



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/08157/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 November 2017**

**Decision & Reasons  
Promulgated  
On 05 December 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**CONSTANTINE LEROY WALKER  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J. Waite, Counsel instructed by Okofor & Co Solicitors  
For the Respondent: Ms A. Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, who is an overstayer, appeals from the decision of the First-tier Tribunal (Judge Sweet sitting at Hatton Cross on 27 June 2017) dismissing his appeal brought on human rights grounds against the decision of the Secretary of State to refuse to grant him leave to remain as the parent of a British national child. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal ("UT").

## **The Reasons for the Grant of Permission to Appeal**

2. On 21 September 2017, Judge Pickup granted permission to appeal for the following reasons:

It is arguable that the judge should have considered EX.1 under Appendix FM in relation to the appellant's accepted involvement in the upbringing of his British citizen child and thus the judge should have assessed the reasonableness of expecting the child to leave the UK. Similarly, there was no consideration outside the Rules of s117B(6) when considering proportionality. It is arguable that the appellant had a genuine and subsisting relationship with a qualifying child and thus the same reasonableness test applied. **Following MA (Pakistan) [2016] EWCA Civ 705**, the wider public interest would also have to be taken into account. None of this was considered by the First-tier Tribunal..

## **Reasons for Finding an Error of law**

3. By a Rule 24 Response dated 3 October 2007, Mr Chris Avery of the Specialist Appeals Team said that the Respondent did not oppose the appeal. He invited the UT to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant met the requirements of Appendix FM and/or succeeded under section 117.
4. In **South Bucks District Council v Porter (2) [2004] UKHL 33** Lord Brown said at [26]:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration.

5. The Judge did not make a finding on the principal issue, which was whether the appellant could bring himself within EX.1 He appeared to accept that the appellant had a genuine and subsisting parental relationship with Child "T", but he failed to address the legal ramifications of this. Instead, he proceeded to find against the appellant on proportionality grounds, including the fact that he had been overstayer since April 2004, and accordingly little weight should be given to his private life. The judge made no mention of Section 117B(6) when considering proportionality, although this section was plainly in play.
6. Accordingly, the decision is vitiated by a material error of law for the reasons given in the grant of permission, and it must be set aside and remade, as is conceded by the Respondent.

## **The Remaking of the Decision**

7. The appellant is not in a relationship with the mother of T, and they do not live under the same roof. As Judge Sweet found, there is “*clear evidence*” of him nonetheless being involved in T’s upbringing, and his appeal is supported by T’s mother, who was present at the hearing before me with T. Ms Fijiwala accepts that the appellant has a genuine and subsisting parental relationship with T. She also accepts that the appellant has discharged the burden of proving that he takes and intends to take an active role in the child’s upbringing.
8. Thus, the appellant meets all the necessary preconditions to be eligible for a grant of leave to remain under EX.1(a). Ms Fijiwala accepts that it would not be reasonable to expect T to leave the UK in order to accompany his father to Jamaica, as T is a British national whose primary carer is his mother, and his mother is not in a relationship with his father.
9. Part of Ms Fijiwala’s reasoning is derived from the relevant IDIs. As noted by the Tribunal in **SF & Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)** at paragraph [7], the IDIs on family migration - Appendix FM, section 1.0(b), headed “Family life as a partner or parent and private life, 10 year routes”, and dated August 2015, contain at paragraph 11.2.3 guidance on the following question: “*Would it be unreasonable to expect a British citizen child to leave the UK?*” The relevant parts of the guidance are as follows:

Save in cases involving criminality, the decision-maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British citizen to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in **Zambrano**...

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if a child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- Criminality falling below the threshold set out in paragraph 398 of the Immigration Rules;

- a very poor immigration history, such as whether a person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate, the decision-maker must consider the impact on the child of any separation. If the decision-maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the office of the children's champion on the implications for the welfare of the child, in order to inform the decision.

10. Ms Fijiwala invites the Tribunal to give a broad interpretation to this policy guidance with the consequence that, absent misconduct by the parent of the gravity envisaged in the exception (criminality or "*a very poor immigration history*"), the Respondent should be taken as conceding, with reference to EX.1(a) and Section 117B(6) of the 2002 Act, that the public interest does not require the parent's removal where that parent has a genuine and subsisting parental relationship with the British national child.
11. I accept that the appellant does not have a very poor immigration history. There are no aggravating features beyond his overstaying.
12. Nonetheless, I do not consider that, upon its proper construction, the policy discussed in **SF** will avail all applicants who in a similar position to that of this appellant (i.e. applicants who are "mere" overstayers). However, in any given case, it is clearly open to the Respondent to concede the issue of reasonableness; and on the particular facts of this case, the concession made by Ms Fijiwala is entirely proper.
13. Accordingly, the appellant qualifies for leave to remain as a parent under paragraph EX.1(a) of Appendix FM, and it is not unnecessary for me to consider an alternative claim outside the Rules.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is allowed on human rights (Article 8 ECHR) grounds.

I make no anonymity direction.

Signed

Date 3 December 2017

Deputy Upper Tribunal Judge Monson

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I decided to make no fee award, as the appellant needed to bring forward further evidence in order to succeed in his appeal.

Signed

Date 3 December 2017

Deputy Upper Tribunal Judge Monson