



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/26124/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 5 February 2018

Decision & Reasons Promulgated  
On 5 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MIT  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Pipi, Counsel, instructed by Rehoboth Law  
For the Respondent: Mr D Duffy, Senior Home Office Presenting Officer

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. This is a resumed hearing of the Appellant's appeal following my decision to set aside the First-tier Tribunal's decision. My error of law decision is annexed to this remake decision. In summary I had concluded that the First-tier Tribunal Judge had,

when assessing the Appellant's Article 8 case, failed to take account of an expressed concession by the Respondent that it would not be reasonable to expect the Appellant's British children to leave the United Kingdom. I had not gone on to remake the decision at the error of law hearing because Mr Duffy indicated that the Respondent may wish to pursue an argument as to the interpretation of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended. I therefore adjourned the case and issued directions to the parties.

2. Following the adjournment, the Appellant submitted a consolidated bundle, as directed, and Mr Pipi submitted a skeleton argument. For his part Mr Duffy did provide a skeleton argument but only very late in the day (it arrived on my desk on the morning of the hearing and had not got through to Mr Pipi before the hearing actually began). Mr Duffy apologised for the lateness of this document. A break was taken in the proceedings to allow Mr Pipi to read and consider Mr Duffy's skeleton argument. On resumption Mr Pipi confirmed that he was content to proceed. Mr Duffy expressly confirmed that the concession made by the Respondent in the reasons for refusal letter (that it was not reasonable to expect the Appellant's two children to leave the United Kingdom) was being maintained. It was also agreed that in light of the way in which the case was argued before me previously and my error of law decision, the focus of this appeal remained squarely on section 117B(6) of the 2002 Act.

### **Submissions of the parties**

3. Mr Duffy relied on his skeleton argument. In particular he submitted that there was a legitimate argument to the effect that if the Respondent accepted that the Appellant's British children could not be *expected* to leave the United Kingdom, any Tribunal considering this issue would not need, or would not be able, to assess whether or not it would *in fact* be reasonable for that to occur. Mr Duffy acknowledged that there could be said to be a "tension" between the words used in section 117B(6) and the submission being put forward by the Respondent. He accepted that there was a degree of ambiguity in the Respondent's guidance (the document entitled Appendix FM Section 1.0b Family Life 10-Year Route, dated August 2015, at paragraph 11.2.3).
4. In addition, Mr Duffy submitted that there were relevant factors in the Appellant's history which strongly counted against him, namely the conviction and the conduct associated with it, his use of a false document, and his generally poor immigration record. He submitted that a separation of the Appellant from his children would in all the circumstances be proportionate.
5. Mr Pipi relied on his skeleton argument (drafted before he had had sight of Mr Duffy's). He could not fully understand the nature of the Respondent's new position on section 117B(6). He submitted that the Respondent's new argument appeared to suggest that if the Respondent conceded that it was not reasonable to expect a child to leave the United Kingdom, the whole issue fell away, and Tribunals would in effect be precluded from applying the substance of section 117B(6). The Respondent's position appeared to undermine the application of a provision of primary legislation.

I was asked to accept that the Respondent's guidance should not be used as an aid to the construction of a statute. As to the suitability issue under Appendix FM, Mr Pipi submitted that the Appellant's 2009 conviction was now spent and was an irrelevant matter. In respect of the forged document, the Appellant had never been charged and I should treat this point as though the Appellant was somebody who had received a caution, not a conviction. In respect of the best interests of the children I was referred in particular to page 69 of the Appellant's new bundle.

### **Relevant findings of fact**

6. In reality there are no factual disputes in this appeal. I find that the Appellant is and has been in a genuine and subsisting relationship with his wife at all material times, and that the couple have two British children born in 2004 and 2006. I find that the Appellant was in fact convicted of indecent assault in 2009 and received a twelve months' Probation Order. I find that the Appellant was in possession of a false document (namely an ILR vignette contained in his passport). I find that he used this document between 2001 and the point at which this document was detected by the Respondent in 2014.
7. In respect of the Appellant's older son, I accept that he suffers from kidney problems as set out in the medical evidence in the Appellant's new bundle (pages 35 to 36). It is clear from the letter from this child's primary school at page 69 of the Appellant's bundle that the Appellant is heavily involved in his son's education. The school is of the view that the son would suffer if his father were to be removed and notes that the child is at a critical stage of his school life (he is in Year 6 and will be taking SATS in the summer term).

### **Conclusions**

#### *Article 8 within the context of the Rules*

8. In respect of Appendix FM), the First-tier Tribunal Judge had already found that the suitability requirement under S-LTR1.6 applied to the Appellant. Although the judge had not spelt this out in any great detail, it is clear enough that this was based not simply on the 2009 conviction but the Appellant's conduct as a whole, including the immigration history. This particular aspect of the judge's decision had not been challenged in the grounds of appeal and had not been the subject of submissions at the error of law hearing. At the resumed hearing Mr Pipi confirmed the focus of the Appellant's case remained on section 117B(6).
9. For the avoidance of any doubt, I too conclude that the Appellant cannot rely on Appendix FM because of the suitability issue. Even accepting that the 2009 conviction was spent, there remains the adverse immigration history including the use of a false document over a protracted period of time.

#### *Article 8 outside the context of the Rules*

10. I turn immediately to section 117B(6), this being the agreed core issue in the appeal.

11. The Appellant's two children are clearly qualifying children: they are both British and resident in this country.
12. The clear statutory wording of the second limb of section 117B(6) is as follows:

"...the public interest does not require the person's removal where

...

(b) it would not be reasonable to expect the child to leave the United Kingdom."
13. In respect of Mr Duffy's position in this appeal, I confess that I remain somewhat unclear as to what precisely is being put forward. Paragraph 18 of his skeleton argument appears to suggest that once the Respondent concedes that it would be unreasonable to expect British children to leave the United Kingdom, the issue need not or cannot arise on appeal. It is said (or at least appears to be said) that this is because the question of whether or not it would *actually* be reasonable is purely hypothetical.
14. I reject this argument for five reasons.
15. First, in interpreting the provision, I give the words contained in section 117B(6)(b) their natural and ordinary meaning. The word "expect" is used, not "actually" or "required". The Respondent's position in this appeal appears to be an attempt to read words in or otherwise materially change the framework of the provision.
16. Second, I agree with Mr Pipi's point, namely that the effect of the Respondent's argument is that by making a concession in the initial decision, the utility of section 117B(6)(b) is severely undermined or even obviated altogether.
17. Third, I adopt the approach that whatever guidance may exist on the Respondent's part cannot be used as a tool for the construction of a statute. It is of course open to the Respondent to take the position on how *she* will apply statutory provisions as a matter of policy guidance, but that is clearly not the same as how a Tribunal should approach the interpretation of the provision itself.
18. Fourth, the Court of Appeal has looked at section 117B(6) several times now, and I can see nothing in any of its judgments to indicate any potential support for the Respondent's new position. In fact, her argument would appear to run contrary to the general tenor of what is said at paragraphs 17-21 of MA (Pakistan) to the extent that section 117B(6) says what it means, should not be given a gloss, and that if an appellant satisfies the two limbs (including the 'expectation' element), they will succeed in their appeal.
19. Fifth, I fully appreciate the Respondent's wish to be able to take criminality and other misconduct into account when assessing cases involving British children. Yet that is precisely what the construction provided by MA (Pakistan) [2016] EWCA Civ 705 and AM (Pakistan) [2017] EWCA Civ 180 allows for already, without having to perform interpretative gymnastics and apply dubious distinctions.

20. In view of the above, I interpret section 117B(6)(b) to mean that if the Appellant can show that it would be unreasonable to expect one or both of his British children to leave the United Kingdom, he will succeed.
21. In answering this key question I note that it was expressly conceded in the reasons for refusal letter (that concession being maintained before me) that it would be unreasonable to expect the children to leave the United Kingdom. That concession was made in the very same terms as those expressed in section 117B(6). I appreciate the Respondent goes on to say that separation of the Appellant from his children would be justified on the facts of this case. The insurmountable difficulty with this argument is that the express concession in and of itself means that the Appellant succeeds in his appeal because section 117B(6)(b) has been satisfied. There is simply no getting around this.
22. The Appellant's appeal succeeds on this primary basis.
23. In any event, even if my rejection of the Respondent's arguments on section 117B(6) is found to be wrong and/or even if the concession is not determinative of this appeal, I would nonetheless conclude that separating the Appellant from his children at this stage would be disproportionate.
24. This is not a case in which the children are particularly young and have only spent a short time with their father: his two sons are now thirteen and eleven, respectively, and the Appellant has lived with them their entire lives. It is quite clear from the school letter at page 69 of the Appellant's bundle that the Appellant takes a very active part in his younger son's education and the school regards him as being extremely important to the child's educational wellbeing. It is the case that the younger son is in Year 6 and soon to take the important SATS. All of this has a direct bearing on the progression to secondary school. I place significant weight on the view of the school (it being the expert provider involved in the child's education) that he is at a critical stage of his school life. For the Appellant to be removed from his son's life at this point would, I conclude, be extremely disruptive, and would quite clearly be contrary to the best interests. Further, whilst the older son may not be at such a critical stage of his education (although in my view it is very difficult to classify any particular of a child's basic education as "non-critical"), he is nonetheless a boy entering into an important stage of his emotional development. Removal of his father is also very likely to be detrimental to his overall wellbeing and contrary to his best interests too.
25. I of course take into account the public interest factors, which are in this case significant. The 2009 conviction is spent for reasons set out clearly in Mr Pipi's skeleton argument. However, I take account of the conduct relating to the conviction and, importantly the adverse immigration history. Use of a forged document is always adverse to an individual. In this case it was used over a prolonged period of time. This counts heavily against the Appellant. I also take into account the fact the Appellant does not seem to be financially independent at the present time. Further, the Appellant's immigration status has rested in the unlawful category for a long

period of time now and this involves a significant reduction in the weight to be attributed to his family and private life. Overall, the public interest is powerful.

26. In weighing up all relevant factors, the scales are fairly evenly balanced. By a narrow margin (as will often be the case) they tip in the Appellant's favour. In essence, this is because the children's best interests are very strong.

27. The Appellant's appeal succeeds on the alternative basis as well.

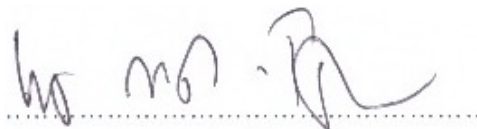
**Anonymity**

28. I do now make an anonymity direction in this case. Although none has been made in the proceedings thus far, the appeal involves a child and my remake decision will be published.

**Notice of decision**

**The decision of the First-tier Tribunal contained material errors of law and I have set it aside.**

**I remake the decision, allowing the Appellant's appeal on the basis that the Respondent's refusal of his human rights claim is unlawful under section 6 of the Human Rights Act 1998.**



Signed

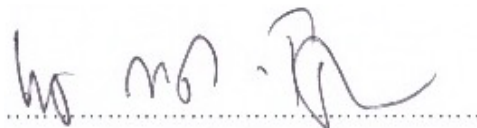
Date: 26 February 2018

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. The Appellant has won his appeal on the basis of facts known to the Respondent throughout and in light of the applicable legal tests.



Signed

Date: 26 February 2018

Deputy Upper Tribunal Judge Norton-Taylor

**ANNEX: ERROR OF LAW DECISION**



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

Appeal Number: IA/26124/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 October 2017**

**Decision & Reasons Promulgated**

.....

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**[M I T]  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr E Papi, Counsel, instructed by Rehoboth Law  
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Pears (the judge), promulgated on 11 November 2016, in which he dismissed the Appellant's appeal against the Respondent's decision of 7 July 2015, refusing a human rights claim. That claim was essentially based upon the Appellant's relationship with an Indian national with indefinite leave to remain in the United

Kingdom and their two British citizen children. The Appellant had two convictions against him which, in the Respondent's view, meant that he fell foul of the suitability requirements under Appendix FM to the Rules. Significantly, the Respondent had, at page 5 of the reasons for refusal letter, accepted that it would not be reasonable for the two children to leave the United Kingdom.

### **The Judge's Decision**

2. The judge took various factors relating to the Appellant and his wife into account when assessing Article 8. He concluded that the presence of the Appellant was not conducive to the public good. He recognised that the children were both British. Having considered certain matters relating to them into account, he concluded, at paragraph 61, that it would not be unreasonable to expect the children to leave the United Kingdom. Five paragraphs later he considers the children's best interests and concludes that the family unit could all return to India.

### **The Grounds of Appeal and Grant of Permission**

3. The brief grounds complain about the judge's approach to the Article 8 assessment, in particular that relating to the two children. Permission to appeal was granted by Upper Tribunal Judge Pitt on 5 September 2017.

### **The Hearing before Me**

4. Mr Duffy confirmed that in light of the reasons for refusal letter the Respondent had never contended that the children could reasonably leave the United Kingdom. He emphasised that this was the case particularly in light of the Respondent's guidance on Appendix FM (Appendix FM 1.0b, August 2015, at paragraph 11.2.3.). It was apparent that the judge had failed to appreciate this when assessing Article 8. The core issue before him was whether a separation of the Appellant from the rest of his family was justified, particularly in light of the convictions. The judge had clearly failed to deal with this issue. In light of this Mr Duffy accepted that there had been a material error of law.

### **Decision on Error of Law**

5. In light of Mr Duffy's fair and quite properly made concession I find that the judge did materially err in law.
6. I have some sympathy for him in that it is less than clear as to how the case was argued before him by the representatives, in particular the Presenting Officer. However, the reasons for refusal letter was clear: the Respondent was not suggesting that the children could reasonably be expected to leave the United Kingdom. In light of this the issue was whether the Appellant could be justifiably separated from his children (and presumably his wife as well). It is apparent that in light of the judge's misapprehension as to what the case before him really involved, he failed to deal with the separation issue. It was by no means the case that a separation would inevitably be justified. In light of the foregoing, the error in approach is material and I set aside the judge's decision.



**Disposal**

7. I have decided to retain this case in the Upper Tribunal.
8. Initially I was of the view that I could remake the decision on the evidence currently before me. The judge's conclusion on the suitability issue has not been challenged by the Appellant and in light of that he could not succeed in respect of Appendix FM. However, section 117B(6) is clearly relevant. Mr Duffy indicated that the Respondent may wish to pursue a particular argument in respect of this provision. On instructions he may be required to suggest that the issue of expectation within section 117B(6) could be interpreted so as to defeat the Appellant's Article 8 claim. However, at this stage he was not in a position to state whether or not such an argument would be pursued. He suggested that the matter be adjourned for a resumed hearing in due course. Mr Pipi did not argue to the contrary.
9. I accede to Mr Duffy's suggestion and adjourn this appeal for a resumed hearing to be conducted before me in due course. I will issue directions to the parties to ensure that all relevant matters are fully considered on the next occasion.

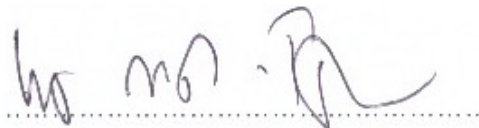
**Notice of Decision**

**The decision of the First-tier Tribunal contains a material error of law and I set it aside.**

**I adjourn this appeal for a resumed hearing to take place in the Upper Tribunal on a date to be fixed.**

**Directions to the parties will be issued separately.**

**No anonymity direction is made.**



Signed

Date: 6 November 2017

Deputy Upper Tribunal Judge Norton-Taylor