



IAC-AH-LEM-V1

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

Appeal Number: IA/12510/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 26<sup>th</sup> August 2015**

**Decision & Reasons Promulgated  
On 16<sup>th</sup> September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FRENCH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**D B**

**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer

For the Respondent: Miss A Bhachu instructed by Messrs J M Wilson

**DECISION AND REASONS**

1. D B is a citizen of Jamaica born on 12<sup>th</sup> March 1974. He has been in this country since the year 2000, initially as a visitor but subsequently as an overstayer, apart from a period between 2006 and 2007 when he had leave to remain. I will refer to him as “the Claimant”. In 2011 he made a further application for leave to remain on the basis of the Human Rights Convention in the light of relationships in this country. That application was refused on 21<sup>st</sup> February 2014 and a decision taken to remove him to Jamaica.

2. The Claimant's appeal against that decision was heard before Judge of the First-tier Tribunal Freer, who in a decision promulgated on 16<sup>th</sup> September 2014 dismissed the appeal with regard to the Immigration Rules but allowed it under Article 8 ECHR. Although the judge clearly had reservations about elements of the evidence he heard he found (at paragraph 83 of his decision) that

"Taking all the material before me in the round with the reservations I have expressed I find that DB has a genuine parental relationship with two children of the household and a step-parent relationship with two other children of the household. Although he has on the record had trouble involving other children there is no indication disclosed to me that the police or social workers are concerned about his relations with the four children in his present household."

The judge found in the following paragraph that two young children born to the Claimant and his current partner were entitled to British citizenship, being born to a British mother, who themselves had human rights. He also found that would not be reasonable for the children with whom the Claimant lived to have to go to Jamaica.

3. The judge had already found (at paragraph 80) that

"There is so much disruption envisaged in so many people's lives by removal of this Appellant that I find there are cogent or compelling exceptional reasons to consider this outside the code of the Immigration Rules. There are step-children who cannot be expected to migrate or lose their mother, for example."

4. He then went on to set out Sections 117B and 117D of the Nationality, Immigration and Asylum Act 2002. At paragraphs 85 and 86 he found that in the light of subsection 117B(6), which he described as "the statutory direction", notwithstanding his previous negative findings he allowed the appeal. He went on in subsequent paragraphs to note that the Claimant did have some criminal background but he did not qualify as a "foreign criminal" or a person shown to have caused "serious harm". He found that little weight was required to be given to the Claimant's relationship with his partner VJ in the light of subsection 117B(4)(b) and that in the light of 117B(4)(a) and 117B(5) the Claimant's private life provided a much weaker argument than his family life. He allowed the appeal in respect of family life only.

5. The Secretary of State applied for permission to appeal. In the grounds of application, which now stand as the Grounds of Appeal, it was submitted that the judge had misidentified the relevant test. It was said that Section 117B(6) did not say that the public interest in removal was defeated but only that public interest did not require removal where the party involved had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. It was argued that the relevant provisions of the amended Immigration Rules set out how the different factors in Section 117B were to be balanced in a particular case to determine whether removal was

justified. For example where the maintenance of immigration control was in the public interest but the factors in 117B(6) applied the Rules set out the circumstances when the former outweighed the latter. It was therefore necessary to continue to look to the Rules to see how those competing factors should be balanced. Where the applicant failed to meet the requirements of the Rules, as was the case with the current appeal, unless there were exceptional circumstances the public interest factors in Section 117B would cumulatively justify removal. The findings made by the judge clearly pointed to the correct outcome being the dismissing of the appeal.

6. In granting permission Designated Judge of the First-tier Tribunal McClure noted that whilst there was some difficulty in going behind the plain wording of the statute given the issues raised it was arguable the judge had misdirected himself as to the meaning and effect of the provision. In response to the grant the Claimant's representative submitted a response under Upper Tribunal Procedure Rule 24 arguing that the grounds related to a disagreement with the findings, the judge had properly directed himself and had considered all relevant factors. The judge, it was said, had found there were compelling and compassionate circumstances and it was open to him to reach the conclusion he did. On this basis the appeal came before me.
7. At the commencement of the hearing Mr Richards for the Secretary of State said that it was a fine and nice point as to the interpretation of Section 117B(6). He perceived that the judge had allowed the appeal with reluctance. The Applicant had not impressed the judge but he felt hamstrung by the wording of Section 117B(6). Mr Richards confirmed that the Claimant's relationship with qualifying children was not challenged but said that the judge had considered that Section 117B(6) had put an end to the public interest issue. He submitted that the words "does not require" did not put an end to the matter of proportionality. There was still room for a balancing exercise.
8. In response Miss Bhachu for the Claimant said that the judge had found that there were cogent or compelling exceptional reasons to consider the appeal outside the code of the Immigration Rules in the light of the interests of the children. Their interests were not covered by the Rules. She submitted that when the judge was considering whether there were such compelling exceptional reasons he was already conducting a balancing exercise. She submitted that in any event there was no material error as the judge had taken all factors into account. He expressly stated that he placed little weight on the Claimant's relationship with his partner. The Claimant was not subject to deportation and did not come within Section 117C. She described Section 117 as like a jigsaw puzzle in which all the elements fitted together. This was a family splitting case. The judge took all factors into account and she submitted no other conclusion was reasonably open to him in the absence of a deportation order. It was open to the judge to decide what weight to attach to the phrase "does not require" in Section 117B(6). Taking account of the

interests of the children if there were any error it would not be material. Mr Richards had nothing further to add on behalf of the Secretary of State.

9. Having heard those submissions I reserved my decision which I now give. The decision and reasons of the First-tier Tribunal Judge is a careful and thoughtful document. The judge considered whether all issues had been covered under the Rules or whether it was necessary to go on to consider matters under Article 8 outwith the Rules. He gave his reasoning at paragraph 80, which I have referred to above. He then went on, at paragraph 81, to set out in full Sections 117B and 117D of the 2002 Act. He was clearly aware of those provisions. His finding that the Claimant had a continuing genuine parental relationship with the children involved, which undoubtedly equates to family life, was not challenged. Although the judge did not formally refer to **Razgar** it is implicit that he found the first four of Lord Bingham's questions set out at paragraph 17 of that judgment as being met. The issue therefore rested on proportionality.
10. The judge clearly gave great weight to subsection 117B(6), which he had earlier recited in the context of the whole of the subsection. The thrust of the appeal on behalf of the Secretary of State is that the judge should have viewed the Section through the prism of the Immigration Rules. The Claimant had already failed to establish that he met the requirements of the Immigration Rules and the judge had found that there were compelling circumstances requiring consideration under Article 8 proper. The reason for that was the circumstances of the children which implicitly the judge found were not adequately covered by the Rules in the particular circumstances of this case. It would have been otiose for the judge then to have decided proportionality according to the Rules. Had the Claimant succeeded under the Rules there would clearly have been no cause to have gone on to consider Article 8 beyond the Rules. Although Section 117 of the 2002 Act certainly does mandate the approach to proportionality under Article 8 the Rules themselves do not do so. In **Forman (SS117A - C considerations) [2015] UKUT 00412 (IAC)** the panel chaired by the President stated (at paragraph 12)

“... however in cases such as the present where the starting point is that the Claimant does not satisfy the requirements of the Rules, with the result that the sole question is whether his Article 8 claim can be successfully established outwith the framework of the Rules, we consider that the latter form a backdrop but little more in the context of an exercise which differs sharply from that just mentioned ...”.

That does not indicate a significant influence by the Rules in interpreting Section 117.

11. Subsection 117B(6) reads

“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.”

The subsection refers to the public interest. In subsection 117A(2) it is stated that in considering the public interest the court or Tribunal must in particular have regard to the considerations in Section 117B (we are not here concerned with a deportation case). In subsection 3 it is stated “The ‘public interest question’ means the question of whether an interference with a person’s right to respect for private or family life is justified under Article 8(2).”

12. That is the very issue of proportionality that falls to be decided under the fifth of Lord Bingham’s questions. Subsection 117B(6) is in express terms and clearly weighed heavily with the judge. I was not referred to and am not aware of any decision of the Upper Tribunal or of the Court of Appeal addressing in clear terms the effect of subsection 117B(6). It was stated by the Tribunal in **Bossade (SS117A - D - interrelationship with Rules) [2015] UKUT 415 (IAC)** at paragraph 39

“We have noted above that certain provisions of part 5A, in particular Section 117B(6) and Section 117C(4)-(6) might be argued to operate as a self-contained set of legal requirements providing a complete answer to the ‘public interest question’ and we have noted that decision on such issues is best left to future case or cases. All that we would observe here is that even if one or both sets of provisions were found to be determinative of the ‘public interest question’ in a particular case, it remains that part 5A is silent about what this means for the success or failure of an Article 8 claim or about a person’s consequential immigration status.”

13. In **Forman** it was stated (at paragraph 17)

“... we are not required to decide in the present case whether there is any tension between Section 117A(2) which obliges the court or Tribunal concerned to have regard to the list of considerations listed in Section 117B and, where appropriate, Section 117C and the contrasting terms of Section 117B(5) and (6) which are framed as an instruction to the court or Tribunal to attribute little weight to the two considerations specified ...”

14. The judge clearly gave considerable weight to 117B(6) and that is not surprising in the light of its express terms. That he did not regard it as the sole element to be considered is indicated by the fact that he also referred to other elements of Section 117. He was aware that the Claimant had a conviction and caution but he did not meet the threshold of “foreign criminal” in the statutory provisions. Indeed I note that in the refusal letter (paragraph 60) it was accepted that the Claimant’s application did not fall for refusal under any of the suitability grounds at Sections S-LTR 1.2 to S-LTR 2.3 and S-LTR 3.1 in Appendix FM. The Secretary of State had not refused the application on that basis.
15. Reading the decision as a whole the judge was clearly aware and took account of Section 117 of the 2002 Act, he had already found that there were compelling circumstances with regard to the children, warranting

going beyond the Rules themselves, he referred to aspects of Section 117B other than subsection (6). The weight to be attributed to subparagraph (6) was, in the absence of perversity or irrationality, a matter for him. Whilst he might have expressed the proportionality assessment in a different and fuller way, having regard to all of his findings I do not find that he erred materially in his approach.

**Notice of Decision**

There was no material error of law in the making of the decision of the First-tier Tribunal and the decision that the appeal be allowed under Article 8 ECHR therefore stands.

As the interests of the children are involved I make the anonymity order below.

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

I order that the disclosure or publication of any matter likely to lead members of the public to identify the Claimant or members of his family is prohibited. Any breach of this order may lead to proceedings for contempt of court.

Signed

Date 04 September 2015

Deputy Upper Tribunal Judge French