



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17610/2016

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 30<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 21<sup>st</sup> June 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

BE  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: The Appellant in person  
For the Respondent: Ms H. Aboni, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Jamaica.

2. **Rule 14: 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 his family. This direction applies both to the Appellant and to the Respondent.**
3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 9<sup>th</sup> August 2017, dismissed his appeal against the decision of the Respondent made on the 6<sup>th</sup> July 2016 to refuse his application for leave to remain.
4. Permission to appeal was granted by First-tier Tribunal Judge Bird on the 23<sup>rd</sup> October 2017.
5. The background to the appeal is set out in the decision letter and the determination at paragraph 4. It can be summarised as follows. The Appellant entered the United Kingdom on 21 September 2002 as a visitor with leave until 21 March 2003. On 16 June 2003 after his leave had expired, he applied for leave to remain as the spouse of a settled person but the application was rejected as the application had not been completed correctly. A further application was submitted on 9 July 2003 which was refused on 27 May 2004.
6. In or about 2006 the Appellant began a relationship with PR who had entered the United Kingdom in the year 2000 on a visit visa valid for six months. On 11 April 2008 the child, N, was born in the UK. On 21 December 2010 the local authority began support under section 17 of the Children Act 1989. On 11 January 2016 a child, T, was born in the UK.
7. On 19 February 2016 the Appellant was served with a notice of immigration decision (notice of removal) and a statement of additional grounds for completion. On 8 March 2016, the Home Office was advised by the Appellant's representative that he was in a relationship with his partner and they had been living together since their relationship began in 2006. The Home Office treated the statement as an Article 8 (human rights) application which resulted in a refusal decision dated 6 July 2017.
8. The decision letter was summarised at paragraph 6 of the determination. The Appellant could not meet the Immigration Rules under Appendix FM as a partner as he could not meet the eligibility requirements because his partner was not a British citizen or was present and settled in the United Kingdom. Furthermore he could not meet the eligibility requirements as a parent because he did not have sole responsibility for the children. As to EX1, it was considered that he would not meet the requirements although he was the parent of a child under 18 years of age because he had not provided evidence that the relationship was genuine and subsisting. Furthermore as the relevant child was not a British citizen, there was no evidence that he had lived continuously in the United Kingdom for seven years immediately prior to the application or in the alternative, even if it was accepted that he had lived continuously in the United Kingdom for at least seven years, it was not unreasonable

to expect the child to leave. In this respect it was stated that as the Appellant and the child's mother had no leave to remain in the United Kingdom, it was considered reasonable to expect the child to leave the United Kingdom with both parents and maintain the family unit. No evidence had been submitted to suggest that his upbringing and well-being would be affected in any way or that his physical and emotional needs would not be met. It was considered that he was still of an age where he could adapt to the Jamaican lifestyle and culture. English is the spoken language in Jamaica.

9. As to private life under Paragraph 276ADE, he could not meet the requirements given his length of residence since September 2002. As to whether there were any very significant obstacles to his integration into Jamaica, it was not accepted that there would be such significant obstacles given that he was 37 when he left Jamaica and was not accepted that he would have lost all ties to his country of origin. He had continuing cultural, linguistic and social ties and would still be familiar with the culture language and social customs of Jamaica. It was acknowledged that his integration may be initially difficult whilst he resettled there but he would be entitled to exercise his full rights of citizenship. It was noted that he receive support from the local authority and no evidence of been provided to demonstrate that would be very significant obstacles to his integration into Jamaica.
10. The decision letter at paragraph 55 – 65 made reference to his partner, PR and a refusal under the private life rules.
11. The decision letter also made reference to the two children, N born in 2008 and T born in 2016 and considered their circumstances separately. In relation to N it was noted that he was a national of Jamaica and was born in the United Kingdom in 2008. Whilst he had lived in the United Kingdom for at least seven years, it was not considered unreasonable to expect him to leave the United Kingdom and that he could leave the United Kingdom with his parents and maintain the family unit. It was considered that he would have the help and guidance of his parents which would enable them to make the adaptation to the way of life in Jamaica. The decision letter at paragraph 70 considered that his upbringing and well-being would not be affected in any way nor could it be said is physical and emotional needs would not be met. He was still of an age where he could adapt to Jamaican lifestyle and culture. In relation to T, he had been born in 2016 therefore had not lived in the United Kingdom for seven years.
12. At paragraph 79 – 99 the decision letter made reference to whether there were any “exceptional circumstances” for a grant of leave to remain outside of the Rules, taking into account section 55 of the Borders, Citizenship and Immigration Act 2009. It was acknowledged that the Appellant had established a family life in the United Kingdom with his partner and children but that it had been done in the full knowledge that he had no legal basis stay and may be required to leave the United Kingdom at any time. The decision letter took into account circumstances upon return to Jamaica along with the children and stated that the Appellant and his partner would be able to support them whilst they adjusted to life there. It was noted

that he currently receive support in the form of housing a weekly subsistence and the local authority upon return to Jamaica he would have the right to work and provide for himself and his family. Paragraph 87 made reference to the eldest child and the issue of education. It observed that only one letter had been provided but it was not considered exceptional that a child have to leave the school he was enrolled in and move to another school and to cultivate a new circle of friends. The decision letter at paragraph 89 also considered the COI S report for Jamaica 2013 which made reference to the education system in that country. It was noted that N was only eight years of age would therefore have been educated in the UK for only four years and was still of primary school age and would therefore be able to complete the majority of education in Jamaica when the language of instruction was in English. Whilst it was accepted that he, his partner and the children had established a degree of private life, it was in the knowledge it had been formed in almost entirely whilst both Appellant had been present in the United Kingdom without any authority. It was considered reasonable to expect the Appellant, his partner and children to return to Jamaica and continue their family life there.

13. The Appellant sought permission to appeal and the appeal came before the First-tier Tribunal on the 3<sup>rd</sup> August 2017. In a determination promulgated on the 9<sup>th</sup> August 2017 the Judge dismissed the appeal under the Immigration Rules and on human rights grounds (Article 8).
14. The judge set out his findings of fact and reasons at paragraphs 21 - 33. In relation to paragraph 276 ADE(1)(vi) the judge found that they were no very significant obstacles to his reintegration to Jamaica as a judge found that he had extensive family there and he had spent the majority of his life there. He found him to be fit, well and in a position to seek employment. (See paragraph 25). As to the welfare of the children N and T, at [26] the judge made reference to the letter sent by the social services. He observed that there was nothing in that letter to suggest that the Appellant would be unable to care for the two children or post any form of risk to them. The judge stated that he had not been provided with any satisfactory information to show that there was no schooling available in Jamaica or that the children's position will be one of destitution or risk. He found that the children's welfare would be served by them being in the care of their father. The judge stated that N would not have developed an independent family or private life and he was of an age when it was relatively easy to adapt. The judge also found there was no suggestion that the Appellant would not protect his children should their mother suffer from any form of relapse.
15. At [28] he found the child's interests are best served by remaining in the UK with their father who had the support of the UK state but that a move to Jamaica "would not be particularly detrimental to either child" if it was with the Appellant. At [29] the judge found that it was reasonable for the "qualifying child" N, to leave the United Kingdom finding that his welfare would not be adversely affected, whilst he had spent his life in the UK, both his parents were Jamaican as was his nationality. They had retained their cultural roots and is young and adaptable. The judge found that schooling would be available. Thus it was entirely reasonable that he should

leave the United Kingdom. The judge also found that there were “strong reasons” for him to leave the UK, being the nationality of the family and the parents’ immigration history as overstayers.

16. At paragraph 31 – 34 the judge considered proportionality and the public interest considerations. In this regard, he found that the Appellant’s private life and family life was in the UK when he had a temporary status and whilst in the UK unlawfully and having made no attempt to regularise his status until after N was over seven years of age. He found that he could speak English but not that he was self sufficient. In respect of section 117B(6), the judge relied upon the earlier findings that it was reasonable for N to return with his family members. The judge considered the Appellant’s partner’s mental health and that the children would be with their father as a sole parent but that the Appellant could be trusted to look after the children. The judge found that it did not been listed as a “linked case with the other family members” (see paragraph 32). At paragraph 33, the judge returned to the issue of the immigration history and that it was reasonable for the children to leave the UK. Thus the judge dismissed the appeal.
17. The appeal came before the Upper Tribunal. The Appellant appeared in person as he had before the First-tier Tribunal. It is plain that he has had the benefit of legal advice as set out in the FTT decision at paragraph 2 and in the light of the grounds of appeal having been drafted and submitted by solicitors. He relied upon the written grounds. In his submissions he stated that the social services were still involved and that his partner did not give evidence at the hearing as there was no one to look after the children. He was unclear as to whether there were any past or current proceedings in relation to the children or what they actually were.
18. He did not accept the recitation of the evidence made by the judge at paragraph 20 and reiterated that his mother was 96 years of age, had a leg amputated, she had no home and was looked after by the church. He stated that it was not reasonable for them to return to Jamaica as there was no provision available for them. There was no property and nowhere the children to go. In relation to his partner, he stated that both her parents were dead. He said that whilst there were cousins in Jamaica he did not know them. He said he had little contact with any of his siblings.
19. Ms Aboni on behalf of the Secretary of State submitted that there was no objective evidence relating to Jamaica nationality and that if they claimed to be stateless they would have to demonstrate that they had approached the authorities. There had been no attempts to establish the nationality of the parents or the children. Thus it was not established that the children had been denied Jamaican nationality as the grounds has stated. She submitted that the burden was on the Appellant and that the judge was not in error by stating that the parents and the children were of Jamaica nationality.
20. As to the consideration of reasonableness, she submitted the judge gave adequate consideration to this issue as set out in the findings of fact. He considered the children’s welfare and that there was no evidence of any health concerns. He

properly considered the adult party's immigration status and considered the public interest considerations under section 117B. She submitted that there was no evidence to suggest that education was not available in Jamaica and no need to be identified in relation to the children. Thus she submitted that the judge has carried out adequate proportionality assessment to reach the conclusion that the family could return together.

21. At the conclusion of the submissions I reserved my decision which I now give.
22. As set out above, notwithstanding legal representation at some points during the litigation history, the Appellant has appeared before the Tribunal at substantive hearings in person. For the purposes of the hearing before the Upper Tribunal, his legal representatives had drafted the grounds of appeal. They did not attend the hearing for the reasons given in a letter dated 27 April 2018 however made it plain that the Appellant would be attending in person and relying on the grounds submitted in support of the application for permission to appeal. The letter also made reference to the eldest child N, who was entitled to apply to be registered as a British citizen. I have therefore considered the points raised by the Appellant during the hearing and have done so in the light of the grounds that were drafted by his legal representatives.
23. Permission to appeal was granted on the basis that it was arguable the judge made conflicting findings and failed to give adequate reasons for finding that it would be reasonable for N as the only "qualifying child" who had always lived in the UK and was nine years of age at the date of the hearing, to go to Jamaica.
24. The grounds of paragraph 1 make reference to the assessment of the best interests of the eldest child, N. The judge reached the conclusion at paragraph 28 that the best interests of the eldest child, N, were best served by remaining in the UK with his father who had the support of the UK authorities. However he later concluded that it was reasonable for N to leave the UK along with his parents as a family unit. Considering the best interests of the eldest child N, the Respondent had an overriding obligation to have regard to the welfare of the child in the exercise of the various statutory functions. The best interests of the child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment, it is important to have a clear idea of a child circumstances and what is in the child's best interests before determining whether those interests are outweighed by the force of other considerations.
25. The decision letter made little reference to the children's best interests and at one point was not even satisfied that the eldest child had been in the UK continuously for seven years. There was no evidence referred in the decision letter in respect of the local authorities position since 2010. Whilst the judge did apply his mind as to whether further evidence should be supplied by the Social Services at paragraph 26, he decided it was not necessary primarily because the Appellant had been represented and that there was no evidence to suggest that the father would be unable to care for the children. However there was no information concerning the

children's involvement with the Social Services or any consideration of that in the context of their needs. The decision letter referred to the children having been children in need under section 17 of the CA 1989. In my judgment, the children's circumstances had not been assessed when addressing their best interests in the context of reasonableness of return.

26. The grounds also submit at paragraph 6 that the judge erred in his consideration of S117B(6) by placing great importance on the parents' immigration history. This is the point made at paragraph 3 in the permission grounds.
27. In assessing whether the public interest considerations are sufficiently serious to outweigh the best interests of the child the judge was required to take into account the statutory provisions contained in section 117B (6), which states that the public interest will not require the person's removal where he has a genuine and subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.
28. There is no dispute that N is a 'qualifying child' for the purpose of section 117B (6) having lived in the UK for 9 years. It is not disputed that the Appellant has a genuine and subsisting parental relationship with the child. The issue identified is whether it would be 'reasonable' to expect the child to leave the UK within the meaning of section 117B (6). In MA (Pakistan) v SSHD [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include consideration of public interest factors, but declined to depart from the earlier decision in MM (Uganda) v SSHD [2016] EWCA Civ 450, which concluded that it did. In MA (Pakistan) Lord Justice Elias emphasised that significant weight should still be given to the interests of a child, especially with reference to the Respondent's published policy guidance which has since been updated in February 2018.
29. The FFTJ made no reference to the guidance: Immigration Directorate Instructions "Family Migration Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes" which has now been updated in February 2018, when considering the reasonableness of return.
30. Furthermore whilst the judge proceeded on the basis that the eldest child, N, had been in the UK for over 7 years it does not appear that the significance of his length of residence was adequately considered in the light of the jurisprudence.
31. As set out in the jurisprudence, the relevance of seven years' residence for a child is of significant weight. In the older decision of E-A, the Upper Tribunal considered the effect of a "period of substantial residence" by a child at [39]:

"Absent other factors, the reasons why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of time such roots are put down, personal identities developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of

private life are forged and therefore the weight to be given to the passage of time would depend on the facts in each case.”

32. In the decision of **Azimi-Moayed and Others (Decisions affecting children: onward appeals) [2013] UKUT 00197 (IAC)** the Upper Tribunal returned to the issue of the likely nature of any private life formed by a young child at paragraphs 13. At [13(iii)] – 13(iv)] the Upper Tribunal said this:
- “(iii) ..... residence in a country other than the state of origin can lead to the development of social, cultural and educational ties that it would be inappropriate to dispute, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
- (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from aged 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.”
33. Whilst the decision in **Azimi-Moayed** is a case determined after the policy DP/96 being repealed, the Court of Appeal distinguished this case in the decision of **MA and Others [2016] EWCA Civ 705** at [71] to [73] and stated that the test can no longer be “compelling reasons” because that was not the language of Section 117B(6) or paragraph 276ADE and that it set the bar “too high”.
34. However the decision in **MA** makes it plain that the length of residence of seven years is a matter of significant relevance and weight. Thus the older jurisprudence has recently been reaffirmed in the decision of **MA and Others** (as cited) the judgment given on 7 July 2016. In **MA** the Court of Appeal at paragraphs [46] to [49] placed importance on the length of residence of a child and the fact that a child had been in the UK for seven years must be given significant weight (see [46]).
35. Furthermore, the decision in **MA** makes reference to the position that where a child had been in the UK for that length of time, the starting point is that the child’s status should be legitimised unless there was a good reason not to do so (see [103]). When applied to the analysis in the present case, whilst the judge did make reference to the best interests of the children, the judge made no reference to the significance of the nine year residence of the child N. Whilst Ms Aboni on behalf of the Respondent submitted that the judge had properly considered the public interest considerations and in particular the Appellant’s immigration history as set out at paragraph 33 of the decision, there is no reference to the starting point that the child’s status should be legitimised given the length of residence (and see **MT & ET (child's best interests: ex tempore pilot) Nigeria [2018] UKUT 88 (IAC)**).
36. A further point raised in the grounds relates to the judge’s assessment of the nationality of the parents and the children. In essence it is asserted in the grounds that the judge erred in law at paragraph 29 when he concluded that both the parents of N and T are Jamaican and thus their nationality is also Jamaican. The grounds go



on to state that there was no evidence before the judge to establish Jamaican nationality and thus the judge erred in his assumption of the child's nationality (see grounds at paragraphs 2 - 4).

37. I do not consider that the grounds in relation to this point are made out. There was clear evidence that the Appellant and his partner were Jamaican nationals. If it was asserted on behalf of the Appellant that the children were "stateless" it was incumbent upon the Appellant to produce evidence to demonstrate that was the position. There was no evidence before the Tribunal that referred to children born to Jamaican nationals overseas having to register their children to acquire Jamaican nationality and there is no country evidence attached to the grounds. The reference made to a decision at paragraph 3 relates to India and not Jamaica.
38. The grounds also make reference to the judge failing to note that the eldest child was entitled to be registered as a British citizen. Whilst that may be the position, at the date of the hearing N was not registered as a British citizen and thus could not be considered as such. In my judgement this is a point that can in reality be made in the context of the weight attached to the length of residence; a matter that I have set out in the preceding paragraphs whereby I have found a material error of law.
39. I raised a point with Ms Aboni which had not been raised in the grounds so that she had the opportunity to respond on behalf of the Respondent as the Appellant was not represented and it was "Robinson obvious". This related to the decision in PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC) The judge at paragraph 32 had made reference to the appeal and that it was not a "linked case with other family members" and that he had been told by the presenting officer that no application to be made by the mother or children. Ms Aboni confirmed that the Appellant's partner had no status but did not know there had been any decisions served upon her. However the decision letter at paragraphs 55 - 65 did consider her human rights and each child was also considered separately. The family were also considered as a whole under the section entitled "exceptional circumstances". The Tribunal did not hear any evidence from the Appellant's partner and it is not clear whether or not she was able to give evidence in the light of the letter from the social services or whether she was asked to provide any evidence relating to return to Jamaica. There does not seem to be any consideration of the issue of return as a family unit against the background of the Appellant's wife's circumstances. As I have reached the conclusion that there are errors of law require further consideration, this should also be clarified by the Respondent in the event that the Appellant does not have any legal representation.
40. Consequently, I am satisfied that the decision of the First-tier Tribunal judge involved the making of an error of law and therefore the decision cannot stand and shall be set aside.
41. I have therefore reached the decision that the appropriate course is that the appeal should be remitted to the First-tier Tribunal when all matters relevant to the issue of reasonableness of return, including any evidence from the local authority relating to

the children and their parents should be considered. It is necessary for there to be the opportunity to hear up-to-date evidence concerning their best interests when considering the issue of reasonableness of return and any evidence that relates to the Appellant's partner. If there is any issue as to nationality that must be addressed at the hearing by evidence.

42. Thus the appeal shall be remitted to the First-tier Tribunal where it is anticipated further evidence will be given and factual findings made on all outstanding issues applying the correct legal framework.

**Decision:**

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the appeal is remitted to the First-tier Tribunal.

*SM Reeds*

Signed

Date: 16<sup>th</sup> June 2018

Upper Tribunal Judge Reeds