The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28675/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & reasons promulgated**
On 11 August 2015	**On 3 September 2015**

BEFORE
DEPUTY UPPER TRIBUNAL JUDGE PICKUP
UPPER TRIBUNAL JUDGE EDWARD JACOBS

BETWEEN

Secretary of State for the Home Department Appellant

and

Husband of Mrs M Respondent

Anonymity Order Made

Representation
For the appellant: Mr Avory
For the respondent: No representative

DECISION AND REASONS FOR DECISION

1. This is one of two cases that were heard together. The other case is reference IA/28677/2014. Our decisions are identical and our reasons, apart from the names, are the same.

A. History and background

2. Mrs M is a student with limited leave to remain in the United Kingdom. These appeals concern her husband and daughter; we refer to them

collectively as her family. She entered the United Kingdom on 11 June 2008 and her family followed on 22 August 2008. They all had leave that was coterminous, at first until early August 2009, then until 30 January 2012. On 4 July 2011, the Immigration Rules were changed. The family was now required to apply together for their leave to be extended. By then, for reasons relating to her course, Mrs M's leave had been extended until 7 April 2013, but her family's had not. Her leave has subsequently been extended, first to December 2014 and now to May 2016.

3. Coming back to Mrs M's family, they applied for their leave to be extended at the end of January 2012. This was refused on 26 October 2012. There was an appeal, but this lapsed as the Secretary of State withdrew the decision.

4. A new decision was made on 20 March 2013; again, the application was refused. It is important that this was a new decision, not a new application. The application that was refused was still that of 28 January 2012. There was now a second appeal.

5. Mrs M and her family also applied (at the same time) for leave on 28 March 2013. She told us that she had been advised to do this by the presenting officer at the appeal, although there is no record in the Secretary of State's file to that effect. In any event, the application was not valid as there was already an outstanding application.

6. Returning to the second appeal, this came before Judge Brenells of the First-tier Tribunal, who allowed the appeal on the presenting officer informing the tribunal that Mrs M's leave had been extended. The case was remitted to the Secretary of State for reconsideration.

7. The application was again refused on 25 June 2014, leading to a third appeal. This came before Judge Samimi of the First-tier Tribunal, who allowed the appeal on the ground that leave should have been granted outside the Immigration Rules in order to avoid an interference with family life.

8. The Secretary of State applied for permission to appeal to the Upper Tribunal on three grounds:

- the judge had taken an impermissible 'near miss' approach to the Immigration Rules, contrary to *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261;
- the judge had failed to have proper regard to section 117B of the Nationality, Immigration and Asylum Act 2002; and
- the judge's consideration of Article 8 was fundamentally flawed.

9. Judge Pirotta of the First-tier Tribunal gave permission to appeal, saying:

> "The reasons in the Determination reveal the error in the Decision as the IJ [Immigration Judge] concluded that the family life of the 13 year old son [this is a mistake for daughter] who had been in the United Kingdom since 2008 was sufficient to override the Immigration Rules and paid scant regard to pertinent issues to be considered under s.117B.

The application discloses arguable material errors of law in the assessment exercise and findings which the IJ made, the conclusions reached were not open to the IJ on the facts before him as the Appellants' residence was precarious and could not have given rise to any expectation of being permitted to remain."

b. The application of the Immigration Rules

10. The Secretary of State was right to refuse the application under the Rules. Mrs M's family did not apply for leave at the same time as her family and that was fatal. It matters not that she was put into a difficult position as a result of the change of rules. Before us, she relied on the joint application made on 28 March 2013. That cannot assist her either, because it was not a valid application. Even if she was advised to make that application by a presenting officer, that cannot change the position under the Rules.

c. Leave outside the rules – interference with family life

.i The legislation

11. Any consideration of Article 8 requires a tribunal to apply sections 117A and 117B of the 2002 Act:

PART 5A

Article 8 of the ECHR: Public Interest Considerations

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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.'

.ii Analysis

12. The judge began by making the self-evident point that a failure to satisfy the Immigration Rules did not prevent an applicant relying on Article 8, citing *Izuazu* [2013] UKUT 00045 (IAC).

13. Next the judge took account of the need to have regard to the welfare of children. Again, that cannot be disputed as a relevant factor.

14. The judge had regard to section 117B, setting out its terms and making findings relevant to its provisions. We note:

- Section 117B(1): both applicants ‘have continued to comply with all the requirements of the Immigration Control.’
- Section 117B(2): both applicants ‘speak English’.
- Section 117B(3): ‘The Appellants meet the financial requirements of the Immigration Rules’. ‘There has been no challenge to the family’s ability to financially support’ the applicants. ‘The family’s presence in this country is contributing to the economic well being of the country.’ ‘There has been no suggestion that the Appellants have been a burden on the tax

payer, to the contrary the presence of the Appellants together with the Sponsor continues to contribute to the well being of the country.'

- Section 117B(4): 'Both Appellants … have continued to comply with all the requirements of the Immigration control.'
- Section 117B(5): this relates to private life. It was not relevant as the judge based the decision on an interference with family life, not private life: 'the Respondent's decision clearly would have a detrimental effect on the continuation of family life.'
- Section 117B(6): there was no dispute as to the genuine and subsisting relationship between parents and their daughter. It would not be reasonable to remove the child 'who has been at school in the United Kingdom since 2008.' She 'would clearly be forced to live apart from her mother for the duration of her leave.'

15. We reject the argument that the judge applied an impermissible near miss approach. It is right that the judge was aware that the only factor in the way of giving leave under the Rules was the fact that the three members of the family did not apply at the same time, but that is just a background fact to the application of Article 8. It explains why the exercise of discretion outside the Rules arose for consideration. It is also right that the judge referred to the family's compliance with immigration control, but that is relevant under section 117B(4). It is, again, right that the judge referred to the fact that the family were financially independent and met the financial requirements of the Rules, but they were relevant under section 117B(2). Those matters, whether viewed individually or collectively, do not show that the judge reasoned from the 'near miss' under the Rules to the application of Article.

16. We come now to the argument that the judge's application of section 117B was 'a superficial, and therefore unlawful, appraisal of the public interest factors'. Taking the points made in the grounds individually:

- The judge did not fail to acknowledge that effective immigration control is in the public interest. That is surely self-evident given the legislation. Judges do not have to repeat what is in legislation that they have cited in full in order to demonstrate that they are complying with that legislation. That would be mere empty formality. It is more pertinent to ask whether there is anything in the judge's reasoning to indicate that the judge did not have due regard to this, as required by section 117A(2). We accept that the judge could have given fuller consideration to this issue, but that does not mean that this is necessarily an error that has affected the outcome. The impact of this omission has to be considered in the context of the case as a whole.
- The grounds state that the Secretary of State 'asserts that where the Rules (which form the rubric of immigration control) are not satisfied, the public interest requires removal.' That cannot be right. If it were, there would be no scope for the Secretary of State to exercise a discretion outside the Rules. The Secretary of State would be abdicating that discretion, which would be unlawful.

- Next, the grounds argue that the judge failed to have regard to the precarious nature of the family's presence. Again, it is right that the judge did not expressly state this, but that does not mean that the judge overlooked this well-known consideration. As before, we have asked ourselves whether the lack of express consideration of this factor was an error that affected the outcome.
- Finally, the grounds argue that section 117B is not an 'a la carte menu of matters to be considered'. We do not accept that that is how the judge viewed the section. What the judge did was to make findings that were relevant to section 117B. They were all permissible, even beyond dispute. The Upper Tribunal has to take account of the difficulties facing judges when a case requires a consideration of a variety of factors. A judge who focuses on the individual factors is criticised for not considering them as a whole, while a judge who takes an overview of the factors as a whole is criticised for not making specific findings. In this case, the judge made individual findings on matters that were relevant. Their cumulative impact speaks for itself on the overall assessment that he had to make.

17. The final ground relates to Article 8. In effect, this argument builds on the previous grounds in order to show that the judge's analysis was fundamentally flawed. The Secretary of State argues that:

> "It is for the family to decide whether they wish to return to the Philippines together (as a unit) or whether the As [the applicants] return to the Philippines and either make a fresh application as the S's [Sponsor's] dependants, or await her return at the end of her leave."

Our conclusions

18. We accept that the judge's analysis was not perfect, but that is not the test. We accept that the judge could have given express consideration to the public interest and not left the findings to speak for themselves. But the Upper Tribunal's jurisdiction is limited to errors of law and that means errors that are material in that they affected the outcome. It is our view that the judge made findings of fact that were justified on the evidence and that form a sound foundation for the conclusion that there was an interference with the family life of each of the applicants. Returning to the Philippines, with or without their mother, and whether or not they submitted a fresh application for leave, would interfere with their family life.

19. The reality is this. There was a family life. It was precarious to the extent that it depended on the leave given to each member. But within those limits it was soundly established in this country. If Mrs M did not return with her family, they would be split as a family, at least temporarily, for the time it took to make a fresh application and receive leave. If Mrs M returned with her family, they would, temporarily or permanently, be deprived of the family life they have established in this country, albeit that it was precarious within the limits of the leave allowed to them. Either way there will be an inference with the family life they have. That leaves the issue of proportionality. As a paper exercise, the Secretary of State's argument of the alternatives may seem

sound. But the issue of what is disproportionate must be founded in reality, albeit one viewed through the lens of section 117B. It is our view that, given the findings made, the judge was entitled to find that the balance lay in favour of the applicants. To the extent that the judge's analysis was not as full as it might have been, we consider that fuller consideration would not have produced a different outcome.

NOTICE OF DECISION

The appeal is dismissed.

The decision of the First-tier Tribunal made on did not involve the making of an error on a point of law (sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007).

ANONYMITY ORDER RESPONDENT

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity throughout these proceedings. No report of these proceedings (in whatever form) shall directly or indirectly identify the respondent or any member of the respondent's family. Failure to comply with this order could lead to a contempt of court.

Signed on original
on 1 September 2015

Edward Jacobs
Upper Tribunal Judge