

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

IA/10075/2015



Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at: Manchester**

**On: 20<sup>th</sup> July 2016**

**Determination**

**Promulgated**

**On: 26<sup>th</sup> July 2016**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Brioney Stanishlous Mothersill  
(no anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

For the Appellant:  
For the Respondent:

Ms Faryl, Counsel instructed by Mohammad & Co Solicitors  
Mr Harrison, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a national of Jamaica born on the 26<sup>th</sup> June 1984.
2. On the 30<sup>th</sup> June 2015 the First-tier Tribunal (Judge Grimshaw) dismissed his appeal, on human rights grounds, against a decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Appellant appealed to the Upper Tribunal and on the 28<sup>th</sup> April 2016 I found the decision of the First-tier Tribunal to contain errors such that it was set aside. My reasons are set out in the attached 'Error of Law Decision' but in summary I found that the First-tier Tribunal had failed to give effect to the provisions in s117B of the

Nationality Immigration and Asylum Act 2002. The Tribunal had accepted that the Appellant had a genuine and subsisting relationship with not only his own son in the UK (M) but with his step-son (S) who is a British national and therefore a “qualifying child” for the purpose of s117B(6). The determination had not considered this finding in the context of the statutory provision. The findings of fact made by the First-tier Tribunal were unchallenged by either side and are preserved.

### **The Factual Matrix**

3. The Appellant wishes to remain in the United Kingdom *inter alia* because he has an Article 8 family life here. That family life is said to consist of (in no particular order):
  - a) His marriage to [TM], a Jamaican national living lawfully in the UK with a grant of Discretionary Leave;
  - b) His paternal relationship with his son M, born in 2014. M is a Jamaican national and has leave in line with his mother Ms [TM];
  - c) His paternal relationship with his stepson S, born in 2006. S is a British national and is currently living with his baby brother, his mother Ms [TM], and the Appellant.
4. The background to those relationships is that the Appellant and Ms [TM] met approximately five years ago. They pursued a long-distance relationship. The Appellant had work commitments in Cuba and Ms Mathews was living in the UK. They spent time together when they could, in both the UK and Jamaica. Ms [TM] became pregnant in 2013. In June 2014 the Appellant came to the UK as a visitor in order to be here for the birth of his son. He had intended to return to the Caribbean in order to continue working there. After he has spent some time here however he realised that Ms [TM] needed his support. They have all been living together as a family since the Appellant’s arrival and it would be very disruptive if they were to be now separated. It would cause considerable distress to everyone. Ms [TM] cannot relocate because her son S is a British national and his father will not consent to him leaving the country. It was for these reasons that the Appellant made an application for leave to remain in the UK on the basis of his family life. He made that application before his visitor’s visa expired.
5. The First-tier Tribunal accepted that factual background. Although S sees his biological father regularly the Tribunal accepted that he had developed a “strong bond” with the Appellant who for instance spends time each day helping him with school work. S’s father had

given evidence to the effect that he would not allow S to leave the UK; the Tribunal did not expressly reject this but noted that he had done so in the past, for instance to attend his mother's wedding in October 2013. The Tribunal found M is too young to maintain any kind of meaningful relationship with his father via "modern means of communication".

6. Before me the Appellant relied on the findings of fact made by the First-tier Tribunal and asked me to take account of an item of new evidence, an Educational Psychologists Report prepared by Dr Ian Corban, a chartered Educational and Child Psychologist. That report was admitted without objection by the Respondent. The subject of the report is S. In order to prepare it Dr Corban interviewed Ms Mathew, spoke with staff from S's primary school and spent a day observing S. It is a helpful and detailed report. In summary the position is that S has special educational needs which are centred on his communication difficulties. He is described as a "popular child" whom Dr Corban found to be "engaging, friendly and well-mannered". The challenges he faces are around memory, concentration and ability to understand what is happening in different social situations. His level of maturity is observed by his Mum to be lower than his actual age. He is assessed as being in the 3<sup>rd</sup> percentile in terms of his verbal abilities, centile 0.3 in respect of 'General Conceptual Ability' and on the World Reading Scale he was found to have a reading age of 6 years 10 months (his chronological age at date of testing was 10 years 10 months). As a consequence S needs far more support than another boy of his age, without those specific challenges, would do.

### **My Findings**

7. The Appellant made his application for leave to remain on human rights grounds on the 6<sup>th</sup> November 2014. As a result his application fell to be decided with reference to Immigration Rules codifying Article 8, ie paragraph 276ADE(1) and Appendix FM.
8. The Appellant accepts that he cannot meet the requirements of the Rules. He has not lived in the UK for long enough to qualify under any of the 'long residence' provisions in paragraph 276ADE(1), and he cannot show there to be any significant obstacles to his integration in Jamaica. In respect of Appendix FM the Appellant cannot get past the first hurdle: he is not eligible to make an application under those provisions because he had leave to enter as a visitor at the time that he made his application.
9. I am satisfied that there are good grounds to proceed to consider the Appellant's Article 8 rights outwith the framework of the Rules. Appendix FM is not a "complete code" and this is a paradigm case to illustrate why: the Appellant has a genuine and subsisting family life

albeit that he entered as a visitor. I therefore consider the Appellant's case within the Razgar framework.

10. It is accepted that there is a family life and that the Appellant's removal would be an interference with it. Although it is possible that Ms Mathew and M could go to Jamaica to live with the Appellant it is in my view extremely unlikely that they would do so, since it would mean leaving S behind. Although his father has in the past permitted him to make short visits to Jamaica he has made it very clear (in his witness statement dated 15<sup>th</sup> June 2015) that he will not allow him to leave the country permanently.
11. I am satisfied that a decision to remove a person with no right to remain under the Immigration Rules is a decision rationally connected with the legitimate Article 8 (2) aim of protection of the economy.
12. The question is whether the decision is disproportionate, or to put it another way, whether the consequences for the Appellant and his family would be "unjustifiably harsh" when weighed against the public interest.
13. The starting point for consideration of proportionality is s117B of the Nationality, Immigration and Asylum Act 2002:

*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.

14. In the recent case of MA (Pakistan) & Ors v SSHD [2016] EWCA Civ 705 the Court of Appeal considered the construction of that statutory provision, and found that sub-section 6 is not simply one of six equally weighted considerations [at 17]:

“there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to the public interest considerations unless that is permitted, either explicitly, or implicitly, by the subsection itself”

15. It follows that if an applicant can show the three limbs of 117B(6) to be satisfied, the public interest will not require his removal and the appeal must be allowed.

16. In this case it is not in issue that the Appellant has a genuine and subsisting relationship with S, who is a qualifying child. The question is whether it is “reasonable” to expect S to leave the UK. The question of exactly what “reasonable” means remains at large, in light of the decision of the Court of Appeal in MA to grant permission for an onwards appeal to the Supreme Court. For the purpose of this appeal, I take the approach advocated by the Secretary of State and approved, albeit with much reluctance, by the Court in MA. That accords with the approach taken by the Upper Tribunal in PD & Ors (Article 8 - conjoined family claims) [2016] UKUT 108 (IAC). The assessment is not limited to the circumstances pertaining to the child. The decision maker must weigh in to the balance all relevant factors, including the position of the parents, but must give substantial weight

to the long residence (or nationality) of the child.

17. In this case it hardly matters what approach is taken. That is because all factors point towards it not being “reasonable” to expect S to leave the UK. Apart from the fact that he is a British citizen with the right to enjoy the benefits of living in the country of his nationality, he has regular contact with his biological father who lives here and who makes strong objection to him being removed from the jurisdiction. He is a child with special educational needs who has a strong support structure in the UK in the form not only of his family, but his school who have provided significant “support scaffolding” in order to assist him in the transition to secondary school. S also has another half sibling on his father’s side and if he were required to leave the UK that relationship would very likely be scuppered. For all of those reasons it is wholly unreasonable that S be expected to travel to Jamaica with his stepfather.

### **Decisions**

18. The determination of the First-tier Tribunal contained an error of law and was set aside, albeit with preserved findings of fact. Following submission of further evidence and submissions, I re-make the decisions in the appeal as follows:
- i) The appeal is dismissed under the Immigration Rules.
  - ii) The appeal is allowed on human rights grounds.

Upper Tribunal Judge Bruce  
21<sup>st</sup> July 2016

## Appendix A: Error of Law Decision

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

IA/10075/15



Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at: Manchester**

**On: 28<sup>th</sup> April 2016**

**Determination  
Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Brioney Stanishlous Mothersill  
(no anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

For the Appellant:  
For the Respondent:

Ms Faryl, Counsel instructed by Mohammad & Co Solicitors  
Mr A. McVeety, Senior Home Office Presenting Officer

**ERROR OF LAW DECISION**

19. The Appellant is a national of Jamaica born in 1984. He appeals with permission<sup>1</sup> the decision of the First-tier Tribunal (Judge Grimshaw)<sup>2</sup> to dismiss his appeal, on human rights grounds, against a decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

<sup>1</sup> Permission granted on the 29<sup>th</sup> September 2015 by First-tier Tribunal Judge Nicholson

<sup>2</sup> Determination dated 30th June 2015



## Background and Matters in Issue

20. The Appellant wishes to remain in the United Kingdom *inter alia* because he has an Article 8 family life here. That family life is said to consist of (in no particular order):
- d) His marriage to Ms [TM], a Jamaican national living lawfully in the UK with a grant of Discretionary Leave;
  - e) His paternal relationship with his son M, born in 2014. M is a Jamaican national and has leave in line with his mother Ms [TM];
  - f) His paternal relationship with his stepson S, born in 2006. S is a British national and is currently living with his baby brother, his mother Ms [TM], and the Appellant.
21. The background to those relationships is that the Appellant and Ms [TM] met approximately five years ago. They pursued a long-distance relationship. The Appellant had work commitments in Cuba and Ms Mathews was living in the UK. They spent time together when they could, in both the UK and Jamaica. Ms [TM] became pregnant in 2013. In June 2014 the Appellant came to the UK as a visitor in order to be here for the birth of his son. He had intended to return to the Caribbean in order to continue working there. After he has spent some time here however he realised that Ms [TM] needed his support. They have all been living together as a family since the Appellant's arrival and it would be very disruptive if they were to be now separated. It would cause considerable distress to everyone. Ms [TM] cannot relocate because her son S is a British national and his father will not consent to him leaving the country.
22. When the matter came before the First-tier Tribunal it was not contested that the Appellant could not meet the requirements of Appendix FM. He failed at the first hurdle of 'eligibility': as a visitor he was not able to 'switch' under the 'family life' Rules. Nor could he show that he met the requirements of paragraph 276ADE, since he had not been in the UK long enough. The case was put on classic Article 8 grounds, that is to say outside of the Immigration Rules on the basis of the *Razgar* framework.
23. The Tribunal directed itself that compelling circumstances would need to exist before a grant of leave 'outside of the Rules' could be justified. In assessing that test the Tribunal made a number of admirably clear findings of fact, which it helpfully divides into factors that weigh in the Appellant's favour, and those that might be thought to weigh against him. Those factors identified as supportive of the Appellant's case were:

- i) The Appellant enjoys a family life with his wife and the children;
- ii) He has taken on the responsibilities of a father to S as well as M;
- iii) The Appellant did intend to leave the UK at the end of his visit;
- iv) The Tribunal accepts that he changed his mind once he had bonded with his son and witnessed the burden faced by Ms [TM];
- v) Although S continues to see his biological father he has developed a “strong bond” with the Appellant who, for instance, helps him with his school work;
- vi) S is not permitted to leave the UK by his father;
- vii) M is too young to maintain any kind of meaningful relationship with his father via “modern means of communication”;

Those held to weigh in favour of the Respondent were:

- viii) The couple had originally been happy to live apart, because the Appellant had a well paid job at Guantanamo Bay US Naval Base. They had not planned to live together for the first 5 to 6 years of their marriage;
- ix) Those plans did not change when Ms [TM] became pregnant;
- x) Ms [TM] and M could therefore continue their relationship with the Appellant in line with their original plans;
- xi) S has a father in this country with whom he enjoys regular contact and with whom he can stay if his mother goes to visit the Appellant;
- xii) S has been permitted to visit Jamaica in the past by his father.

24. Pulling all of that together, the Tribunal accepts that the Appellant likely underestimated how the birth of M would be a “life-changing” experience for him:

“He is a new father keen to develop his family life in this country. Be that as it may, although I have sympathy for the Appellant I cannot find that his position, or that of his family in the United Kingdom that he will leave behind, is either rare or exceptional”

On that basis the appeal is dismissed.

## **Error of Law**

25. Permission was granted on the ground that the Tribunal has arguably erred in failing to consider section 117B of the Nationality Immigration and Asylum Act 2002. The considerations listed at (1)-(6) of that statutory provision are mandatory considerations for any Judge conducting an Article 8 proportionality balancing exercise in this Chamber. The matters set out at (1)-(5) could all inform the weight to be attached to the public interest in removal, however it is subsection (6) which is the focus of this appeal. It being accepted that the Appellant enjoys a family life with M, and potentially S, it would appear that the Tribunal accepted that he had a “genuine parental relationship”, at least with his own son. The Tribunal was therefore bound to consider whether it would be “reasonable” for M (and potentially S) to leave the UK in order to continue his relationship with the Appellant. If it was not, then it was not in the public interest for the Appellant to be removed: s117B(6). The failure to consider this provision was an error of law.
26. Before me Ms Faryl did not challenge the findings of fact made by the First-tier Tribunal. She did however submit that the determination failed to address one aspect of the evidence that was before it. That was the material relating to S. Ms [TM]’ eldest child has special educational needs and is said to have recently suffered “immense upheaval” when his father separated from his stepmother, who left taking S’s half-brother with her. There were no findings on these assertions and it was an important part of the Appellant’s case.
27. I therefore agreed to re-make the decision, in respect of proportionality, at a later date when evidence could be called in respect of S and any other relevant matter.

## **Decisions**

28. The determination of the First-tier Tribunal contains an error of law as identified above. The findings of fact are preserved, but the proportionality assessment is set aside.
29. I make no direction for anonymity in this unreported decision. Should either party consider an anonymity order to be appropriate (in view of involvement of minors) an application should be made at the resumed hearing.

Upper Tribunal Judge Bruce  
1<sup>st</sup> May 2016