



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12971/2019

THE IMMIGRATION ACTS

Heard at Bradford (Via Skype)
On 12 February 2021

Decision & Reasons Promulgated
On 2 March 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DA
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Walters & Palskitt Solicitors.

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of the First-tier Tribunal promulgated on 24 September 2020 in which it dismissed the appellant's appeal on the basis of his family and private life pursuant to Article 8 ECHR.
2. Permission to appeal was granted by a judge of the Upper Tribunal on a renewed application, the operative part of the grant being in the following terms:

I grant permission on one ground identified at paragraph 6 and 7 of the grounds of appeal. It is arguable that the judge did not consider the position of the children when assessing proportionality with s117B(6) in mind.

In so far as the issues raised at paragraphs 1 - 5 of the grounds of appeal are concerned, they are disagreements with the findings and do not disclose an arguable error of law. At paragraph 5 the Appellant criticises the judge for attaching weight to a social worker's report that he submitted in evidence. In respect of the persistent offender issue I endorse the decision of Resident Judge of the First-tier Tribunal Zucker who refuse permission on 4 November 2020.

3. In the response to directions issued by the Upper Tribunal a Senior Home Office Presenting Officer, following reference to Runa (see below for full citation), wrote:

c) In the circumstances the respondent does not oppose the appellant's appeal on the limited grounds identified and invites the Tribunal to remake the decision based on the DFTT Judges findings that the appellant has contact with the children and that it would not be reasonable for them to leave the United Kingdom.

d) the respondent requests an oral hearing to re-determine the appeal. The respondent has no objection to this hearing being conducted remotely.

Error of law

4. In the Runa v Secretary of State for the Home Department [2020] EWCA Civ 514 when giving the lead judgment Lord Justice Singh wrote at [32] to [37]:

32. In this context, we heard interesting submissions from the parties as to whether there is scope for Article 8 to play a part in cases where section 117B(6) arises. Mr Anderson submitted on behalf of the Secretary of State that there is a residual scope for Article 8 to apply. This is because he submits that, although section 117B(6) is a "freestanding" provision (see *KO*, at para. 17), that does not mean that it is exhaustive of the scope of Article 8. He submits that section 117B(6) is to be regarded as a benevolent provision, which can only operate in one way, potentially in favour of an appellant but never adversely to an appellant. I would accept Mr Anderson's submission in this regard. It seems to me both to be right in principle and also to be consistent with the analysis of section 117B(6) given by Elias LJ in *MA (Pakistan)*, at para. 17, where he said that that subsection "must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the subsection are satisfied, the public interest will not justify removal."

33. This is important because a conventional Article 8(2) inquiry can take into account, as part of the overall proportionality exercise, other public interest considerations, including the conduct of the parent or parents. Under section 117B(6) there is no room for such an inquiry to take account of the conduct of the parents: that is the effect of the decision of the Supreme Court in *KO (Nigeria)*, which overruled the earlier decision of this Court in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617; [2016] Imm AR 954 and in that respect approved what had been said by Elias LJ in *MA (Pakistan)* (as that case was known before it became *KO (Nigeria)* when it went to the Supreme Court), at para. 36. Under section 117B(6) the only question is focussed on the child: would it be reasonable to expect the child to leave the UK? If the answer to that is No, there is no need to go on to consider Article 8(2) more generally. However, as a

matter of principle, and as Mr Anderson rightly submitted, if the answer is Yes, there will still be a residual scope for Article 8(2) to be considered.

34. The next submission made by Mr Biggs in support of his "categorical" or "hypothetical" approach was that otherwise a tribunal would be compelled to undertake a very difficult factual analysis, which would be contrary to the underlying purpose of section 117B. However, as Mr Anderson pointed out, in Article 8(2) cases more generally, such difficult questions can arise and tribunals do have to face up to them. He reminded us in that context of what was said by Sedley LJ in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, at para. 42. As Baker LJ observed during the course of the hearing before us, similar questions can arise in family proceedings under the Hague Convention. Although a provision such as section 117B(6) reduces the scope for judicial evaluation which may be necessary, it does not eradicate it completely. Where necessary, and depending on the facts, judges can and do ask questions which may call for a difficult evaluation. That could include asking the question what is going to happen to the family unit if one parent has the right to remain in the UK and the other does not.
 35. Finally, in this context, Mr Biggs placed reliance on what was said by the Upper Tribunal in *Patel (British citizen child – deportation)* [2020] UKUT 45 (IAC). I observe, however, that that was a decision on section 117C(5), a provision which was said by the Upper Tribunal to call for a hypothetical question to be answered: see para. 32 of the judgment. In my respectful view, that does not assist the Court in determining the issue which arises on the present appeal.
 36. I would therefore reject Mr Biggs's primary submission as to the interpretation of section 117B(6). I would, however, accept his alternative submission, that the provision calls for a fact-finding exercise so that the full background facts must be established against which the only statutory question posed by that provision can then be addressed. I would emphasise again, as the Supreme Court did in *KO (Nigeria)* and this Court did in *MA (Pakistan)* and *AB (Jamaica)* that, once all the relevant facts have been found, the only question which arises under section 117(6)(b) is whether or not it would be reasonable to expect the *child* to leave the UK. The focus has to be on the child.
 37. I would also accept Mr Biggs's submission that the test under section 117B(6) is not whether there are "insurmountable obstacles" to the maintenance of family life outside the UK. That would be so even in an ordinary Article 8 case: see *GM* at paras. 42-52, in particular paras. 43-44 (Green LJ). That is all the more so in a case which is not a conventional Article 8(2) one but arises under section 117B(6).
5. The First-tier Tribunal at [110] of that decision wrote:
- “As noted above it would not be reasonable for the children to go with the appellant to Iraq. The issue being whether or not it would be reasonable for the children to remain in the United Kingdom without the appellant.”
6. The First-tier Tribunal found the appellant unable to succeed under the Immigration Rules and thereafter went onto consider Article 8 ECHR.
 7. The finding in relation to the Article 8 assessment is set out at [116 -119] in the following terms:
 116. For the reason set out I find that the appellant does not meet the requirements of the Immigration Rules. I have considered whether there are factors outside the rules warranting a grant of leave on Article 8 grounds. I find there are no such factors.

117. On the basis of the matters set out I find there is a genuine parental and therefore family relationship between the appellant and his children and that the decision taken will interfere with that family relationship. I find that the appellant has established a private life in the UK and that the decision will interfere with such.
118. I find that the decision is in accordance with the law and for the purposes of maintaining immigration control or prevention of crime and disorder. Finally I have to determine whether or not taking account of all the circumstances the decision is proportionately justified. For the reasons set out I find that the decision is proportionately justified.
8. In this statement the First-tier Tribunal erred as the question of entitlement pursuant to section 117B(6) does not appear to have been considered.
9. Section 11B(6) of the 2002 Act reads:
- (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.
10. It was specifically stated in the refusal letter that the appellant is not subject to a deportation order.
11. The application refused was a human rights application for leave to remain in the UK on the basis of the appellants family and private life. While the Immigration Rules are material to a human rights appeal, the inability of a party to satisfy the requirements of the Rules is not determinative of the merits of an appeal in all cases. The First-tier Tribunal was required to assess the matter by reference to article 8 ECHR and in doing so to incorporate as part of the deliberations the provisions of section 117 of the 2002 Act.
12. On the basis of the findings made and on the clear understanding of the law relating to section 117B(6), which reflects the Secretary of State's view as to the proportionality of a decision to remove a person from the United Kingdom if the requirements of that section are met, which it is not disputed before me they are in this case on the basis of the finding would not be reasonable to expect the child to leave the UK, this appeal must be allowed.
13. Although the appellant has succeeded at this stage the concerns expressed in the refusal and by the First-tier Tribunal in relation to his behaviour and violent acts is of concern. He needs to be aware that should such conduct continue, and he receive a qualifying sentence of imprisonment, he might find himself the subject of an order for his deportation from the United Kingdom in which case the advantage conferred by section 117B(6) will no longer be available to him.

Decision

14. **I allow the appeal.**

Anonymity.

15. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 12 February 2021