



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

Appeal Number: HU/13667/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13<sup>th</sup> March 2018**

**Decision & Reasons Promulgated  
On 15<sup>th</sup> March 2018**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**ALI [H]  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms S Akinbolu, Counsel, instructed by Maliks and Khan Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Pakistan born in 1985. He arrived in the UK in 2006 with leave to enter as a student. He then varied his leave to remain as the spouse of a British citizen called Ms Hobbs which was granted from 2009 to 2011. Prior to the end of this period of leave and following the breakdown of his relationship with Ms Hobbs he applied

for leave to remain on the basis of his Article 8 ECHR rights. His application was refused and his leave as a spouse curtailed. His appeal against this decision was dismissed in a decision promulgated on 28<sup>th</sup> June 2011. He became appeal rights exhausted on 8<sup>th</sup> July 2011.

2. In July 2011 the appellant met Ms Najima [H], a British citizen residing and working in the UK, and they were married in an Islamic ceremony in February 2012, and then a legally binding civil ceremony in March 2013. In September 2013 the appellant submitted an application for leave to remain based on his private life ties with the UK and his family life relationship with his partner Ms [H]. He was refused without a right of appeal on 12<sup>th</sup> October 2013. He brought judicial review proceedings against this decision which were concluded when he was refused permission for judicial review at an oral hearing on 4<sup>th</sup> December 2014.
3. On 25<sup>th</sup> August 2015 he was informed of his liability to detention and removal by the respondent. In response his solicitors put forward a statement of additional grounds in September 2015 which was treated by the respondent as a human rights claim. In March 2016 the appellant's human rights claim was certified as clearly unfounded. The appellant's solicitors then sent a pre-action protocol letter threatening judicial review action against this certification, and as a result the respondent withdrew the certification and decided to treat the further representations as a fresh claim with a statutory right of appeal.
4. The refusal of this fresh claim is set out in a decision letter dated 17<sup>th</sup> May 2016. The appellant and his wife had a baby daughter born in the UK in January 2017 who is a British citizen by birth. The appellant's appeal against the decision was dismissed on human rights grounds by First-tier Tribunal Judge Nixon in a determination promulgated on the 2<sup>nd</sup> March 2017.
5. Permission to appeal was granted by Judge of the First-tier Tribunal EM Simpson in a decision dated 5<sup>th</sup> October 2017 on the basis that it was arguable that the First-tier judge had erred in law in the consideration of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (henceforth the 2002 Act).
6. The matter came before me to determine whether the First-tier Tribunal had erred in law.

#### *Submissions – Error of Law & Remaking*

7. The appellant argues in summary as follows.
8. Firstly, it is argued, there was a failure to apply paragraph EX1(a) of Appendix FM of the Immigration Rules. This is a ground which is described by Judge Simpson in the grant of permission as misconceived but permission is not explicitly refused on this basis. It is argued that it is irrelevant that the child was not born at the date of application as this

was not part of the requirements of the EX1 paragraph, and further it is argued that the appellant's counsel wrongly appeared to accept this at the hearing.

9. Secondly it said that there was a wrong legal approach to s.117B(6) of the 2002 Act as it was found that despite this provision that the child was of a "young age" and thus her best interests did not outweigh the public interest in removal. It is argued that having found that she was a British citizen and that the appellant had a genuine and subsisting parental relationship with her that the only question was whether it was reasonable to expect her to leave the UK. It could not be found to be reasonable as the respondent's own guidance stated, at that time, that it was not reasonable to expect a British child to leave the UK absent issues of criminality which are clearly not present here, see Immigration Directorate Instructions Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes (August 2015). If there was no public interest in the appellant's removal then it was a material error of law not to find that his removal was a disproportionate interference with Article 8 ECHR, and therefore not to have allowed the appeal.
10. Mr Duffy accepted that the First-tier Tribunal had erred in law but for slightly different reasons. He argued that there had been a failure to deal with the issue of a new matter, i.e. the birth of the child, properly and in accordance with s.85 of the 2002 Act, and then by dealing with the appeal under s.117B(6) of the 2002 Act absent consent to the new matter being raised as he believed the refusal to look at paragraph EX1 of the Immigration Rules indicated that perhaps there had been no consent to this matter being included in the appeal.
11. I indicated that I found that the First-tier Tribunal had erred in law and would set out my reasons in writing, as I have now done below. I invited the parties to make submissions on remaking. It was agreed that there was no need for any further evidence as the factual matrix was not in dispute and had not altered since the hearing before the First-tier Tribunal.
12. Mr Duffy gave consent on behalf of the Secretary of State for the new matter of the birth of the appellant's British citizen child to be considered as part of this appeal.
13. Mr Duffy then submitted that the appeal should be dismissed as neither s.117B(6) of the 2002 Act nor the materially identical provision at EX 1 of Appendix FM of the Immigration Rules had any application to the facts of this case as there was no "expectation" that the appellant's British citizen baby would leave the UK as on the facts of this case she would and could remain in the UK with her mother and primary carer who is also a British citizen. The word "expect" in s.117B(6)(b) had important independent meaning, and this was not fulfilled and the provisions therefore not engaged on the appellant's facts.

14. Mr Duffy argued that it was still necessary to do a proportionality exercise to see if the requirement that the appellant return to Pakistan to get entry clearance was Article 8 ECHR compliant. There could be facts, as per Chikwamba v SSHD [2008] UKHL 40 where this was not the case. In this case it was proportionate for the appellant to go back to Pakistan and obtain entry clearance without his daughter. There was no evidence of any long delays or other onerous obstacles if this approach were taken. The appellant was not a refugee as in Chikwamba. This position was reflected in the respondent's new policy, Family Migration Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes dated 22<sup>nd</sup> February 2018.
15. Ms Akinbolu accepted that the appeal could no longer succeed on the basis of the respondent's policy as this had now been changed, so arguments based on SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120(IAC) were not relied upon. However she argued that the meaning contended for by the respondent for s.117B(6) of the 2002 Act and paragraph EX 1(a) of Appendix FM of the Immigration Rules was not correct. It did not reflect the wording of those provision or the question that the Upper Tribunal had to answer, which had been determined in cases such as Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) and by the Court of Appeal in MA (Pakistan) v SSHD [2016] EWCA Civ 705.
16. At the end of the hearing I indicated that I would allow the appeal but that I would set my reasons out in writing.

### *Conclusions – Error of Law*

1. I find that the First-tier Tribunal erred in the two ways. Firstly, by failing to deal with the issue of a new matter given the birth of the appellant's child lawfully in accordance with Mahmud (s.85 NIAA 2002 – “new matters”) [2017] UKUT 488.
2. Secondly, and if consent had been dealt with and granted, I find that the First-tier Tribunal erred in law by the treatment of s.117B(6) of the 2002 Act at paragraph 27 of the decision. It is accepted by the First-tier Tribunal that the appellant and his wife are in a genuine and subsisting relationship and that there is a child of the marriage, see paragraph 18 of the decision. It is clearly accepted that the appellant has a genuine and subsisting parental relationship with his British citizen child. The child is unarguably a qualifying child. The only question that then arises is whether it would be reasonable to expect the child to leave the UK.
3. At the time of the decision the respondent's applicable 2015 guidance was clear that it would not have been reasonable to expect this child to leave given the appellant's lack of criminality or other seriously prejudicial behaviour. Further the decision of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 finds that removal of a qualifying child requires very powerful reasons, see paragraph 49 of that decision. I find

that this legal framework has not been acknowledged and used by the First-tier Tribunal in determining the appeal. The findings of the First-tier Tribunal are that the appellant plays an active role in his child's upbringing and that it is in the best interests of the child to live with both parents, and that the appellant's spouse and mother of his child will not accompany him to Pakistan.

4. In these circumstances I find that the decision errs in law for failure to apply the correct legal frame work; a failure to consider material matters; and by considering immaterial matters such as the outcome of a future entry clearance application (clearly anticipated to be positive by the First-tier Tribunal) by the appellant, see paragraph 27 of the decision.

### *Conclusions - Remaking*

5. The Court of Appeal has consider the meaning of s.117B(6) of the 2002 Act in the case of MA (Pakistan) and the fourth element (as identified at paragraph 19 of the judgement), namely, "whether it is unreasonable to expect the child to leave" in considerable detail. At no point in this discussion is this considered to be anything other than a hypothetical question focusing on the concept of reasonableness, which in turn was to be determined by the factors relating to the child's best interests and public interest matters such as the criminal and immigration behaviour of the parents. At no point is the provision said to have no application if the child would not or could not in fact leave.
6. The interpretation argued for by Mr Duffy and set out in the respondent's new policy is not one supported by an authority. Further it is not one which fits with the natural meaning of the words in the statutory provision, which is not drafted only to apply to children who can be forced or are expected to leave, but is said to apply to qualifying children who in turn are either British citizens (all of whom naturally cannot be required to leave) and to those who have lived in the UK for a continuous period of seven years. It would also put children without leave, who are "expected" to leave in a better position, as they would be able to utilise s.117B(6) of the 2002 Act to keep both of their parents in the UK, than those with British citizenship and with a British or settled parent able to care for them, which seems a most unlikely parliamentary intention.
7. I find, for these reasons, that s.117B(6) of the 2002 Act is therefore available to the appellant and, as argued by Ms Akinbola, that the exercise that I must perform is to consider whether it would be unreasonable to expect the appellant's daughter to leave the UK in light of her best interests, citizenship and the appellant's immigration history, following the test as laid out in MA (Pakistan). I turn to the findings of the First-tier Tribunal: the appellant plays an active role in his child's upbringing but her mother is her primary carer as a 14 month baby; the best interests of the child are to live with both parents; and

that the appellant's spouse and mother of his child will not accompany him to Pakistan. I give appropriate weight to the appellant's daughter's British citizenship and her right to live in the UK. I find that it would not be in her best interests to leave the UK.

8. I now balance against this the public interest factors. This appellant has no criminal record. He has overstayed his leave to remain but entered lawfully with entry clearance, and has not evaded immigration control or used false identities. He has not always made successful application but there is no evidence before me that he has made dishonest ones. His current application is one based on the accepted facts of a genuine marriage. Whilst giving weight to the public interest in immigration control I do not find he has a seriously detrimental immigration history.
9. Taking all the material facts into consideration I find that it would be unreasonable to expect the appellant's British citizen daughter to leave the UK and as a result I find that he is entitled to the benefit of s.117B(6) of the 2002 Act. It follows that I find that there is no public interest in his removal, and that his removal would be contrary to Article 8 ECHR as a disproportionate interference with his right to respect to family life.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley

Date: 14<sup>th</sup> March 2018

Upper Tribunal Judge Lindsley

Fee Award

Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because the appeal was allowed on the basis of evidence not put before the respondent at the time of decision.

Signed: Fiona Lindsley  
2018

Date: 14<sup>th</sup> March

Upper Tribunal Judge Lindsley