



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

Appeal Number: IA/27543/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 11th October 2017**

**Decision & Reasons Promulgated
25th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MR BTO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Amgbah, Counsel instructed by UK Law Associates
For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Secretary of State of 15th July 2015 to refuse to grant him leave to remain on the basis of his private and family life. First-tier Tribunal Judge Chamberlain dismissed the appeal in a decision promulgated on 2nd January 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Andrew on 9th August 2017.
2. The background to this appeal is that the Appellant and his partner have two children, both daughters, born on 25th October 2006 and 30th June 2009. Both are

British nationals. It is unclear from the papers when the Appellant claims to have entered the UK, the Reasons for Refusal letter states that he claims to have entered 19 years prior to his application but that was not accepted by the Secretary of State. It states in the Reasons for Refusal letter that the Appellant first came to the attention of the Home Office on 15th March 2010 when he applied for leave to remain outside the Rules. That application was refused. However on 31st January 2012 the Appellant was granted discretionary leave to remain until 31st January 2015 on the basis of his relationship with his partner and children. The refusal of the Appellant's application for further leave to remain is the subject of this appeal.

3. As set out in the Reasons for Refusal letter, and found by the First-tier Tribunal Judge, the Appellant has a number of criminal convictions obtained since the grant of discretionary leave in January 2012 as follows:
 - A conviction on 12th April 2013 for making false representations for gain and possessing or controlling an article for use in fraud and received a suspended sentence of four weeks.
 - A conviction on 14th February 2014 for driving whilst disqualified and possession or control of identity documents with intent and imprisoned for a period of eight months.
 - 26th March 2015 of using a vehicle while uninsured, driving a motor vehicle with excess alcohol and driving whilst disqualified for which he received a sentence of imprisonment of 112 days, was disqualified from driving for four years and received a fine and his driving licence was endorsed.
4. Having considered the convictions the Secretary of State considered that the application should be refused under paragraph 322(5) of the Immigration Rules on the basis that it would be undesirable to permit the Appellant to remain in the UK in the light of his character and convictions. The Secretary of State considered the application under the partner route and under the parent route but noted in relation to both that the Appellant could not meet the suitability requirements. In relation to private life under paragraph 276ADE the Secretary of State considered that there would be no significant obstacles to the Appellant's integration in Nigeria. The Secretary of State concluded that there were no exceptional circumstances in the case.
5. The First-tier Tribunal Judge considered the refusal in relation to paragraph 322(5) and concluded that the Respondent was entitled to refuse the application on the basis that the Appellant's presence in the UK was not conducive to the public good [22]. In considering Article 8 outside the Immigration Rules the judge followed the steps set out in the case of Razgar [2004] UKHL 27 including an assessment of the factors set out in Section 117B of the 2002 Act. In relation to Section 117B(6) the judge noted at paragraph 28:

"The Appellant's children are British citizens and hence are qualifying children for the purposes of Section 117B(6). However I have very little documentary evidence before me relating to the Appellant's children. While I would not necessarily expect evidence from them, given their ages, their mother's witness statement does not set out any detail relating to her children, but refers back to the Appellant's witness statement. The only detail is set out in the Appellant's witness statement and I have found above

that I do not consider him to be a credible witness. The only other documentary evidence I have is one letter from their school."

6. The judge considered the best interests of the children noting their ages and the fact that they have lived in the UK for all of their lives and the fact that they are both British citizens [30]. The judge found that the Appellant has spent time in prison when he has been separated from his children due to his own behaviour but attached no weight to the Appellant's claim that he was released early from prison because he played a significant role in his children's lives given that he has provided no corroborative evidence of that and in light of her finding that he was not a credible witness. The judge found that it would be in the Appellant's children's best interests to remain in the UK with both of their parents but given her finding that the Appellant has not been honest with their mother about the extent of his criminal offending and that due to his criminal offending the children have been separated from their father, the judge found that if the Appellant and his partner decided to move to Nigeria the children would be returning as a family unit [35]. She noted that there was no evidence to corroborate the claim by the Appellant's partner that she is responsible for looking after her mother and the judge concluded that it would be reasonable to expect the children to move to Nigeria with the Appellant and their mother but noted that this would be the choice of the Appellant and his partner [39]. Alternatively, the Appellant's partner could choose to remain in the UK with the children and they could continue the family life with their father through visits and modern means of communication noting that they have been previously separated from their father owing to his criminal behaviour and there is no evidence to suggest this caused any of them any particular problems [40].

Error of Law

7. The Grounds of Appeal to the Upper Tribunal contend that, as the Appellant was granted discretionary leave to remain prior to the introduction of the new Immigration Rules on 9th July 2012, the judge erred in failing to consider the appeal on the basis of the Home Office policy in relation to discretionary leave to remain.
8. Ms Willocks-Briscoe submitted the relevant policy guidance at the hearing, the Asylum Policy Instruction Discretionary Leave Version 7.0 published on 18th August 2015. The transitional arrangements are set out at section 10 and 10.1, which relates to applicant's grant of discretionary leave before 9th July 2012, provides:

"Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing 6 years' continuous DL (or where appropriate a combination of DL and LOTR, see Section 8 above)), unless at the date of decision they fall within the restricted leave policy.

Caseworkers must consider circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of 3 years' DL should normally be granted.

Caseworkers must consider whether there are any circumstances that may require departure from the standard period of leave. (See section 5.4).

If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused.

Those granted DL for 6 months because of the refusal or withdrawal of asylum or humanitarian protection on grounds of criminality and who do not fall within the restricted leave policy, must normally wait 10 years before being eligible to apply for settlement...”.

9. The section on exclusion and criminality is at 3.6. It sets out details of the restricted leave policy which deals with discretionary leave for those excluded from protection under Article 1F of the Refugee Convention and does not apply in this case. The relevant part of 3.6 is the following:

“Where an individual does not fall within the restricted leave policy (for example, where they are not excluded under Article 1F or the criminal sentence was less than 2 years’ imprisonment), caseworkers must consider the impact of any criminal history before granting DL, having regard as appropriate to part 9 (General Grounds for Refusal) and, where an individual is not liable to deportation, paragraph 353B(i) of the Immigration Rules. Criminals or extremists should not normally benefit from leave on a discretionary basis under this policy because it is a Home Office priority to remove them from the UK.

In cases where there are exceptional reasons for granting DL to someone with a criminal history who does not fall within the restricted leave policy, the duration of leave to be granted, up to 30 months, will depend on the individual circumstances of the case. Caseworkers must consider whether removal appears to be reasonably likely and the extent of any risk posed by the individual, which may justify keeping the case under more regular review, eg by granting 6 months’ DL. Where DL is granted for 6 months or less, if the individual travels outside the UK their limited leave will lapse whereas leave granted for a longer period allows a person to leave the UK and be readmitted during the validity of their leave...”.

10. In the Grounds of Appeal it is accepted on behalf of the Appellant that the criminality section of the policy does apply. However it is submitted that the manner in which the section applies under the discretionary leave to remain policy is different from the manner in which it was considered applied under Appendix FM and it is necessary to consider whether the approach taken by the Respondent and the First-tier Tribunal Judge was in line with the transitional provisions and criminality thresholds of the policy.
11. In relation to this issue I firstly note that, contrary to the assertion in the grounds, in the Reasons for Refusal letter the Secretary of State did consider the issue of an extension of discretionary leave to remain. At page 2 under the heading “Active Review of Discretionary Leave” the Secretary of State considered the Appellant’s criminal convictions in line with paragraph 322(5) of the Immigration Rules. Paragraph 322(5) provides as follows:

"Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused

...

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;..."

12. Ms Willocks-Briscoe submitted that the Respondent did in fact consider the policy and this is demonstrated by the way the Reasons for Refusal letter is structured.
13. Further, I accept her submission that section 3.6 of the policy requires an assessment of the general grounds of refusal in part 9 and then an assessment of paragraph 353B(i) of the Rules. In my view it is clear that the Secretary of State took the proper approach under the Discretionary Leave policy. Under the heading "Active Review of Discretionary Leave" at pages 2 to 3 of the Reasons for Refusal letter, before deciding to refuse the application under paragraph 322(5), the Respondent considered the general grounds for refusal deciding:

"It would be undesirable to permit you to remain in the United Kingdom in the light of your character and convictions as you continue to display scant regard of the law and persistently offend; causing undue alarm and distress"
14. In her decision the judge reviewed the Appellant's criminal convictions at paragraphs 14 to 21 taking account of the Appellant's evidence in relation to those and noting in particular that the Appellant was not credible in relation to his explanations about the nature of his convictions. The judge undertook a detailed analysis of the PNC record of convictions which noted twelve aliases and found that the PNC record is accurate and that the Appellant has used multiple identities and different dates of birth. The PNC record shows seven court appearances with twelve convictions which the judge accepted as having been established in relation to the Appellant. The judge concluded that the Secretary of State was entitled to refuse the Appellant's application on the basis that his presence in the UK was not conducive to the public good and under the suitability requirements [22]. In my view this is clearly a review of the Respondent's application of the discretionary leave policy at paragraphs 2 to 3 of the reasons for refusal letter.
15. It was Ms Willocks-Briscoe's submission that the Respondent undertook analysis of exceptional circumstances as set out in paragraph 353B(i) of the Immigration Rules at paragraphs 5 and 6 of the reasons for refusal letter. In her assessment of the appeal under freestanding Article 8 that is exactly what the First-tier Tribunal Judge did too.
16. It is therefore my conclusion that there is no error of law in respect of the first ground. Therefore the contention on behalf of the Appellant that the Respondent erred in failing to consider the case under the discretionary policy has no basis.
17. The second main ground put forward in the Grounds of Appeal is that the judge erred in her approach to the consideration of Article 8 outside the Immigration Rules.

In particular it is contended that the judge erred in her approach to Section 117B(6) in terms of the assessment of the children.

18. Ms Willocks-Briscoe submitted that the judge accepted that there was no decision for the children to leave but looked at whether it would be reasonable for the children to leave the UK if that choice was made by the family. She submitted, in reliance on the decision in AM (Pakistan) [2017] EWCA Civ 180, that the judge was entitled to look at the wider public interest. Lord Justice Elias gave the following guidance:

"19. There were two grounds of appeal. First, it was said that the UT erred in assessing the question of reasonableness by focusing solely on the position of the child. The FTT had adopted the correct approach in looking at wider public interest considerations. Second, the UT was wrong to treat section 117B(6) as a self-contained provision to be read independently of the other matters identified in that section. The considerations in section 117B(6) ought to have been treated as just one relevant factor when considering whether an interference with article 8 was justified. Properly construed, it did not take priority over the public interests considerations. In effect, this was challenging the *Treebhawan* ruling.

20. After the appeal was lodged, these two grounds were considered by this court in *MA (Pakistan)* where I gave the leading judgment with which King LJ and Sir Stephen Richards agreed. The court's analysis is consistent with the first ground of appeal succeeding, but the second failing. The court, admittedly reluctantly, concluded that it was inherent in the reasonableness test in section 117B(6) that the court should have regard to wider public interest considerations and in particular the need for effective immigration control. The Court would not have reached that conclusion absent authority, but felt obliged to follow another decision of the Court of Appeal in *MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617; [2016] IMM A R 954*. That was a case concerning foreign criminals which engaged section 117C rather than 117B, and in particular to the need in section 117C(5) to show that it would be "unduly harsh" rather than simply not unreasonable, to require the qualifying child to leave the UK. However the court in *MA (Pakistan)* considered that the structure of the relevant provisions was sufficiently similar to require a common approach. Accordingly, since the Court in *MM (Uganda)* had held that wider public interest considerations relating to effective immigration control could be taken into account when deciding whether or not it was unduly harsh to send an applicant back to the country of origin, so likewise should they be taken into account when considering under section 117B whether it is not unreasonable to do so. But the court also held that section 117B(6) was a self-contained provision in the sense that where the conditions specified in the subsection are satisfied, the public interest will not justify removal. The wider public interests considerations can only come into play via the concept of reasonableness in section 117B(6) itself. In the light of this decision, the Secretary of State no longer pursues the second ground of appeal."

19. The judge was entitled to take into account the wider significant factors in relation to criminality and not just the fact that the children were British citizens in considering Section 117B(6). I accept Ms Willocks-Briscoe's submission that the judge here looked at all relevant factors including the best interests of the children and the evidence presented and found, notwithstanding Section 117B(6), that the children were British citizens that there was significant weight to be attached to the public interest here. She emphasised that there was no decision here for the children to leave but the issue

was a matter of choice if the remainder of the family members wish to go with the Appellant to Nigeria. I accept that the judge has given adequate reasons for her findings that in the circumstances of this case the wider public interest outweighs the best interests of these British children.

20. In my view it is clear that the judge found there was family life and properly considered the best interests of the children taking into account the limited evidence before her in relation to the children. The judge considered all of the provisions of Section 117B.
21. In conclusion in my view it is clear that the judge considered all of the evidence before her and gave weight to all relevant factors and attributed the weight she did to them. The conclusion by the judge that the decision to remove the Appellant was proportionate to his right to family life in accordance with Article 8 was open to her on the basis of the evidence before her.

Notice of Decision

22. The decision of the First-tier Tribunal did not contain a material error of law.
23. The decision of the First-tier Tribunal shall stand.

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 their 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: 24th October 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

The appeal has been dismissed, therefore there is no fee award. I have dismissed the appeal and therefore there can be no fee award.

Signed

Date: 24th October 2017

Deputy Upper Tribunal Judge Grimes