



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/02521/2017

**THE IMMIGRATION ACTS**

Heard at Newport  
On 6 November 2018

Decision & Reasons Promulgated  
On 29 November 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FORHAD [A]

Respondent

**Representation:**

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer

For the Respondent: Mr V Ogunbusola, instructed by M-R Solicitors

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State (whom I shall refer to as the “respondent”) appeals against the decision of the First-tier Tribunal (Judge Povey) allowing the appeal of Mr [A] (whom I shall refer to as “the appellant”) under Art 8 of the ECHR.
2. The appellant entered the UK on 24 January 2010 as a student with leave valid until 30 May 2013. Applications for further leave were refused on 5 August 2013 and 6 February 2015.

3. The present application for leave was made on 21 September 2015. That application was essentially based upon his relationship with his daughter, [LJ] who is a British citizen. While the appellant's relationship with his daughter's mother no longer subsists, contact arrangements are in place and, as Judge Povey accepted, the appellant plays an active role in his daughter's upbringing.
4. On 25 January 2017 the respondent refused the appellant's application for leave to remain in the UK as a parent under para R-LTRPT of Appendix FM of the Immigration Rules (HC 395 as amended) and Art 8. In refusing the application for leave, the Secretary of State relied, inter alia, upon the suitability requirement in para S-LTR.1.6 of Appendix FM, namely that the appellant's presence in the UK is not conducive to the public good, on the basis that he had previously submitted a fraudulently obtained TOEIC English language certificate, having used a proxy-taker for one part of the test.

### The Appeal

5. The appellant appealed to the First-tier Tribunal. The appeal was restricted to human rights grounds, namely Art 8. In allowing the appellant's appeal, Judge Povey accepted that the appellant had a genuine parental relationship with his daughter and that he played an active role in her upbringing. He accepted, for the purposes of Art 8.1, that "family life" existed between the appellant and his daughter and that his removal would interfere with it.
6. Judge Povey, however, found that the appellant's removal would be disproportionate. Applying s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") Judge Povey concluded that it would not be reasonable to expect his daughter to leave the UK and that, therefore, the public interest did not require his removal.
7. Judge Povey's reasons are succinctly set out at paras 24–28 of his determination as follows:
  - "24. Given the existence of family life between the Appellant and his daughter and the primacy given to the child's best interests, there are compelling circumstances which require the appeal under Article 8 of the ECHR.
  25. The Respondent's decision to refuse the Appellant leave to remain is of sufficient gravity to engage Article 8 and is a decision made in accordance with the law. The issue to determine is whether it is a proportionate means of achieving the Respondent's legitimate aim of effective immigration control (being an aspect of the economic well-being of the country).
  26. The conditions set out in section 117B(6) of the NIA Act 2002 are met. The Appellant has a genuine and subsisting parental relationship with a qualifying child (defined as a person under 18 years of age who is a British citizen: section 117D(1), namely his daughter. It would not be reasonable for the child to leave the UK, as accepted by Mr Howells. The public interest in not requiring the Appellant's removal prevails over the public interest in the maintenance of effective immigration control, the public interest in

English speaking and the public interest in financial independence, as set out in section 117B (1) – (3) of the NIA Act 2002.

27. I reach that conclusion even if the Respondent made it out her claim that the Appellant had sought leave to remain by deception. That still does not tip the balance in favour of the Respondent, given the impact section 117B(6) has on my assessment of proportionality. In the circumstances, I find that the Respondent's decision is a disproportionate interference with respect for the Appellant's family life under Article 8 of the ECHR.

28. For that reason, I allow the appeal."

8. The Secretary of State sought permission to appeal on two grounds. First, the judge had been wrong in applying s.117B(6) of the 2002 Act without making any finding, and thereby taking into account, whether the appellant had, in fact, practised deception by fraudulently obtaining a TOEIC English language certificate. Secondly, the judge had been wrong in finding that it would not be reasonable for the appellant's British citizen child to leave the UK since the respondent was not expecting her to leave the UK as she would remain with her primary carer (namely her mother) in the UK.
9. On 1 May 2018, the First-tier Tribunal (Judge E B Grant) granted the Secretary of State permission to appeal.

### Discussion

10. In his oral submission on behalf of the Secretary of State, Mr Howells acknowledged that he was in some difficulties in respect of both grounds in the light of two recent decisions: first, the Supreme Court's decision in KO (Nigeria) and others v SSHD [2018] UKSC 53 and secondly, the Upper Tribunal's decision in SR (subsisting parental relationship, s117B(6)) [2018] UKUT 334 (IAC).
11. In respect of the first ground, Mr Howells accepted that the Supreme Court in KO (Nigeria) had concluded that in assessing whether it was "reasonable to expect" a qualifying child such as the appellant's daughter to leave the UK, a court or Tribunal was not to engage in a balancing exercise, weighing the impact upon the child against the public interest. That would, of course, in this case have required the impact upon the appellant's child to be weighed, inter alia, against any deception established against the appellant.
12. In my judgment, the effect of KO (Nigeria) in relation to the proper interpretation of s.117B(6) of the 2002 Act as set out in [17]-[19] is, as Mr Howells accepted. The Supreme Court disagreed with the approach to s.117B(6) approved by the Court of Appeal in R (MA (Pakistan) and others) v UTIAC [2016] EWCA Civ 705. In assessing, therefore, whether it is "reasonable to expect" a qualifying child to leave the UK the focus must be exclusively upon the position of the child. Of course, the immigration state of a parent may be relevant in assessing "in the real world" the impact a parent's removal may have on a child's "best interests". So, for example, if neither parent has any basis for remaining in the UK, that will be relevant in

assessing a child's "best interests" because it would "normally be reasonable for the child" to be with its parents (see [18] and [19] of KO (Nigeria)).

13. Consequently, although at the time of Judge Povey's decision MA (Pakistan) required him to balance the public interest (including any deception established against the appellant) against the impact upon the appellant's child of his removal, as a result of KO (Nigeria), and following the declaratory effect of the Supreme Court's decision, Judge Povey was correct: he was not required to take into account any deception by the appellant in reaching his assessment under s.117B(6) of the 2002 Act of whether it was "reasonable to expect" the appellant's child to leave the UK. (I would add that, as Mr Howells accepted, Judge Povey also stated (at para [27]) that any deception would not "tip the balance" in the respondent's favour.)
14. The Secretary of State's first ground of appeal, therefore, fails.
15. As regards the second ground of appeal, this also fails in the light of the Upper Tribunal's decision in SR. In the headnote, the relevant part of the decision is summarised as follows:
 

"The question of whether it would not be reasonable to expect a child to leave the United Kingdom ('UK') in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK?"
16. Here, as the appellant's child was a British citizen and living with her primary carer, namely her mother who is also a British citizen, there could be no basis upon which she could be "required" to leave the UK. But, in accordance with the approach in SR, Judge Povey considered whether it would be "reasonable to expect" her to leave the UK. That was indeed accepted by the Presenting Officer (who was, in fact, Mr Howells) before Judge Povey.
17. That concession was, no doubt, based upon the fact that the appellant's child was a British citizen whose primary carer (her mother) was also a British citizen and, given that the appellant's relationship with his former partner had broken down, it could not conceivably be "reasonable" to expect the appellant's daughter (in all probability with her mother) to leave the UK to live in Bangladesh with the appellant.
18. The appellant, therefore, established that s.117B(6) applied and that, as a consequence, "the public interest does not require [his] removal". As a result of s.117B(6) applying, the appellant's removal was disproportionate (see Rhuppiah v SSHD [2018] UKSC 58 at [36]).
19. Mr Howells drew my attention to [53] of the Upper Tribunal's decision in SR where it was acknowledged that:
 

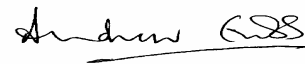
"the straightforward construction of Section 117B(6)(b) might appear to provide an overly generous approach to those parents with a genuine and subsisting relationship with a British citizen child living with another person in the UK, but who cannot meet the requirements of the Immigration Rules, ..."

20. That is, nevertheless, potentially the effect of s.117B(6) which, when it applies, provides a conclusive determination of the “public interest” issue and proportionality under Art 8.2 of the ECHR.

**Decision**

21. For these reasons, the First-tier Tribunal did not err in law in allowing the appellant’s appeal under Art 8. That decision, therefore, stands and the appeal of the Secretary of State to the Upper Tribunal is dismissed.

Signed



A Grubb  
Judge of the Upper Tribunal

26 November 2018

**TO THE RESPONDENT**  
**FEE AWARD**

Judge Povey decided not to make a fee award. I see no reason to interfere with that decision which, therefore, stands.

Signed



A Grubb  
Judge of the Upper Tribunal

26 November 2018