



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20182/2016

THE IMMIGRATION ACTS

Heard at Field House
On the 17th May 2018

Decision & Reasons Promulgated
On 22nd May 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SF

(ANONYMITY DIRECTON MADE)

Respondent

Representation:

For the Appellant: Miss J Isherwood, Senior Presenting Officer
For the Respondent: Mr I. Ali, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

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 Appellants and to the Respondent.

1. The Secretary of State with permission, appeals against the decision of the First-tier Tribunal (Judge Lloyd) who, in a determination promulgated on the 19th September 2017 allowed his appeal against the decision of the Respondent to refuse his application for leave to remain and on human rights grounds (Article 8).

2. Whilst the Secretary of State is the Appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.
3. The Appellant is a national of Sierra Leone. His immigration history is set out within the determination at paragraphs 2-4 of the FTT determination and in the decision letter issued by the Secretary of State of the 9th August 2016. It can be summarised briefly as follows.
4. The Appellant was issued with visit visas on four occasions valid at various times between 9 July 2004 and 2 May 2009. He also applied for a student Visa in December 2007 but that application was refused. He last entered the UK in September 2008 as a visitor.
5. On 3 May 2016 he applied for leave to remain indicating that he wished to be considered under the partner and parent route. The Appellant stated that he was in a genuine subsisting relationship with his former wife and he was the father of two children in the UK; one of whom was a British citizen, known as J and A. In a decision letter of 9 August 2016 the Respondent refused that application. It is common ground now between the parties that the factual circumstances of the decision letter was superseded by the factual circumstances as at the date of the hearing before the FTTJ on 17 August 2017.
6. However the decision letter can be summarised as follows. The Secretary of State considered whether the Appellant met the suitability requirements but considered that his presence in the UK was not conducive to the public good because his conduct made it undesirable to grant leave to remain and therefore S-LTR1.6 of Appendix FM applied. I would observe that no reasons were given for this conclusion at this point in the decision letter and it was only when looking at the decision on "exceptional circumstances" that it became plain that the Secretary of State had taken issue with his immigration history and the applications that had made be made by him and that essentially it was stated that he had used deception in his applications to gain entry to the UK.
7. The decision letter went on to state that it failed to meet the eligibility requirements because it was not accepted that his relationship with his partner was genuine and subsisting and that he had failed to provide sufficient evidence to show that they had lived together in a relationship akin to marriage for at least two years prior to the date of the application in 2016.
8. As to EX1, the Respondent did not accept that he had a relationship that was genuine and subsisting with his partner in the UK nor was it accepted that he had a child permanently residing in the UK. It is unclear to me on what basis the Secretary of State had reached that conclusion given the residence of J and A in the United Kingdom.
9. It is further not accepted that he met the requirements as to private life under paragraph 276ADE.
10. As to exceptional circumstances and whether there were any relevant matters outside of the Immigration Rules, the decision letter made reference to A, the eldest child and

his medical circumstances and also again repeated the claim that J was not in the UK and was therefore not required to be in the UK for the purposes of childcare. The rest of the decision made reference to the previous applications made and the decision letter again returned to the absence of the children and concluded that as he came to the UK is a visitor he did not reside within the family unit, the youngest child could continue to live with his mother and remain in the UK as he is a British citizen. Thus it was decided it was reasonable for J to remain in the United Kingdom with his mother.

11. The Appellant appealed that decision and the appeal came before the First- Tier Tribunal at a hearing on the 17th August 2017. In a determination promulgated on the 19th September 2017 he allowed the Appellant's appeal on human rights grounds.
12. The Respondent sought permission to appeal that decision and permission was granted by the First-tier Tribunal on the 13th March 2018.
13. The appeal was therefore listed before the Upper Tribunal. Miss Isherwood relied upon the grounds. In her oral submissions she conceded that since the decision letter had been issued, the circumstances of the Appellant had changed. However she submitted the judge had made a material error of law in allowing the appeal. As regards the grounds she submitted that the judge did not consider whether there were "insurmountable obstacles "to family life continuing in Sierra Leone and that the decision did not deal with that issue. She further submitted that there was nothing in the papers concerning that issue and it was not addressed by the judge.
14. In respect of the consideration of section 117B, she submitted the judge failed to weigh and take into account that his private and family life was established when the Appellant was an over stayer. Furthermore that the judge failed to consider whether it was reasonable to expect the qualifying child to leave the UK. She submitted the findings set out at paragraph 26 were wholly inadequate.
15. She also relied on a point that had not been raised in the grounds but that had been set out in the grant of permission at paragraph 4, namely that the Respondent, having refused the application on the ground that his presence in the UK was not conducive to the public good, it was arguable that the judge made no adequate findings on this issue. In this respect she made reference to paragraphs 21 - 24 of the determination.
16. Mr Ali, who appeared before the First-tier Tribunal relied upon his skeleton argument. He also made the following oral submissions. He submitted that the decision could have been structured better and that it had been made clear before the FTTJ that the issue related to Article 8 outside of the rules. The judge at paragraph 10 set out the correct legal test given the rights of appeal available to the Appellant.
17. As to insurmountable obstacles, he submitted that the Respondent had made it clear that the refusal decision did not obligate J, who was a British citizen child to leave and that he could continue to reside in the UK with his British mother and thus this was sufficient to indicate that family life could not continue in Sierra Leone.

18. As to the issue of dishonesty, he submitted that that was in fact considered by the judge at paragraphs 16 and 18 and that the judge found the Appellant's explanation to be plausible (see paragraph 24). He submitted that this was addressed in the Appellant's witness statement paragraph 17 to 21 and that there was no indication that the judge upheld any finding of dishonesty. In any event he submitted, the judge properly identified within the determination that the relevant aspect of the Appellant's conduct was that he had an overall poor immigration history due to his overstaying since 2008 (see paragraph 24).
19. As to section 117B(6), he referred the Tribunal to the determination at paragraph 26 in which the judge had found that there was no public interest in removal because the Appellant had a genuine relationship with a qualifying child.
20. In essence he submitted that the grounds were no more than a quarrel with the assessment of the evidence and findings and thus the determination should be upheld. He reminded the Tribunal that there were compassionate circumstances that were evident on the factual matrix of this family.
21. After having had the opportunity to hear and consider the oral submissions of the parties I informed them that I had reached the conclusion that I was satisfied that there was an error of law that was material.
22. I found no error of law in relation to the first ground advanced on behalf of the Respondent in which it was asserted that the judge made a material misdirection in law at paragraph 23 by stating that the Appellant had satisfied Gen 1.2 as a partner. It is plain from considering the rules that GEN 1.2 4(iv) makes reference to the parties living together at least two years prior to the application. That is correct however any error in this respect was immaterial because as the judge set out at paragraph 10 the only appeal under section 82 (1) (b); refusal of the human rights claim is on the ground that the decision is unlawful under Section 6 Human Rights Act 1998 which entails a consideration of human rights as at the date of the hearing. It was therefore open to the judge to make an overall finding that the Appellant and the sponsor were in a genuine subsisting relationship that had been so since 2014 and that at the date of the hearing was in excess of two years.
23. I also found no error of law in the issue identified in the grant of permission which related to the issue of the Appellant's presence in the UK as not conducive to the public good. I have set out earlier in this decision the contents of the decision letter which were unclear. Nonetheless the judge did properly consider this issue at paragraphs 21 - 24 of the decision. As Mr Ali submitted, the judge had the opportunity and advantage of hearing the oral evidence of both the Appellant and his partner and set out that evidence within the determination at paragraphs 13 - 18 which was consistent with his witness statement. Thus contrary to the grounds, I am satisfied that the judge did consider the issue of whether any dishonesty was deployed in respect of the visit visa applications and the student visa. However the judge reached the overall conclusion that there was "nothing implausible or incredible about the version events which is now portrayed to me". The judge therefore found that after the divorce of the Appellant and sponsor (in 2005) they remained on good terms, that the Appellant

visited his children and that the relationship was rekindled in approximately 2014 and that those were all “plausible claims”. Furthermore the issue identified in the decision letter is to whether there was a child in the UK, was also entirely straightforward. The evidence of the Appellant and the sponsor confirmed that the sponsor and A went for treatment abroad in 2016 and that this was temporary with the Appellant remaining in the UK with a younger child contrary to the contents of the decision letter. Whilst the judge at [24] stated that there were “cautious findings “in respect of dishonesty, a complete reading of the determination makes it plain that the judge overall reached the conclusion that whilst the previous applications on their face showed what appeared to be incorrect information, the Appellant had given a plausible explanation in respect of that. Consequently I am satisfied that the grounds do not demonstrate that the judge failed to consider or make adequate findings on that issue.

24. However I am satisfied that the judge did not properly consider section 117B (6) at paragraph 26 of the determination. Whilst Mr Ali submitted that the judge had properly found that he had a genuine subsisting relationship with a qualifying child, that fails to take into account the second limb of section 117B(6) which relates to the issue of reasonableness. As Miss Isherwood submitted, there had been no consideration of that within the determination and no consideration of the best interests of the child concerned. Consequently I was satisfied that the making of the decision did demonstrate the making of an error on a point of law and that the decision should be set aside.
25. In terms of re-making the decision, Miss Isherwood and Mr Ali accepted that the real issue was not one of insurmountable obstacles given the circumstances of the parties and that even if there were no insurmountable obstacles the real issue related to that of S117B(6). It was therefore agreed that the parties would address this issue by way of oral evidence from the Appellant and for submissions from each of the advocates.
26. It was common ground by reason of his British Citizenship, J was a qualifying child and it was not in dispute that the Appellant had a genuine and subsisting parental relationship with him and the issue was reasonableness of return. There was no separate best interests assessment or assessment of reasonableness at (paragraph 26) although there was a consideration of the other public interest considerations under section 117B relating to financial independence and ability to speak English, both of which were resolved in favour of the Appellant. The countervailing factor identified was that of his poor immigration history having been an over stayer since his visit visa ran out in 2008 (see judge’s finding at [24]. Those findings would be preserved.
27. It was therefore agreed between the advocates that the only outstanding issue related to S117B (6) and the overall proportionality balance.
28. I therefore heard oral evidence from the sponsor. He confirmed the contents of his witness statement were true. In relation to updating the Tribunal as to J’s circumstances, stating that he was now taking his A-levels and had an offer of a place at university to enter higher education. He stated that J had no experience of living in Sierra Leone but had visited once in 2010 for a period of three weeks to see his grandfather and grandmother which had been the first time he had ever seen them

before his grandfather had passed away. That was the only visit that he had made Sierra Leone since he'd been in the United Kingdom from the age of two. He stated that J did not speak any of the indigenous languages. As to relatives in the United Kingdom, he made reference to distant relatives J had a large number of friends in the United Kingdom many of them he had grown up with; they had attended the same school and they had continued their friendships.

29. He made reference to the letter written by J in the bundle at page 10. He was asked about the reaction J to the prospect of his having to live in Sierra Leone or for the Appellant to be separated from him now. The Appellant said that J would be devastated and that they had had several conversations since the sad circumstances in 2016 and the death of his sibling. He said he had no memory of Sierra Leone.
30. In cross-examination Miss Isherwood asked questions concerning connections in Sierra Leone. The Appellant stated that they had distant relatives there; both his mother and father had passed away and his partner had no parents alive either. He conceded that his partner had no siblings in the event the length of time that he lived in the United Kingdom and that he would have no property or accommodation, no place to live with no close relatives to assist. UK there were two sisters living in Sierra Leone. He stated that she had kept in touch with some of her siblings but since the funeral had not wanted to talk about events that occurred. He confirmed J did not speak any of the indigenous languages of Sierra Leone and that he had not taught him to speak any language. He denied any suggestion that he would be able to support him to integrate into Sierra Leone. He confirmed that his wife was still in employment and supporting the family.
31. Miss Isherwood made the following submissions. She made reference to the 2018 guidance and that it made reference to the circumstances in which a parent can be expected to return and made reference to the public interest considerations being of such weight to justify their removal when the British child could remain in the UK with another parent. In this case she submitted that the Appellant had a very poor immigration history and was a long-term overstayer in breach of the immigration rules. She submitted that he had remained in the UK unlawfully since 2008 has not made any further application.
32. As to J's best interests, she acknowledged the difficulty of his age and the family circumstances and stage that he had reached in his education. However she submitted that with regard to the wider family, his parents had experience of living in Sierra Leone and would be able to reintegrate their without any difficulty and that there was still some family members present even if they were distant. Thus the test was not met under S117B(6) and that it would not be disproportionate for the Appellant to be removed.
33. Mr Ali made the following submissions. He made reference to the relevant case law and in particular MA (Pakistan) and the relevant guidance. In respect of this particular Appellant, he did not fall into the category of someone whose conduct was such to undermine immigration controls, for example he had not committed significant or persistent criminal offences nor had he repeatedly and deliberately breached the

immigration rules although he accepted the judge's finding at [24] that he had a poor immigration history. He placed weight upon the evidence of the Appellant and of J that it was not reasonable for J to leave the UK given the family's circumstances and that the evidence demonstrated that there would be an adverse effect upon J if his father were to be removed and the family unit disrupted. He made reference to the important stage that he was in his education and that he had not lived in Sierra Leone since he was 2 and had no recollection of that country. The visit made in 2010, which he did not remember now, did not give any basis for any links to the country. He did not speak the language and had firm friendships in the United Kingdom. He made reference to paragraph 49 of MA (Pakistan) and that J had established a significant private life in the United Kingdom over the last 16 years.

Decision:

34. Appendix FM, "Family Members", begins with a general statement which explains that it sets out the requirements to be met by those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (para GEN.1.1). It is said to reflect how, under Article 8, the balance will be struck between the right to respect for private and family life and the legitimate aims listed in Article 8(2). The Appendix nevertheless contemplates that the Rules will not cover all the circumstances in which a person may have a valid claim to enter or remain in the UK as a result of his or her Article 8 rights. Paragraphs GEN.1.10 and GEN.1.11 both make provision for situations "where an applicant does not meet the requirements of this Appendix as a partner or parent but the decision-maker grants entry clearance or leave to enter or remain outside the Rules on Article 8 grounds".
35. In this case, whilst the FTTJ stated that the Appellant could meet the requirements under the Rules under Appendix FM as a partner or 276ADE, Mr Ali accepted that his submissions before the judge related to Article 8 and an assessment outside of the Rules. It is not disputed that the Appellant has a wife and child in the UK who are both British citizens.
36. I conclude that removal of the Appellant in consequence of the decision is likely to interfere with his family life in a sufficiently grave way to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).
37. The state can lawfully interfere with an Appellant's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes:

see *Hesham Ali v SSHD* [2016] UKSC 60 and see *R (MM and others) (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, the Supreme Court at [43].

38. In the assessment under Article 8, the best interests of the child must be a primary consideration. That meant that they must be considered first. They could, of course, be outweighed by the cumulative effect of other considerations. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must “have regard” to the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that 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).
39. S117B 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.

40. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") sets out a number of public interest considerations that a court or Tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.
41. The maintenance of an effective system of immigration control is in the public interest. The Appellant entered the UK in 2008 with entry clearance as a visitor. His immigration history shows that he remained in the UK unlawfully throughout his period of residence from 2008 until the present day.
42. On the evidence currently before the Tribunal the only aspect of the Appellant's immigration history that gives weight to public interest issues is the poor immigration history of having overstayed his temporary leave as a visitor and for failing to regularise his status.
43. The First-tier Tribunal judge found that the Appellant had given a sufficiently credible explanation in response to the allegations in the decision letter
44. However the fact of his poor immigration history gives significant weight to the public interest in removal.
45. The FTTJ found that the Appellant could speak English and there is evidence to show that his wife is working and that the family are financially independent. Although these are factors that section 117B(2)-(3) requires a Tribunal to take into account, the fact that the Appellant is not an additional burden on public finances is a neutral factor that does not add weight to the individual circumstances of his claim to remain in the UK: see AM (Section 117B) Malawi [2015] UKUT 260.
46. His relationship with his wife is not straight forward The Appellant had previously been married to his partner but had divorced in 2005. They remained on good terms despite her re-marriage and the FTTJ accepted that he entered the UK on visit visa to maintain his family life with his children. He re-established his relationship with his former wife in 2014 at a time when he had no leave to remain. Section 117B (4) requires little weight be given to a relationship formed with a British partner at a time when a person was in the UK "unlawfully". I am satisfied that the Appellant would have known that his immigration status was not lawful.

47. The Appellant has lived in the UK since 2008. I would accept that he had established a private life since that time but principally it is his family life that he relies upon. He cannot meet the private life requirements contained in paragraph 276ADE of the immigration rules both in terms of his length of residence or in showing that there are likely to be 'very significant obstacles' to integration in Sierra Leone, where he grew up, and has language and cultural connections. Any private life that he might have established in the UK was during a time when he was remaining in the UK unlawfully. The Tribunal is required by section 117B (5) to give little weight to any private life that is established at a time when a person's immigration status is precarious. For these reasons, I place little weight on any private life that the Appellant might have established when considering where a fair balance should be struck.
48. When assessing the proportionality of the removal decision the judge was obliged to consider the best interest of the child, J, who would be affected by the decision. There is no specific reference made by the judge when considering the circumstances of J.
49. I have therefore considered the best interests of J now aged 17 years. In assessing the best interests of the child I have taken into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.
50. I have also taken into account the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 and *MA (Pakistan) and others v SSHD* [2016] EWCA Civ 705. The best interests of the child are a primary consideration in this case but may be outweighed by the cumulative effect of other matters that weigh in the public interest.
51. The fact that the Appellant's son is a British citizen is a matter of intrinsic importance. The child had rights and advantages arising from his citizenship. . The importance of British citizenship was underlined in the speech of Lady Hale (as she then was) in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 ("*ZH (Tanzania)*") in the following terms :-

- “30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child
31. all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.
32. 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.”

ZH was a case of removal where the parents were estranged and the child would therefore be separated from one parent if the other were removed. In this case, whether J and his mother relocate with the Appellant is a matter of choice for them. Neither could be forcibly removed but have the choice to live with the Appellant in Sierra Leone.

52. I am satisfied from the evidence that he is in full time education and is properly to be regarded as at a crucial time in his education as he is presently sitting his A-level examinations. The evidence before me demonstrates that he is likely to do well in those exams and has plans to enter into higher education in the United Kingdom. As to his life in the United Kingdom, J provided a letter at page 10 of the bundle in which he supports his father’s application. He sets out the family history and relates the very sad circumstances relating to his brother’s death in 2016. In that respect, he set out the assistance that his father’s presence in the United Kingdom is given to him. Further accept the oral evidence given by the Appellant as to the strong private life that he has which includes many long-lasting friendships some which have been formed since primary school. It is plain from hearing the evidence from the Appellant and reading the letter from J that the family members have derived support from each other during a very difficult time.
53. I am further satisfied that the Appellant has given credible evidence relating to circumstances in Sierra Leone. Whilst J went to visit that country for three weeks in 2010, his father stated that he had little memory of that time. He had gone to visit his grandfather which was the only time he had seen him before he passed away. He has no knowledge of the languages of Sierra Leone and has no links with any distant

family relatives that remain there. The Appellant has not lived there since 2008 and has no source of accommodation or employment.

54. As the FTTJ set out, the Appellant's partner is in employment and supports the family. Miss Isherwood submitted that it is a matter for her whether she chooses to remain in the UK or continues her family life with the Appellant in Sierra Leone. If she chooses to remain in the UK the Appellant's removal would lead to the separation of the Appellant from his partner and child. In my judgement the separation of J from his father would not be in his best interests and given the history to which I have referred, his removal would be likely to have an adverse impact upon him. This is evidenced by what is said in his letter at page 10 but also in the oral evidence that I have heard from the Appellant.
55. I therefore conclude that the best interests of J are to remain in the UK with both parents as a family unit.
56. In assessing whether the public interest considerations are sufficiently serious to outweigh the best interests of the child I have taken 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.
57. As a British citizen J is a 'qualifying child' for the purpose of section 117B (6). 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. The FTTJ 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" February 2018). The guidance at page 35 begins with a heading "EX1(a) -reasonable to expect" and states;
- "First, the decision maker must assess whether refusal of the application will mean that the child will have to leave the UK or is likely to have to do so. Where the decision maker decides that the answer to this first stage is yes, then they must go on to consider secondly, whether, taking into account their best interests as a primary consideration, it is reasonable to expect the child to leave the UK..."
58. That interpretation of the provision whether it is reasonable to expect the child to leave also appears in the section of the Guidance which is headed "Reasonable to expect a child to leave the UK?" (see page 74) which begins with the following statement:

“If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK.”

59. The Guidance sets out at (page 7):

“Where the child is a British citizen

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 to the UK because, in practice, the child will not, or 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 who has 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.”

60. The Guidance appears to reflect matters set out in MA (Pakistan). It accepts that the usual presumption where a British Citizen child’s rights are at issue is that it is not reasonable to expect that child to leave and it is only where there are strong reasons of public interest for removal that a parent in a genuine and subsisting relationship with such a child should be removed. In such circumstances the guidance recognises that the British Citizen parent and child cannot be forcibly removed and the Guidance suggests therefore that the public interest might outweigh the child’s best interests in appropriate cases if the child can remain with the parent who is entitled to be in the UK. The present guidance is different from that which was before the Court in MA (Pakistan) and appears to require consideration of whether J will or is likely to be required to leave the UK with the Appellant and his mother or whether it is more likely that J will remain here with his mother. However that is not what is set out or required in the statute in Section 117B (6). That only requires that there be a genuine and subsisting parental relationship with the qualifying child which both parties in this appeal agree is the position here, and an assessment of whether it is reasonable to expect the child to leave the UK. The consideration therefore is not whether it is reasonable to expect the child to remain in the UK without one parent. That is not the wording of the legislation and guidance can be viewed as providing for a “gloss “on the wording of the statute itself.

61. The guidance goes on to recognise that, even if another parent would be able to remain in the UK with the child, weighty public interest considerations would be needed to justify the separation of a British child from a parent. The circumstances outlined in the policy guidance are not exhaustive, but indicate that significant public

interest considerations such as criminality or a very poor immigration history might be sufficient to justify a decision that would lead to a British child being separated from a parent.

62. As I have set out earlier, the Appellant does have a poor immigration history, but the findings of the First-tier Tribunal did not find that there was any deception practised in his applications for visit visa or as a student (see paragraphs [21-24]. 30. I have given significant weight to the interests of J and the impact that it might have on him if he were to lose the advantages of citizenship by relocating to Sierra Leone or if he was separated from his father if his mother chose to remain in the UK.
63. Having considered the public interest considerations identified which relate to his poor immigration history by being a long-term overstayer, I do not conclude that his actions are sufficiently serious to outweigh the interests of J on the facts of this particular case. It also follows that I do not find that it would be reasonable to expect J to leave the UK within the meaning given to the phrase contained in section 117B(6) I conclude that it would not be reasonable to expect the child to leave the UK within the theoretical meaning given to the phrase contained in section 117B(6).
64. Thus, having considered all the relevant factors and the proportionality balance, I am satisfied that the decision to refuse the Appellant's human rights claim is unlawful under Section 6 of the Human Rights Act 1998.
65. Consequently the appeal is allowed; the decision of the FTT is set aside and remade; the appeal is allowed.



Signed
Upper Tribunal Judge Reeds

Date: 17/5/2018