



IAC-AH-PC/SC-V2

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

Appeal Number: IA/03987/2015

THE IMMIGRATION ACTS

**Heard at Manchester
On 21st October 2015**

**Decision & Reasons Promulgated
On 25th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**H.A.
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Khan, solicitor

For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 3rd September 1963. On 19th February 2014 the Appellant was granted limited leave to enter the United Kingdom until 5th August 2014 as a visitor. On 31st July 2014 he applied to vary his leave to enter or remain. That application was refused by a Notice of Refusal dated 15th January 2015. In making that refusal the Secretary of State noted that the Appellant had not in his application mentioned that he had children in the UK and noted that the Appellant had submitted an application for a contact order whilst in the UK on 24th March

2014. Removal directions pursuant to Section 47 of the 2006 Act were also provided on 15th January 2015.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Nicholson sitting at Manchester on 28th April 2015. In a decision and reasons promulgated on 13th May 2015 the Appellant's appeal was allowed on human rights grounds.
3. On 19th May 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal contending that the judge's consideration of Article 8 was fundamentally flawed. It is appropriate herein to set out verbatim the Secretary of State's Grounds of Appeal.

"In para 74 the judge essentially concludes that Section 117B(6) has precedence over the other public interest considerations set out in Section 117. The judge's justification for this primarily seems to be because this is what Parliament had unambiguously stated. However this is equally true of the other parts of Section 117. The Secretary of State considers that the approach he set out in para 73 is in fact the correct one and that 117B(6) is simply one of the Section 117 factors to be taken into account. This has completely skewed his consideration of Article 8 as he has applied it as being definitive of the position of the public interest. This is a material error because as the judge points out in para 75 if he had interpreted para 117B(6) differently he might have been able to reach a different conclusion."

4. On 14th July 2014 Judge of the First-tier Tribunal Molloy granted permission to appeal. Judge Molloy contends that the Grounds of Appeal raise an interesting question of how First-tier Judges should interpret the various parliamentary provisions set out in Section 117 of the 2002 Act. In particular there may have been an error of law because the First-tier Tribunal Judge appeared to have given more weight to one of the subparagraphs than others.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the appeal process Mr HA is referred to herein as the Appellant and the Secretary of State as the Respondent. Mr Kahn advises me that there has been no Rule 24 reply served on behalf of the Appellant.

Submissions/Discussion

6. Mr Harrison advises that the judge's consideration of Article 8 outside the Immigration Rules is considered within paragraphs 59 to 79 of his determination. He submits that from paragraph 74 onwards the judge has failed to adequately explain the basis by which he has allowed the appeal by virtue of his failing to give adequate reasons as to his consideration of Section 117B of the 2002 Act. He points out that the judge makes reference to a tension between sub-Sections 1-3 and sub-Section 6 of Section 117B and has made an unambiguous finding that Section 117B(6)

takes precedence over any other factor. He submits that the judge's reasoning as to why he reached that conclusion is inadequate and further submits that there is a possibility that there is less ambiguity than is stressed in the determination and that in fact there is no tension at all. He submits that there is a material error of law and that the matter should be reconsidered?

7. Mr Khan submits that the judge has looked at all the factors of 117B starting at paragraph 66 and that it is not as if he jumps to a conclusion without giving reasons. He submits that the judge has analysed the matter in depth, given careful considered reasons and has made findings that he was entitled to. He contends that there is no material error of law in the decision of the First-tier Tribunal and asked me to dismiss the Secretary of State's appeal.

The Law

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Statutory Authority

10. Section 117B. 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.

Findings

11. No reference is made to me within this appeal to the judge's conclusion that the Appellant cannot meet the Immigration Rules therefore the refusal to allow him entry pursuant to the Rules is correct. There is no cross-application by Mr Khan. The issue therefore turns solely on whether or not the First-tier Tribunal Judge erred in his consideration of Article 8 outside the Immigration Rules. My conclusion is that he did not but it is important I give my reasons. The judge made findings which are not disputed that the Appellant has Article 8 family life with his children and that in the light of the court orders the Secretary of State acknowledged that the Appellant had a genuine and subsisting parental relationship with his children. At paragraph 64 the judge quite properly takes as his starting point full account of all the considerations weighing in favour of refusal, then considers prejudice to family life and goes on to decide whether the refusal of leave prejudices that family life in a manner sufficiently serious as to amount to a breach of the fundamental rights protected. His starting point is Section 117B of the 2002 Act. Judge Molloy in granting permission commented that the appeal raised interesting questions as to how First-tier Tier Judges should interpret the

various parliamentary provisions set out in Section 117. I actually do not think that that is a basis for granting permission to appeal. It is necessary to consider that there is an arguable error of law for granting permission but to a certain extent the judge has rescued himself by contending that there may have been an error due to the weight given to the various subparagraphs. It is consequently with that argument in mind that I consider the submissions and representations made to me.

12. Judge Nicolson has noted that paragraph 117B(1) states that the maintenance of effective immigration control is in the public interest and that because the Appellant needed an interpreter and did not appear to speak fluent English and there was no evidence to show that he was financially independent in this country. He found that those factors pursuant to paragraphs 117B(2) and (3) were factors that would make it in the public interest to refuse the Appellant further leave and remove him. The judge has consequently given due and full consideration to paragraphs 117B - (1) to (3).
13. Thereafter the judge has gone on to consider paragraph 117B(6). Analysis of that subparagraph is critical. It starts off by stating that it applies to a person who is not liable to deportation. That is a fact noted by the First-tier Tribunal Judge. Thereafter it states that 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 UK.

The judge has set out this subparagraph and considered it. He has considered it at paragraphs 68 through to 70. It is neither necessary nor appropriate for me to set out those considerations save to say that he has looked at the issue in considerable detail and made findings that he was perfectly entitled to. It cannot remotely be said that those findings constitute a material error of law and indeed it is not those findings that are challenged by the Secretary of State.

14. The judge's conclusion at paragraph 71 that it would therefore not be reasonable to expect the children to leave the UK is one that he was perfectly entitled to make. The challenge is to whether or not he has properly applied Section 117B(6) or whether he has given undue weight to it. Mr Harrison criticises the use of the word tension as between sub-Sections 117B(1) to (3) and 117B(6). I disagree with that analysis. Had the judge merely stated that then there would be some merit in the submission but the judge carefully goes on to explain why he considers there to be a tension in his conclusions at paragraph 72, then at paragraphs 73 to 78 goes on to try and resolve them. I find his analysis particularly at paragraphs 74 and 75 to be impeccable. The difficulty on behalf of the Secretary of State appears to be found, if there is any, in the actual wording of the statute. All the judge has done is interpret the statute. It is important to note that the head note for the Section states:

Article 8: public interest considerations applicable in all cases

(The underlining is my own emphasis).

It is therefore appropriate to give due and full consideration to the paragraphs in all cases. The analysis carried out by the judge at paragraphs 74 and 75 is exactly on that point. Paragraph 117B(6) is specific to the individual. It is confined to removal and it is unequivocal. These are all findings that the judge was entitled to make as matters of law and I believe quite properly made. If the Secretary of State has any challenges here then it should not be to the findings of the First-tier Tribunal Judge but with the drafting of the statute.

15. For all the above reasons this is an extremely well-constructed and well-reasoned decision from an extremely experienced Immigration Judge who has given full and thoughtful consideration to the application of the relevant statutory provisions. The determination does not disclose any material errors of law and the appeal therefore of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal contains no material error of law, the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

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 his 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.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

