



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/45698/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 December 2015**

**Decision Promulgated
On 21 December 2015**

Before

Upper Tribunal Judge Southern

Between

G.E.S.

(Anonymity direction made by First-tier Tribunal)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D. Revill of counsel, instructed by Peer & Co, solicitors

For the Respondent: Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION

1. The appellant, who is a citizen of Jamaica born on 31 October 1970, has been granted permission to appeal against the decision of First-tier Tribunal Judge Pedro who, by a decision promulgated on 2 June 2015, dismissed his appeal against the respondent's decision, made on 3 November 2014, to remove him from the United Kingdom, pursuant to s 10 of the Immigration and Asylum Act 1999 having refused his human rights application founded upon rights protected by Article 8 of the ECHR.

2. The grounds upon which permission was sought and granted raise, in particular, two interesting questions of law. First, where a concession is made by the appellant's representative that the appellant cannot succeed under the immigration rules, and so pursues no such argument before the judge, if despite that the circumstances do disclose a clearly arguable case that the appellant meets the requirements of Appendix FM, is it an error of law for the judge not to address that, on the basis of being "*Robinson Obvious*" in accordance with the principles set out in *R (Robinson) v SSHD* [1997] EWCA Civ 3090? Secondly, is s117B(6) of the Nationality, Immigration and Asylum Act 2002 a self-contained, freestanding provision such that, if its requirements are met, the appellant must succeed in his claim under Article 8, regardless of any other public interest argument that may count against him? In this particular appeal the grounds assert also that the judge fell into legal error by not having regard to s117B(6) at all, even though it was plainly relevant.
3. There is a further issue to be considered, it being said that the judge erred in failing to make specific findings of fact as to, first, whether the best interests of the children affected by the proposed removal of their father from the United Kingdom demanded continuing face to face contact with him, and second, his actual future intentions in respect of the relationships he wished to maintain with those children.
4. It is helpful first to set out a summary of the immigration and litigation history concerning this appellant.
5. The appellant arrived in the United Kingdom on 9 October 1999 and was admitted as a visitor for six months. He overstayed that leave and has been present unlawfully ever since. He next came to notice of immigration officers in July 2004 when he was sentenced to 6 weeks' imprisonment for an offence of driving whilst disqualified. It is not apparent from the papers before me what was the earlier offence for which he was disqualified. His appeal against the removal decision that was served upon him was dismissed in April 2005.
6. Despite that, the appellant remained in the United Kingdom and in October 2009 an application for leave to remain as the unmarried partner of a person settled in the United Kingdom was refused. This was followed, in 2011, with further submissions being advanced on the appellant's behalf in support of his Article 8 claim and, those being refused, a threat of judicial review followed which was not in fact followed up. An application for permission to bring a judicial review of a further refusal of submissions in February 2014 was withdrawn when agreement was secured for yet a further reconsideration which resulted in the refusal of the human rights claim that is under challenge in these proceedings.
7. Thus, the appellant's Article 8 claim has been considered and refused on a number of occasions although, as Judge Pedro pointed out, the

claim had changed as time went on because the appellant has shown a propensity to move on from one relationship to another. The judge said:

“I have also have to take account of the fact that the appellant’s personal history as regards relationships indicates a serial and persistent lack of commitment to any relationship, whether it be with former partners or children ...”

The judge set out a summary of the various relationships the appellant had entered into with several women, including those that have produced children, and observed:

“... past relationships have overlapped and that he has had no respect or commitment towards any of his relationships ...”

8. As for the present state of the appellant’s relationships, for present purposes the following brief summary will suffice. The judge accepted that the appellant enjoyed private and family life in the United Kingdom and that the decision under challenge would engage rights protected by Article 8. The appellant lived with his present partner [JA] in circumstance such as to amount to family life. She, however, would move with him to Jamaica should he be removed. He maintained contact with two of his children in the United Kingdom, both of whom lived with their mothers with whom the appellant’s relationships had ended. These two children were aged 7 and 4 years old. The 7 year old lived some distance away so that he saw her less frequently, during school holidays only. The findings made by the judge of this relationship are clear:

“I find that the appellant’s relationship with (the 7 year old child) amounts to no more than sporadic contact and that should the appellant return to Jamaica he could maintain contact with (the 7 year old child) through modern methods of communication ... there is no evidence before me to indicate that the welfare of (the 7 year old child) would be harmed by the appellant’s removal from the United Kingdom ...”

It is implicit in that finding that the judge accepted that there was a genuine and subsisting parental relationship but that its nature was such that it could be maintained without face to face contact after the appellant had left the United Kingdom

9. The appellant had more frequent contact with the four year old daughter. The judge said that:

“... she recognises the appellant as her father and he frequently takes her to school and collects her from the school ...”

The judge noted that this was because the child’s mother, to whom the appellant was unable to provide any financial support, worked during the week. The 4 year old child lived with her mother and her three half-sisters, aged 14, 16 and 21 and the father of those half-

sisters also assisted with child care arrangements. The judge concluded:

“I accept that (the 4 year old child) has a current ongoing relationship of a close nature with the appellant during weekdays because of the current child care arrangements made between (the child’s mother) and the appellant, and that it may well upset (the 4 year old child) should the appellant no longer be present in the United Kingdom.”

The judge noted that in February 2015 this child accompanied her mother on a 3 week long visit to Jamaica when they stayed with other relatives and so there was a possibility of future visits. The judge had regard to the fact that the younger child would be “upset” should the appellant be removed; the nature of his present involvement with her, her domestic living arrangements and the question of what was in her best interests, bearing in mind what the judge referred to as the appellant’s history of a “serial and persistent lack of commitment to any relationship, whether that be with former partners or children” and concluded:

“... (the 4 year old daughter) would continue to reside with her mother in the United Kingdom, as well as her three half-sisters, one of whom is an adult. Her living and educational arrangements would continue, and there is no reason why the appellant would be unable to maintain contact with (her) from Jamaica through modern methods of communication. There would also be the possibility of visits ...

...

I recognise that I need to balance the public interest against the individual interests of the appellant, [JA] (his present partner) and the appellant’s children. I take into account that the appellant does not meet the family, private life or any other provision of the Immigration Rules for leave to be granted to remain in the United Kingdom ...”

Having addressed the best interests of the children in the United Kingdom and having recognised also that the appellant’s private life was established while he was unlawfully present; that he has close family relatives, including adult children, in Jamaica and that, having spent the first 29 years of his life in Jamaica there would be no obstacle to re-integration, especially as his present partner said she would travel with him and, as a musician, he could seek employment, the judge concluded that the appellant’s removal would give rise to no impermissible infringement of rights protected by Article 8 of the ECHR.

Was the claim under Appendix FM “Robinson obvious”?

10. At the hearing before Judge Pedro the appellant was represented by his solicitor, Mr Peer of Peer & Co, solicitors. The judge recorded that at the beginning of the hearing a concession was made that the appellant could not succeed in his Article 8 claim under the immigration rules:

“Mr Peer accepted that the appellant does not meet any of the family or private life provisions of the Immigration Rules under Appendix FM or paragraph 276ADE. He confirmed that the appellant is seeking to rely on human rights grounds in relation to Article 8 of the European Convention outside the Immigration Rules ...”

That concession, made in clear and unambiguous terms, was recorded by the judge in his record of proceedings and Ms Revill, who appears as counsel for the appellant before the Upper Tribunal, accepts that the concession in those terms was indeed made. She submits that, despite that, it was *Robinson* obvious that the evidence disclosed a clear case under the immigration rules so that it was an error for the judge to fail to engage with that issue. That was because, she submitted, the judge should have appreciated that the appellant fell within EX.1 of Appendix FM and so was entitled to the grant of leave to remain. For the respondent, Mr Jarvis submits that the judge was plainly entitled to rely upon the concession made, and so not carry out any assessment under the rules and he disputes also that there was, in any event, a clearly arguable case under the rules.

11. I have no doubt at all that Mr Jarvis is correct.
12. As a matter of legal principle, the submission that, as a general proposition, a claim to meet the requirements of the rules in respect of a private or family life claim comes within the *Robinson* principle is not established where the judge goes on to consider that claim outside the rules. Secondly, and in any event, in this particular case the appellant did not have access to EX.1 and so there was no evident possibility that his application should have succeeded under the rules.
13. The rationale underpinning the *Robinson* principle is that a judge must have regard to an obvious Convention argument not raised in the grounds of appeal because to ignore it and so deny the appellant the relief sought and to which, as a matter of law, he was entitled, might result in the United Kingdom being in breach of its obligations under the Convention. Although *Robinson* was concerned with an asylum claim, it is uncontroversial that the principle now extends to Convention rights under the ECHR. However, in this case the judge was asked to, and did, carry out a full assessment of the claim under the ECHR outside the rules and so there was no question of the judge ignoring the possibility of an infringement of any Convention right.
14. Quite apart from that, in the absence of a clear and obvious error in making the concession, a judge will be entitled to rely upon a clear and unambiguous assertion by a legal representative that no argument was being pursued on any particular basis. Lord Woolf MR (as he then was) in *Robinson* said that the judge is:

“... not required to engage in a search for new points ...”

and

“... he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they had not taken but which could properly be categorised as merely “arguable” as opposed to “obvious”.

Here, we are concerned not with any point that had been overlooked but with a line of argument that the appellant’s solicitor had specifically confirmed he would not be pursuing because, he said, the appellant did not meet the requirements of the rules. The judge was, in those circumstances, under no obligation to carry out any enquiry or investigation as to whether the appellant might succeed under the rules, especially as he was to embark upon a full examination of the Article 8 claim outside the rules.

15. In any event, this was not a case where it was evident, let alone obvious, that the appellant might have succeeded under the immigration rules. It is Ms Revill’s submission that the appellant should have succeeded under EX.1 of Appendix FM. EX.1 provides, so far as is relevant, that it applies if the applicant has a genuine and subsisting parental relationship with a qualifying child in respect of whom it would not be reasonable to expect the child to leave the United Kingdom. This appellant plainly did have a genuine and subsisting relationship with a qualifying child and the judge accepted that there was “no question” that the child should be expected to leave the United Kingdom. However, the difficulty for the appellant is that EX.1 was not open to him.
16. The tortuous route to be navigated on a journey through these provisions of the immigration rules has attracted a good deal of judicial comment. In order to secure leave to remain as a parent, the appellant must *inter alia* meet the requirements of R-LTRPT.1.1. which includes that the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4 and ELTRPT.3.1. E-LTRPT.2.3 provides as follows:

‘E-LTRP.2.3. Either –

 - (a) The applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British citizen or settled in the UK); or
 - (b) The applicant or carer with whom the child normally lives must be –
 - (i) A British citizen in the UK or settled in the UK;
 - (ii) Not the partner of the applicant (which includes a person who has been in a relationship with the applicant for less than two years prior to the date of the application); and
 - (iii) The applicant must not be eligible to apply for leave to remain as a partner under this Appendix.’

As the judge found as a fact that the appellant was currently in a relationship with an individual who apparently was someone who might be thought to be such a partner as contemplated by E-LTRP.2.3(b)(iii), it is hard to see how it was arguable that the appellant could qualify for consideration under EX.1. Ms Revill tentatively advanced a submission that the partner referred to in E-LTRP.2.3(b)(iii) had to be the same partner referred to in (ii) but the indefinite article deployed in (iii) compared with the definite article in (ii) makes that argument untenable.

17. For these reasons this ground fails.

S117B(6) Nationality, Immigration and Asylum Act 2002.

18. Before embarking upon a discussion of this statutory provision, it is necessary to set out the whole of s117A and s117B:

‘117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B 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.'

19. In *Treebhawon & ors (section 117B(6))* [2015] UKUT 00674 (IAC) which was a Presidential panel decision, the question to be addressed was formulated as follows:

"In a case where a Court or Tribunal decides that a person who is not liable to deportation has a genuine and subsisting parental relationship with a qualifying child, as defined in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and it would not be reasonable to expect such child to leave the United Kingdom, with the result that the two conditions enshrined in section 117B(6) are satisfied, is this determinative of the "public interest question", namely the issue of proportionality under Article 8(2) ECHR?"

The Tribunal found that this question returned a positive answer. That was because s117B(6) unlike the other subsections of s117, was formulated in unqualified terms so that where its conditions were satisfied the public interest does not require removal of the person concerned; the legislation distinguished between those who were and were not liable to deportation, providing differing requirements for each category when the effect upon a child was in play, and because:

"... there is a freestanding public interest in children being reared within a stable family unit."

Pausing there, in the present case the circumstances are such that the various family units to which the appellant has contributed cannot be considered stable because he has withdrawn from each of the family units in which he has produced children, leaving their composition to change after his departure.

20. The conclusion of the Tribunal *Treebhawon* is found at paragraph 20:
- “In section 117B(6), Parliament has prescribed three conditions, namely:
- (a) the person concerned is not liable to deportation;
 - (b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and
 - (c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.”

21. For the appellant, Ms Revill submits that the approach set out in *Treebhawon* is the correct one and should be followed. As the judge accepted both that the appellant had a genuine and subsisting parental relationship with, certainly, the younger child and probably the elder as well and it was accepted that it would not be reasonable for either child to leave the United Kingdom that was the end of the matter. S117B(6) is, she submitted, a self-contained stand-alone provision that was determinative not just of the public interest question but of the question to be addressed in respect of the Article 8 question as a whole so that, even if there are other matters relied upon by the respondent in articulating the public interest in removal, those cannot be considered because s117B(6) is determinative.
22. Mr Jarvis submits that there is room for a different view. He submits, respectfully, that the conclusion of the Tribunal in *Treebhawon*, that s117B(6) comprised “a discrete regime” to which all other public interests arguments must yield is not correct because the requirement of s117A(2) was to the contrary effect.

Discussion:

23. As we have seen, S117B(6) provides as follows:
- “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 subsiding parental relationship with a qualifying child, and

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

24. It can be observed that just two questions are posed by s117B(6). Does the person have a genuine and subsisting relationship with a qualifying child and if so, would it be unreasonable to expect the child to leave the United Kingdom? In the present appeal, positive answers are returned to both questions, certainly in the case of the 4 year old child. If the enquiry ended at that point then one would be left with the conclusion that the public interest would not require the appellant's removal and so the appeal would fall to be allowed.
25. However, the enquiry does not end at that point. That is made clear by s117A(2) which provides:
- “In considering the public interest question, the court of tribunal must (in particular) have regard-
- (a) in all cases, to the considerations listed in section 117B, and
- (b) ...”

It is plain from that provision that the considerations set out in s117B to which regard must be had do not comprise an exclusive list of considerations. If it were otherwise the words “in particular” would be otiose. It is also clear that an assessment of the considerations set out in s117B does not complete the assessment of the public interest question. That is because s117A(2) contemplates that the assessment of the public interest question will include factors other than those set out in s117 and when having regard to those, the assessment being carried out is still that of the public interest question.

26. Put another way, s117B(6) is not a stand-alone provision so that a person meeting its requirements establishes without more that the public interest does not require removal. That is made unambiguously clear by s117A(2). After all, if s117B(6) is taken to be determinative then there would be no room for regard to be had to the other considerations in s117B, as is mandated by s117A(2).
27. It has to be remembered that the assessment being carried out when applying s117A-D is that of a claim under Article 8 of the ECHR. That demands an assessment of all relevant considerations. S117B points to some of those considerations and, in so doing, reinforces the approach that has always been required. It is important to recognise that an appeal does not succeed on the basis of meeting the requirements of s117B(6) but on the basis that there has been an infringement of the ECHR. The application of s117 does no more than illuminate the assessment of the Article 8 claim during the balancing exercise that is carried out when making findings of proportionality.

28. Put another way, a person who meets the requirements of s117B(6) will have established that Article 8(1) rights are engaged and that some justification is required for the interference with those rights arising from the decision under challenge, if that decision is to be a lawful one. It is then necessary to complete the assessment of proportionality required by Article 8(2). In this case, the judge did so after directing himself in terms of the 5 step approach taken from *R (Razgar) v SSHD* [2004] UKHL 27.
29. It may be that there is no more to be said about an appellant present without leave to remain than that he has a genuine and subsisting parental relationship with a qualifying child whom it would not be reasonable to expect to leave the United Kingdom and that continuing face to face contact was required to maintain that relationship. If that were the case then it will have been established that the public interest did not require his removal. However where there is more to be said then the fact that application of s117B(6) delivers an answer that assists the appellant is no more than a step along the path of the assessment and not it's final destination.
30. So what does one take from the assessment under s117B(6) when it is accepted that its requirements are met? First, it must be remembered that a person looking to s117B(6) to assist with his claim that his removal will bring about a breach of rights protected by Article 8 will be a person present without leave to remain. Generally, it is in the public interest that persons present without leave to remain are not allowed to stay and are removed if they do not depart voluntarily. This is given effect by s10 of the Immigration and Asylum Act 1999. However, the effect of s117B(6) is to recognise that in respect of a person who has a genuine and subsisting parental relationship with a qualifying child which relationship could not be maintained by the child leaving the United Kingdom with the parent, the absence of leave to remain will not *in itself* mean that the public interest requires the removal of the parent.
31. That outcome is taken from s117B(6) to the final assessment of the public interest question contemplated as being required by s117A(2) after the Tribunal has had regard to each of the considerations listed in s117B. At that stage, all the considerations relevant to an assessment of the public interest in any particular case need to be factored in before the public interest question can be answered. In particular, an assessment will have to be made of whether, now that it has been established that it would be unreasonable for the child to leave the United Kingdom, it would be a disproportionate interference, and so an infringement of rights of both (or either of) the parent and the child protected by Article 8 of the ECHR, if the child were to remain in the United Kingdom without the parent facing removal, that being, plainly, a relevant consideration not addressed within s117B(6).

32. It is not implicit within s117B(6) itself that it is concerned only with those cases where, because the genuine and subsisting parental relationship can be maintained in the face of the parent's removal only by the child accompanying him, so that if that would not be reasonable, the public interest in removing the parent must yield to the best interests of the child. However, that is the overall outcome when s117 is considered as a whole. That is because the fact that, because of the particular circumstances, it is not necessary for the child to leave the United Kingdom in order to maintain the parental relationship will be one of the factors to be taken into account in considering the public interest question, after having had regard, in particular, to the considerations set out in s117B.
33. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is not determinative of a claim that a person's removal from the United Kingdom will bring about an impermissible infringement of rights protected by Article 8 of the ECHR. It is no more than a statement of principle, if an important one, concerning the public interest question that is to be addressed as part of the proportionality balance to be struck. That statement of principle is just one of the considerations set out in s117B to each of which regard must be had, before completing the task contemplated by s117A.
34. An example may help to illustrate the point: P, who is a person who requires leave to remain in the United Kingdom but does not have it and so faces removal, is the father of a child who lives with her mother in Dorset, but P is a fisherman working in the seas around the Hebrides, as he has for the last 5 years. Given the demands of his work and the modest remuneration it produces P has been unable to visit his daughter during the last 5 years but maintains frequent contact by Skype, telephone calls and email and other social media messages. Plainly, he has a genuine and subsisting parental relationship but that would be maintained in precisely the same way should P be removed from the United Kingdom. It cannot be the effect of s117B(6) that he is entitled to leave to remain even though that is not necessary to achieve the maintenance of the relationship with his daughter as that would be an outcome not demanded by ECHR rights.
35. The fact that such a question, concerning the effect upon the child should she remain in the United Kingdom without the appellant, is not posed specifically in respect of a person not facing deportation, unlike those who do face deportation (as a consequence of s117C(5)) does not mean that it is to be disregarded other than in respect of foreign criminals. Plainly, this is a consideration that will often lie at the very heart of the public interest question that has to be addressed after commencing the process of doing so by addressing those considerations in s117B to which, in particular, regard must be had.
36. As Mr Jarvis submitted, if it were otherwise the result would be remarkable for reasons other than those disclosed by the example

given above which, if the approach advocated by Ms Revill were correct, would demand that leave to remain be granted to the Hebridian fisherman even though that were entirely unnecessary to achieve the objective sought. An application for leave to remain is decided by the respondent by reference to the immigration rules. S117A-D is directed at courts and tribunals and not the respondent's decision makers. If the interpretation of s117B(6) urged on behalf of the appellant were correct it would mean that an application that would be bound to succeed on appeal could properly be refused under the immigration rules. The immigration rules were amended at the same time as the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 were brought into effect in order to ensure alignment. If the intention of the legislature was to create in s117B(6) a self-contained discrete route to establishing rights under Article 8 of the ECHR that excluded all other contrary considerations that would otherwise be taken into account in striking a balance between the competing interest in play, this would be an astonishing oversight. In the explanatory notes published with the Immigration Act 2014, which of course amended the 2002 Act by inserting s117, we find this:

“New Immigration Rules came into force on 9 July 2012. The Act gives the force of primary legislation to the principles reflected in those rules by requiring a court or tribunal, when determining whether a decision is in breach of Article 8 ECHR, to have regard to the public interest considerations as set out in the Act.”

37. Further, if the approach urged on behalf of the appellant were correct this would mean that the best interests of the child will have become *the* primary consideration rather than a primary consideration such as to displace all other public interest arguments, however cogent, in the case of a parent not subject to deportation. Primary legislation is certainly capable of achieving such an outcome, if that is the legislative intention. But it is not apparent that such was the legislative intention giving rise to s117B(6). It would be quite extraordinary if that were the case, given that the effect would have been to set aside the established and powerful line of authority, culminating in *ZH (Tanzania) v SSHD* [2011] UKSC 4 in which Lady Hale made this now familiar observation at para 25:

“Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply Article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".”

Which was explained and reinforced by Lord Kerr at para 46:

“It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to

his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

38. None of these arguments were advanced before the Tribunal in *Treebhawon* and so we cannot know what would have been made of them had they been considered. However, in my judgement Mr Jarvis has presented an unanswerable argument which requires me to take a different approach than did the Tribunal in *Treebhawon*. Therefore, s117B is not a self-contained, discrete provision that is determinative of the public interest question, let alone the broader question of whether there has been a disproportionate and so unlawful interference with rights protected by Article 8(1) of the ECHR. It is one of the considerations to which regard must be had in making that assessment. Certainly, it is a powerful consideration but not one that excludes consideration of any matter that indicates that the public interest does require the appellant's removal, despite that not being required simply on account of the absence of leave to remain.

Error of law:

39. For the reasons given above, it is clear that the judge made no error of law in failing to carry out an assessment within the immigration rules.
40. Nor did the judge fail to have regard to the best interest of the children. He addressed that question specifically, as he made clear in the opening words of paragraph 12 of his decision. The impact of the appellant's deportation upon the children is a thread that is woven throughout the decision of the judge.
41. The decision must be read as a whole and when it is it is entirely clear what the judge found in respect of the appellant's future intentions in respect of the role he would play in the lives of his children. He had a clearly established history of withdrawing entirely from relationships with former partners as well as children and the judge was satisfied that the involvement of the appellant in the lives of the two children with whom he maintained contact was not particularly significant. In respect of the 7 year old child the level of contact was "sporadic" and could be maintained by other means from Jamaica. There was more contact with the 4 year old but the judge made clear that was more in

the context of “child care arrangements” being a pragmatic arrangement facilitating the working life of the child’s mother. The judge made clear that the contact in place was because of the need to make those child care arrangements rather than any long term ambition on the appellant’s part to play an active part in his daughter’s life.

42. I am satisfied also that although the judge made no specific reference in his decision to s117B(6) he did not, on that account, make an error of law. It is plain from his decision that he has carried out a careful assessment of the evidence and has identified all that spoke in the appellant’s favour. He made repeated reference to the need to have regard to the best interest of the children and carried out a detailed analysis in respect of the position of both of the children. He addressed each of the component parts of s117B(6) even if he did not say he was doing so with reference to that provision. He then took those findings to his overall assessment of the Article 8 claim. He accepted that there was, presently, a genuine and subsisting parental relationship with both children, although that was a relatively superficial one so far as the elder child was concerned and one driven by the pragmatism of child care arrangements in respect of the younger child. The judge plainly did recognise that the public interest in removal of a person present without leave to remain could and should yield in the face of the best interests of the children should that be appropriate. However, when considered in the round with the evidence as a whole, he reached for the legally sufficient reasons provided a conclusion that was plainly open to him.
43. Essentially, this was a fact based assessment for the judge to make and, having heard oral evidence, he was best placed to do so. In *Mukarkar v SSHD* [2006] EWCA Civ333 Carnwath LJ (as he then was) said this, at para 40:

“Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”


Here, it is not the case that the judge has taken what might be characterised as an unusually generous view of the facts, but the principle in play is the same one. The fact that this may not have been the only outcome possible on the facts does not disclose that

the judge made an error of law and it has not been established that he did so for any other reason.

Summary of decision:

First-tier Tribunal Judge Pedro made no material error of law and his decision shall stand. The appeal to the Upper Tribunal is dismissed.

Signed



Date:

18 December 2015

Upper Tribunal Judge Southern