



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

Appeal Number: HU075322015
HU075352015

THE IMMIGRATION ACTS

Heard at Bradford

On 19 June 2017

**Decision &
Promulgated
On 06 July 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**C L
D L**

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Worthington, Parker Rhodes Hickmotts, Solicitors

For the Respondent: Mrs Pettersen, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Malawi. The first appellant is the father of the second appellant who was born in 2014. By a decision promulgated on 2 May 2017, I found that the First-tier Tribunal had erred in law and I set aside its decision. My reasons for doing so are as follows:

1. I shall refer to the Secretary of State as the respondent and to the respondents as the appellants (as they appeared respectively before the First-tier Tribunal). The appellants, CL and DL are citizens of Malawi. DL is the minor daughter of the first appellant CL and is aged 2 years. I shall refer to the first appellant as “the appellant” throughout this decision. By a decision dated 23 September 2015, the appellants were refused leave to remain in the United Kingdom. They appeal to the First-tier Tribunal (Judge Howard) which, in a decision promulgated on 29 September 2016, allowed the appeals on human rights grounds (Article 8, ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The Grounds of Appeal are brief. The judge established that the appellants did not meet the requirements of HC 395. He proceeded to conduct an assessment under Article 8, ECHR, but it is submitted that he failed to properly apply the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended).

3. I find that the appeal should succeed and that the decision of the First-tier Tribunal should be set aside. My reasons for doing so are as follows. The appellant had arrived in the United Kingdom as a student in May 2002. He had sought to vary his leave unsuccessfully in 2004 and made no further application until the present application which is the subject of this appeal. The appellant’s relationship with the second appellant’s mother had begun in 2013. It appears that the appellant did not tell the mother of the second appellant that he had no status in the United Kingdom until after she had fallen pregnant. The mother of the second appellant was also a Malawian citizen. The mother of the child has discretionary leave to remain in the United Kingdom as the primary carer of a 5 year old child (S) who is a British citizen. The judge’s analysis of the appeal under Article 8, ECHR commences at [18]. He sets out the familiar guidance contained in Razgar [2004] UKHL 27 and then states that, “in addressing [the Article 8 appeal] I look firstly to ... part 5 of the Nationality, Immigration and Asylum Act 2002.” Thereafter, he sets out Section 117B of the 2002 Act. He observes that there is “an inevitable tension” between Section 117B and Section 55 of the UK Borders Act 2007. The judge observed that the family could live together in their country of nationality, Malawi. However, he considered that this

“causes the burden to fall on (S) and her father as their family life as it now is would end. Added to that they are both British citizens so it further involves the British citizens compromising their family life a situation that must not be brought about lightly. “

The judge concluded by observing that, “given that ... children are separated from one another or their natural parents, removal is not in the circumstances necessary.”

4. As Mr Worthington observed, there are two interrelated families and the complexities are such that outcome of any appeal is by no means clear. Unfortunately, the analysis of Judge Howard is equally without clarity. It is not enough for the Tribunal simply to quote statute law (in this case Section 117B) and thereafter in the analysis make no attempt whatever to apply the detailed provisions of the statute to the facts as found by the Tribunal. The judge identifies the difficulty at the heart of this appeal but he makes no

attempt to resolve the difficulties in the case by a clear application of the law to the facts. Instead, he observes vaguely that “compromising the family life” of British citizens should not be carried out “lightly” while stating categorically yet without any consideration of possible countervailing factors that the separation of children from their siblings or their natural parents is not “necessary”; such an observation may be the outcome of analysis but not a predicate unsupported by any argument.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 29 September 2016 is set aside. None of the findings of fact shall stand. The Upper Tribunal will remake the decision following a resumed hearing on a date to be fixed in Bradford before Upper Tribunal Judge Clive Lane.

2. I heard evidence at the resumed hearing from the first appellant and his partner, D C. That the appellant told me that he had lived at his present address since December 2015, that he lived there with D C and her child by a previous relationship, S, who is a British citizen. The appellant’s partner D C is not a person who currently has settled status in the United Kingdom. D C works as a carer for Rotherham Council working nights (8pm - 7am). Cross-examined by Mrs Pettersen, the appellant CL told me that S spends time with her father who lives in the United Kingdom. Staying contact occurs at the father’s home. Contact takes place on a regular basis.
3. The witness D C told me that her leave to remain had expired in September 2016. She had leave to remain on account of caring for her British child, S. She has applied (before the expiry of her previous leave) for an extension of her leave to remain. She has yet to receive a decision on that application. Cross-examined by Mrs Pettersen, D C told the Tribunal that S goes away every other weekend to be with her father two or three days. D C was not aware that the father of the child is currently in a relationship. However, the father does live with two of his nephews (aged 15 and 13 years). The mother of those children lives in France.
4. The burden of proof in the appeal is on the appellants and the standard of proof is the balance of probabilities (in the Article 8 appeal – there is no appeal on any other ground). The credibility of the witnesses was not challenged and I accept that the evidence which they gave (which I have summarised above) is truthful and accurate.
5. I reserved my decision.
6. As I noted in my error of law decision, the relationships in this case are somewhat complex. Whilst I have summarised the evidence above, the written witness statements add further detail. The matters which I will set out below appear to be not controversial; this evidence has not been challenged by the respondent and I accept it as true and accurate. The father of the child S does not consent to S leaving the United Kingdom with the appellants and D C to live in Malawi. D C says that she will not

leave the United Kingdom if the appellants are removed to Malawi. Child S lives with the appellants and D C save for periods of staying contact with her father and there is no suggestion that daily care for the child S should pass to her father at the present time or in the future. If the family depart together to Malawi, then the relationship between S and her United Kingdom father would be severed. I accept that there is a genuine and subsisting parental relationship between S and her father although I accept that Section 117B(6) of the 2002 Act (as amended) does not directly arise, in the context of the instant appeal, to the father of S and the child S. If the appellants were to be removed and D C and S remain in the United Kingdom then the relationship between the appellants and D C (which I accept is genuine and subsisting but is not a qualifying relationship, because D C is not a settled person) will be ruptured. Indeed, it is difficult to see how it would be reasonable for the second appellant to leave the daily care of her natural mother, D C, and go to Malawi.

7. Mr Worthington, for the appellants, relies on *SF and Others (guidance; post-2014 Act) Albania* [2017] UKUT 00120. The Upper Tribunal in that case held the respondent's policy does not require the primary carer of a British child to be forced to leave the European Union regardless of the age of the child. I accept that it is likely that D C was granted leave to remain in 2014 on account of this policy, there being "insurmountable obstacles" to D C relocating with her family in Malawi because S should not be expected to leave the European Union.
8. The grounds of appeal challenge the previous Tribunal for having failed to apply the statutory provisions in the 2002 Act (as amended) to the facts of this case. In his skeleton argument, Mr Worthington has very helpfully sought to apply the law to the facts Section 117 provides as follows:

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.

117C Article 8: additional considerations in cases involving foreign criminals

....

117D Interpretation of this Part

- (1) In this Part—
- “Article 8” means Article 8 of the European Convention on Human Rights;
- “qualifying child” means a person who is under the age of 18 and who—
- (a) is a British citizen, or
 - (b) has lived in the United Kingdom for a continuous period of seven years or more;
- “qualifying partner” means a partner who—
- (a) is a British citizen, or
 - (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
- (2) In this Part, “foreign criminal” means a person—
- (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and

- (c) who—
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

- (a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
- (b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
- (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

- (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
- (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
- (c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
- (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”

9. Mr Worthington submitted that the appellants are Malawian citizens but also fluent speakers of English. The family has no recourse to public funds; they are supported by D C who works as a care assistant. I accept that the appellant has previously worked in the United Kingdom and, if granted leave, it is likely to do so again. I note that the relationship between D C and the appellant was formed whilst the appellant was living here unlawfully (the first appellant has been an overstayer since 2004). As regards the operation of Section 117B(6), I note that the section refers to “a *parental relationship* with a British child” [my emphasis]. Had it been intended to restrict the application of this sub-section to relationships between British children and their natural parents, I see no reason why the provision would not have said so in terms. The use of the expression “*parental relationship*” is, in my opinion, intended to include relationships beyond a blood tie. It permits the possibility of a parental

relationship occurring between parties who are not related by blood. In the present appeal, I am told that the first appellant looks after the child S taking her to and from school and, significantly, caring for S overnight when her mother, D C, is away from the family home working as a carer. Mr Worthington invites me to find that there is, for the purpose of Section 117B(6), a parental relationship between S and the first appellant. On the facts as I have found them, I find that to be the case. For the reasons given above, I find that it is also not a reasonable to expect S to leave the United Kingdom. It follows, therefore, that the public interest does not require the removal of the first appellant.

10. I have had regard to the age of the children involved in this case. I have had regard also to the fact that they live together as a family. I do not find that it is in the best interests of the second appellant to be removed from that family, and in particular, removed from the care and control of her father, the first appellant.
11. It follows from the findings which I have made above, that it would be disproportionate for the first and second appellants to be removed to Malawi. I therefore allow their appeals on Article 8 ECHR grounds.

Notice of Decision

These appeals are allowed on human rights grounds (Article 8 ECHR).

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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

Date 3 July 2017

Upper Tribunal Judge Clive Lane