



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01667/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 31 May 2018

Decision & Reasons Promulgated  
On 26 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

KASUN [R]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr S Vokes, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

1. By my decision promulgated on 25 April 2018 I found that the decision of First-tier Tribunal Judge Clarke promulgated on 6 July 2017 contained a material error of law such that it should be set aside and remade. I now remake that decision.
2. The background is not in dispute and the relevant facts are as follows:
  - (1) The appellant is a citizen of Sri Lanka born on 2 April 1985.
  - (2) He entered the UK in 2009 on a student visa.

- (3) On 12 November 2012 he applied for a Tier 1 visa and was refused on the ground of having used a falsified document.
  - (4) On 28 August 2015 the appellant applied for leave to remain in the UK on the basis of his relationship with his partner who is a British citizen.
  - (5) On 9 January 2016 the appellant and his partner married.
  - (6) On 18 December 2016 the appellant's son, who is a British citizen, was born. The appellant lives with his wife and son and has a genuine and subsisting relationship with both.
  - (7) The appellant's son has some health difficulties but these are not of a severity that would create an obstacle to the family moving to Sri Lanka.
  - (8) If the appellant is removed to Sri Lanka, his wife and child will more likely than not remain in the UK without him.
3. At the hearing Mr Vokes stated that he would not be calling any witnesses to give oral evidence and he was content for the matter to proceed on the basis of submissions only.
  4. Both Mr Melvin and Mr Vokes focused in their submissions on whether it would be "reasonable", with reference to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), to expect the appellant's child to leave the UK.
  5. Mr Melvin's argument was that in considering reasonableness in this context it is necessary to take into account the conduct of the appellant and in particular his immigration history. Mr Melvin argued that because of the undisputed fact that he had submitted fraudulent documents in a previous immigration application it was manifestly the case that the public interest required the appellant to be removed and this had to be factored into the question of reasonableness having regard to *MA (Pakistan) v SSHD* [2016] EWCA Civ 705.
  6. He also maintained that the conduct of the appellant was such that he fell within the category of individuals where the Home Office's policy dated 22 February 2018, *Family Migration, Appendix FM, Section 1.0b Family life as a partner or parent and private life: 10 year routes* ("the 2018 Policy") envisages that grant of leave to a parent should be refused even though this would result in a British child being separated from his parent. Mr Melvin highlighted that the child in question is under 2 and as such is a very young age where he would be entirely focused on his parents. He submitted that although British citizenship is a significant factor it is not a trump card and in this case the appellant's child would be eligible to become a citizen of Sri Lanka and would be able to continue to enjoy the benefit of both his parents supporting him should they so wish, as it will be a matter for the child's parents to decide whether they prefer to live separately, with the child remaining with his mother in the UK, or together with the family remaining as a unit in Sri Lanka.

7. Mr Vokes' response was that it is of primary significance that the child is a British citizen and not merely a child who has lived in the UK for seven years. He referred to *ZH (Tanzania)* at paragraph 32 where it is stated:

"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."
8. He also referred to the recent decision of the Upper Tribunal *MT & ET* [2018] UKUT 88 (IAC) where it was stated at paragraph 33:

"On the present state of the law as set out in *MA* we need to look for powerful reasons why a child who has been in the United Kingdom for over ten years should be removed notwithstanding that her best interests lie in remaining."
9. Mr Vokes focused on the plain meaning of Section 117B(6) of the 2002 Act, arguing that the relevant question under Section 117B(6) is the reasonableness of the child being removed from the UK whether or not that in fact is what will occur, and the reasonableness of the family being separated is not relevant, even though this is what would in practice occur if the appellant is removed from the UK.
10. Mr Vokes also submitted that the 2018 Policy provides that the parent of a British citizen child should only be removed (in circumstances, as here, where the child will remain in the UK with another parent) where there have been significant or persistent offences or repeated and deliberate breaches of the Immigration Rules. Mr Vokes argued that this is not such a case and compared the factual matrix to that in *MT & ET* where fraudulent documents had been used to obtain employment but this was found to be "not so bad as to constitute the kind of powerful reason that would render reasonable the removal of ET to Nigeria".

### **Analysis**

11. It was common ground between the parties that this is not a case where the appellant is able to meet the requirements of the Immigration Rules.
12. It was also common ground that the appellant has family life with his wife and child such that Article 8(1) ECHR is engaged.
13. The issue in contention is whether removal of the appellant would be a disproportionate interference with his (and his family's) right to respect for family life.
14. Mr Vokes did not argue that removal of the appellant from the UK would result in a disproportionate interference with the family life he enjoys with his wife, and his submissions focused solely on the family life between the appellant and his son. My decision therefore only addresses this aspect of the appellant's family life in the UK.

15. I firstly consider the best interests of the appellant's child. There are 3 possible alternative scenarios.
  - (a) The first alternative is that the appellant is removed to Sri Lanka and his wife and son join him. I recognise that in practice this is unlikely to occur as the evidence indicates that the wife and child will remain in the UK but, as argued by Mr Melvin, that is the family's choice. I do not consider this alternative to be in the best interests of the appellant's son. His mother has no connection to Sri Lanka other than her husband and is not familiar with the culture and language. Although the child upon moving to Sri Lanka will have the benefit of both his parents being present he will lose the benefit of living in a country where his mother is familiar with the society and culture. He will also lose the benefit of living in close proximity to his mother's family, who currently provide significant support.
  - (b) The second alternative is that the appellant's wife and child remain UK without the appellant. I also do not consider this to be in the appellant's child's best interests. Currently the appellant is the primary day to day carer of the child and if he is removed his wife will lose this significant support. In addition, the child would lose the benefit of living with his father and his relationship with his father would be strained by seeing him only rarely.
  - (c) The third option is that the status quo continues with the appellant's child continuing to live in the UK with both parents. In my view, this is firmly in the appellant's child's best interests given that the consequence of the appellant being removed is either that the son will be separated from his father (who plays an important part of his life) or will need to move to a country where his mother will face challenges that will most likely affect the quality of his life.
16. I now turn to consider other factors relevant to this appeal and my starting point is the mandatory considerations specified Section 117B of the 2002 Act.
17. In accordance with Section 117B(1), consideration must be given to the public interest in the maintenance of effective immigration controls. This weighs heavily against the appellant given his use of deception in a previous application and that he has remained in the UK despite having no lawful basis to do so.
18. The appellant speaks English and therefore lack of competence in the English language does not weigh against him, by reference to Section 117B(2) of the 2002 Act.
19. The evidence does not establish that the appellant is financially independent and would not be a burden on the taxpayer. This consideration weighs against him in the article 8 balancing exercise (Section 117B(3) of the 2002 Act).
20. Sections 117B(4) and (5) have no bearing on the case as the appellant has not sought to rely, as a basis for showing his removal would be disproportionate, on his relationship with his wife or the private life he has developed whilst in the UK (other than to the extent that these factors are relevant to his relationship with his child).

Had he had done so, I would have given this only little weight in accordance with Sections 117B(4) and (5) of the 2002 Act.

21. Section 117B(6) is highly relevant, and the arguments before me focused on the question, under that sub-section, of whether it would be reasonable to expect the appellant's child to leave the UK. It is clear from the wording of Section 117B(6), as interpreted in *MA (Pakistan)*, that where the criteria of that section are satisfied there is no public interest in removal. However, the question of reasonableness encompasses consideration of all relevant factors including the immigration history of the appellant such that, as stated by Elias LJ at paragraph 45: "the only significance of section 117B(6) is that where the 7 year rule is satisfied, it is a factor of some weight leading in favour of leave to remain granted." *MA* concerned children who were not British citizens but had lived for over 7 years UK. In contrast, this appeal concerns a small child who has been alive for far less than 7 years, but who is a citizen of Britain. In my view, Section 117B(6) applies in the same way to British citizen children as to children who have lived for over 7 years in the UK, as both meet the definition of a qualifying child under Section 117D(1) and are not differentiated in Section 117D(6). I therefore treat as "a factor of some weight" in favour of granting leave to remain that the appellant's child is a British citizen.
22. I also have regard to the 2018 Policy, which in relevant part states:
 

"Where the child is a British citizen it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because in practice the child is not likely to continue to live in the UK with another parent or primary carer EX.1.(a) is likely to apply. In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal. Where the British citizen child could remain in the UK with another parent or alternative primary carer who is a British citizen or settled in the UK or is being granted leave to remain, the circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history having repeatedly and deliberately breached the Immigration Rules."
23. Applying this policy to the appellant I find as follows:
  - (a) This is not a case where the child would have to leave the UK given that he would be able to remain with his mother. Therefore the first paragraph quoted above is not applicable.
  - (b) As the child would not need to leave the UK, the policy envisages that it may be appropriate to refuse to grant leave where the conduct of the appellant gives rise to public interest considerations of such weight as to justify removal. The examples given of conduct that would justify removal in these circumstances are significant or persistent criminal offences and repeated and deliberate breaches of the Immigration Rules.

- (c) This is a case where the appellant has used deception on a previous occasion in an effort to obtain leave under the Rules. However his use of deception occurred on only one occasion and he cannot be categorised as a person who has repeatedly and deliberately breached the Immigration Rules. His immigration history is poor but it is not “very poor” as that term is used in the 2018 Policy. My view is fortified by the observation that the Upper Tribunal in *MT & ET* at paragraph 34 described an appellant who had engaged in analogous unlawful behaviour as “a somewhat run of the mill immigration offender...[whose] immigration history is not so bad as to constitute the kind of powerful reasons that would render reasonable removal of [her] to Nigeria.” I therefore agree with Mr Vokes that it is not consistent with the 2018 Policy to find that removal of the appellant would be reasonable.

24. In conclusion, I balance the factors relevant to the proportionality of removing the appellant UK as follows:

- (a) Weighing heavily in favour of removal is that it is firmly in the public interest to remove a person who has used deception in an earlier immigration application, remained in the UK unlawfully, and who is unable to satisfy the Immigration Rules. Also weighing on this side of the scales is that the appellant is not financially independent.
- (b) Weighing heavily on the other side of the scales is that the consequence of the appellant being removed from the UK is that either he will be separated from his son or his son, who is a British citizen, will have to leave the UK; and that neither of these scenarios are in the child’s best interests.

25. This is a finely balanced case where there are strong considerations weighing on both sides of the scales. I have taken care to not treat the fact that the appellant’s son is a British citizen, or that it is in his best interests for the appellant to be granted leave to remain, as a ‘trump card’ or a “paramount” consideration. However, having carefully considered the evidence, and taken into consideration factors weighing both for and against the appellant, I have reached the conclusion that the appellant’s removal would constitute a disproportionate interference with the family life he enjoys with his son in the UK and therefore would be contrary to Article 8 ECHR.

### **Notice of Decision**

The appeal is allowed

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 24 June 2018