Nigeria on the 19th August 2007
4. S (girl) born in UK on the 11th May 2010
5. Jd (girl) born in the UK on the 14th June 2012
6. Jl (girl) born in the UK on the 14th June 2012
7. Twin boys H and W came to the UK with their parents on the 7th September 2009 and have lived here since that date. The girls have been in the UK since birth. At the date that the applications for leave to remain were made, the 4th November 2014, H and W had been in the UK for just over five years. At the date of this decision they have been here 8 years and 9 months. S, who was born in the UK, has also lived here for a continuous period of 8 years. These three elder children are therefore ‘qualifying’ children under Part V of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014): see section 117D.
8. The parties are in agreement that the legal framework I must apply is the *Razgar* Article 8 proportionality enquiry, informed by the public interest factors set out in s117B of the 2002 Act.
9. Mrs Aboni accepted that given that the three eldest children are ‘qualifying’ under Part V the Secretary of State accepted that each member of the family enjoyed a private life in the UK to the extent that the relatively low threshold for engaging Article 8 was met. She accepted that the decision to refuse the family leave could interfere with their enjoyment of that right, given that the expected consequence of such a decision would be the family’s eventual removal from the UK.
10. Mr Sinker in turn accepted that the third and fourth *Razgar* questions were answered in the affirmative, since the Secretary of State clearly had, as a matter of law, the authority to make the decision and the decision itself was driven by the rational Article 8(2) purpose of protection of the economy.
11. The only matter in issue was whether the decision to remove this family was, in all the circumstances, proportionate. My starting point in conducting that balancing exercise is s117B of the 2002 Act:

Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

(6) **In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where**—

**(a) the person has a genuine and subsisting parental relationship with a qualifying child, and**

**(b) it would not be reasonable to expect the child to leave the United Kingdom**.

1. At the date of writing the authoritative guidance on how this section is to be applied is to be found in MA (Pakistan):
2. The paragraphs in section 117B achieve different objectives. The structure of subsections (4) and (5) differs from subsections (1) to (3). The latter identify factors bearing upon the public interest which a court or tribunal is under a duty to consider but it is for the decision maker to decide upon the weight to give to these factors in making the determination, subject only to compliance with public law principles. Subsections (4) and (5) implicitly accept that the matters identified therein should be taken into account, but there is a direction as to the weight – or more accurately, the relative lack of it - which should be given to these considerations. Parliament has here sought to identify both relevance and weight.
3. Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. **It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision** in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.
4. 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.
5. **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?**

1. **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.**
2. To that extent the Court agreed with Mr Justice McCloskey in Treebhowan [2015] UKUT 00674 about the structure of s117B. Sub-section (6) was of a markedly different nature to the preceding five matters. A finding that it would not be reasonable to expect a qualifying child to leave is, in effect, determinative.
3. The question then arises: when will it be unreasonable to expect a child to leave the United Kingdom? Having adopted the Treebhowan structural analysis of s117B the Court of Appeal in MA go on to disagree with McCloskey J about what matters were relevant to that enquiry. McCloskey J had suggested that the question was to be answered solely with reference to the child, and his or her best interests. The Court, with some reluctance, rejected that analysis. Drawing an analogy with the approach taken in deportation appeals to the test of “undue harshness”, the Court of Appeal was persuaded that the Secretary of State was correct in her contention that the test in fact required the public interest to be weighed into the balance when considering ‘reasonableness’. This would include all the pertinent matters set out at s117B(1)-(5), as well as any other ‘suitability’ issues that might arise. The Court was however clear that the public interest in s117B cases was materially different from that weighing against persons subject to deportation, where s117C would be applied. For the latter, the statute created a presumption in favour of deportation. For the former, the statute read in line with existing jurisprudence, did just the opposite. At paragraph 46 Elias LJ says this:

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "*Family Life (as a partner or parent) and Private Life: 10 Year Routes*" in which it is expressly stated that once the seven years' residence requirement is satisfied, **there need to be "strong reasons" for refusing leave** (para. 11.2.4). **These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK** with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment”.

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

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

1. Do such ‘powerful reasons’ exist in this case?
2. In his grounds of appeal the Secretary of State relies generally on ss(1)-(5) of s117B and highlights the following matters: i) the adult appellants were found to be “completely incredible” in respect of their failed asylum claims, ii) the family have a very poor immigration history. It is further submitted that the children are not at a particularly vital stage of their educations.
3. It is accepted that all of the Respondents speak fluent English. They claim to be reliant on charity and it cannot therefore be said that they are financially independent. This is a matter that must weigh against them in the balancing exercise since it is in the public interest that persons who seek to remain in the UK are able to support themselves financially. I further note that each of their private lives have been established whilst living in the UK unlawfully and that – at least where the adults are concerned – this means that little weight can be attached to those private lives.
4. I am not prepared to give much significance to whether or not the children are at a ‘vital’ stage of their educations. I need not do so. The point about ‘qualifying children’ is that the Secretary of State *already* accepts that it would be contrary to their best interests for them to be removed from the UK. It is already accepted that the child who has accrued such a period of long residence will have an entrenched private life in the UK – his home, friends, school and in fact everything he knows – will be in this country. It will normally be the case that it would be contrary to his best interests to interfere with that. If the child is about to take exams that may attract even more weight but on the facts here, where the children have in excess of 8 years’ residence, the corresponding reduction would be marginal.
5. As for the parents’ immigration history, this is plainly a matter that attracts considerable weight in the balancing exercise. Section 117B(6) explains that it is in the public interest to refuse leave to persons who do not meet the requirements of the Immigration Rules and that is obviously right. Whether a poor immigration history is capable of amounting to a ‘powerful reason’ is however a matter of fact and degree. It is implicit that any applicant seeking leave to remain on Article 8 grounds, and placing reliance on s.117B(6), must be in the UK without leave; the mere fact of being an overstayer cannot therefore defeat a claim. On the other end of the scale it is arguable that where an individual has repeatedly set out to frustrate the intentions of the rules, has committed crimes, has used deception or otherwise flagrantly circumvented immigration control, the ‘powerful reasons’ looked for by the Court of Appeal might exist. In the recent Presidential decision of MT and ET (child’s best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) the panel (Mr Justice Lane and Upper Tribunal Judge Lindsley) considered the case of an applicant who had overstayed, had made a false asylum claim, had received a community order for using a false document to work illegally and who had pursued various legal means of remaining in the United Kingdom. The panel found that even considered cumulatively those matters did not amount to powerful reasons why it would be reasonable to expect the applicant’s qualifying child to leave the UK [at §34].
6. It seems to me that the immigration history of the adult appellant in that case, MT, is on a par with that of the parents in this family. They are all long-term overstayers who have made a false claim for protection. MT had the additional weight against her of having been convicted of using a false instrument. As far as I have been made aware, neither parent in this family has received a criminal conviction. MT was described by her counsel as a “run of the mill immigration offender” and this is a description that the Tribunal appears to endorse. Whilst in no way reducing the weight to be attached to s117B(1), they conclude that MT’s behaviour was not so serious that it amounted to a powerful reason why it would be reasonable to expect her qualifying child to leave the country.
7. Having taken all of those matters into account I am driven to conclude that there are not powerful reasons why these children should be expected to leave the UK. The findings made by the First-tier Tribunal about their likely circumstances should they be ‘returned’ to Nigeria only serve to underline why it would be in their best interests to remain in this country, and for the reasons I have set out above, the public interest does not, in the case of the three qualifying children, outweigh those best interests. It would not be reasonable to expect them to leave. It follows that the appeals of the parents must be allowed with reference to s117B(6) since the public interest does not require their removal. Mrs Aboni accepted on behalf of the Secretary of State that if this was my conclusion it would follow that the appeals of the whole family would fall to be allowed on Article 8 grounds.

**Decisions**

1. The protection decisions of the First-tier Tribunal contain no error of law and they stand: each appeal is dismissed on protection grounds.
2. The human rights decision of the First-tier Tribunal is flawed for error of law and it is set aside to the extent identified above.
3. I remake the decisions in the appeals in respect of human rights as follows:

“the appeals are allowed on Article 8 grounds”.

1. There is an order for anonymity pertaining to each member of the Respondent family.



Upper Tribunal Judge Bruce

3rd June 2018