



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

Appeal Number: IA/07209/2015

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 4 August 2015**

**Determination issued  
On 18 August 2015**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**ROBSON MARTINS PEREIRA**

Appellant

**And**

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

Respondent

Representation:

For the Appellant: Mr C McGinley, of Gray & Co, Solicitors

For the Respondent: Ms S Aitken, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Brazil, born on 18 January 1964. On 10 February 2015 the respondent refused his application for leave to remain on the basis of private and family life under reference to paragraph 276ADE and Appendix FM of the Immigration Rules and to Article 8 of the ECHR (“no exceptional circumstances”).
2. First-Tier Tribunal Judge JC Grant-Hutchison dismissed the appellant’s appeal by determination promulgated on 11 May 2015.
3. The appeal to the Upper Tribunal is on the following grounds:-

1. Reference is made to paragraphs 16 and 17 of the determination where the Judge accepted that the appellant has a relationship with his partner Ms Priddy and their child ... there is evidence of family and private life ... the Judge has erred in dismissing the appeal under Article 8 ...
2. ... the appellant's child is a "qualifying child" in terms of Part 5A of the 2002 Act as he is British and in terms of Section 117B (6) ... "in the case of a person who is not liable for 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."
4. On 2 June 2015 a First-Tier Tribunal Judge granted permission to appeal, observing:-

"It is arguable ... that the Judge failed to apply the provisions of Section 117B ... this appears to be because the Judge took the view that because there was no removal decision there would be no interference with family life (the appellant is currently in prison serving an 11 year sentence for sexual offences and as yet no deportation decision has been made). However, JM (Liberia) [2006] EWCA Civ 1402 requires the Judge to deal with the Article 8 claim and in so doing she is required to apply the provisions of Section 117A to D of the 2002 Act."
5. At paragraph 17 of her determination the Judge said that as no removal directions had been set there was no interference with family life interests of the appellant, his partner or their child. The Presenting Officer conceded at the outset that this was an error of law, but indicated that she would argue that it was not material.
6. Mr McGinley said that notwithstanding any error of legal approach, the Judge made all the factual findings required to resolve Article 8 and they were as favourable to the appellant as he might have hoped. It was found that the appellant lived with his son for the first five months of the child's life until the appellant was imprisoned, was in touch with his partner every day by telephone and that she regularly visited with the child. Although that was only twice monthly, that was "due only to distance and finances and not for the want of wishing to see each other" (paragraph 16). The appellant's partner and child live in Dumfries whereas he is currently imprisoned at Glenochil. His partner is driven there by her mother and the journey is considerable. Mr McGinley said that the issue remaining in the case was one of balancing those positive family life findings against the appellant's admittedly serious offending. He submitted that the appellant is not a person liable for deportation because no such proceedings have yet been commenced by the Secretary of State. Liability to deportation arises from action taken by the Secretary of State not simply from the fact of conviction. In terms of section 117B (6), the child being a British citizen

and having a mother who is also a citizen and has lived throughout her life in the UK it is not reasonable to expect the departure of the child from the UK and removal to Brazil to maintain the paternal link. The determination should therefore be reversed.

7. Ms Aitken submitted that the error in the determination was not material, because no Tribunal properly directing itself in this case could find that the appellant's removal would be a disproportionate breach of the Article 8 rights involved. Although the Judge accepted that the appellant had a genuine relationship with his partner and child, she also correctly considered Appendix FM of the Rules and set out the suitability requirements at paragraph 14 of her determination. The appellant was bound to be refused leave to remain on grounds of paragraph S-LTR.1.3, his presence in the UK not being conducive to the public good because he had been convicted for an offence and sentenced to imprisonment for at least four years, and on grounds of paragraph S-LTR.1.5, his presence not being conducive to the public good because in the view of the Secretary of State such offending caused serious harm. There was nothing to justify looking at Article 8 any more broadly than prescribed by the Rules. There could be only one outcome and therefore there was no need to remake the determination. Alternatively, it should be remade by again dismissing the appeal.
8. I reserved my determination.
9. There is plainly no error of law in the Judge's decision that the appellant's case could not succeed under the Rules on the basis of family and private life by reason of failure to meet the suitability requirements due to his serious offending.
10. The question, as Mr McGinley put it, is one of balancing the family life features against the serious offending. In my opinion, the Rules provide the answer. There are in this particular case no facts and circumstances which are not foreseen by the Rules but yet might on application of Article 8 require a grant of leave to remain. All relevant matters are addressed in the consideration under the Rules.
11. I do not think that the appellant benefits from section 117B (6) of the 2002 Act as "a person who is not liable for deportation". Such liability does not require a deportation order to have been made or any steps to have been taken towards the making of such an order. Contrary to the submission on the appellant's behalf, I consider that all that is required is that the appellant is susceptible to the making of such an order, which is plainly the case. To hold otherwise would nullify significant parts of the general refusal provisions in paragraph 322(5) and (5A) (relied upon in the respondent's decision) and of the suitability requirements in Appendix FM which clearly are intended to arise from the fact of conviction, not from deportation procedure having been invoked.

12. The Judge said at the end of her determination that she was “not weighing up the appellant’s crimes and future risk to the public and children in particular against his private and family life”. In light of that specific observation, I consider that although the outcome will be same the determination should not simply be left to stand. The question which the judge left hanging should have an answer.
13. As stated above, I doubt if this case justifies looking beyond the Rules. If it might, then taking account of the judge’s positive findings on family life and of the submissions on both sides I am satisfied that the seriousness of the offending and the strength of the public interest is such that the proportionality balance falls clearly against refusal of leave to remain.
14. If there were any shred of doubt about where to strike the balance, I note that in the FtT both the appellant and his partner continued to maintain that he was the victim of a conspiracy and despite his convictions was not in fact guilty of any crimes. A tribunal is bound to proceed by accepting those convictions, and such denial of guilt bodes ill for the future.
15. The determination of the First-Tier Tribunal is **set aside**, but the appeal is again **dismissed on human rights and on all other available grounds**.
16. No anonymity order has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

6 August 2015  
Upper Tribunal Judge Macleman