Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36906/2014**

THE IMMIGRATION ACTS

At Royal Courts of Justice	**Decision and Reasons Promulgated**
On 14 December 2015	**On 22 December 2015**

Before

Upper Tribunal Judge John FREEMAN

Between

Daniel John SMART

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the appellant: *Adam Pipe* (counsel instructed by Charles Allotey & Co)
For the respondent: Miss N Willocks-Briscoe

DETERMINATION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Stokes), sitting at Taylor House on 27 March, to dismiss an article 8 appeal by a citizen of Nigeria, born 2 February 1982.

2. The appellant has overstayed his original visit visa ever since 6 July 2005. He was given notice of illegal entry on 12 May 2010, since when he has made various applications to remain. On 20 November 2012 he married Esther, who has leave to remain till March 2017, and already had a son J, born here 4 March 2005. They all live together with Esther's mother in her house.

NOTE: no anonymity direction made at first instance will continue, unless extended by me.

3. The relevant provisions of the Nationality, Immigration and Asylum Act 2002, as amended, are as follows

> **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) …
> (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.

4. The judge found that the appellant had a 'genuine and subsisting parental relationship' with J, who was clearly a 'qualifying child', and that it would not be reasonable to expect J to leave this country, where he had been born and spent the first ten years of his life. She also found that the appellant had a genuine relationship with Esther; but of course little weight was to be given to that, since it had been established while he was unlawfully here. He did not qualify for admission under the Rules, either as a partner or a parent, without getting entry clearance for the purpose.

5. So the judge's decision depended on whether s. 117B (6) gave an absolute entitlement to someone with that kind of a relationship with a child in those circumstances not to be removed from this country; or whether, as she held, it had to be considered on the basis of proportionality, as between the positive factor it represented, and those which were either negative (apart from the appellant's knowledge of English) or of little weight, raised by the other parts of s. 117B.

6. The judge was writing several months before the appearance of *Treebhawon and others* (section 117B(6)) [2015] UKUT 674 (IAC) on 19 November. The relevant part of the judicial head-note reads:

> *Section 117B (6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)–(3).*

7. *Treebhawon* was a decision of McCloskey J, President and Judge Frances: despite the terms of the head-note, they declined at paragraph 22 to provide a definitive answer to the question of whether "… the unambiguous proclamation in Section 117B (6) is in some way weakened or demoted" where the appellant has to contend with the negative effect of ss. (4) or (5). However, their reasons for not doing so do not apply in the present case, where the grant of permission to appeal turns on this very point, and there has been ample opportunity to argue it before me.

8. In those circumstances I made it clear to Miss Willocks-Briscoe that *Treebhawon* needed to be taken as the starting-point for her argument: while, in view of paragraph 22, I was prepared to consider submissions that it was wrongly decided, it would be pointless to consider the question raised there as if it were *tabula rasa*. Miss Willocks-Briscoe was however unable to do more than to point to the rubric in the heading to s. 117B "Public interest considerations applicable in all cases".

9. While rubrics in statutes do not by any means have the same status as the text, they may provide some guide to interpretation; and it is in any case clear from the text of s. 117B (1) – (5) that they are of general application. The question however is whether what the Tribunal in *Treebhawon* understandably described as the "unambiguous proclamation" in (6) is to be given its full effect; or regarded, as the judge did, as if it were no more than one element in a proportionality equation.

10. The only reason I can think of for the second alternative was not put forward by Miss Willocks-Briscoe, and so I have not heard argument on it. It is based on analogy with the wording of s. 117C:

> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

This is not taken as imposing an absolute requirement in those circumstances for the deportation of the person concerned, who may still argue that there are 'very compelling circumstances' to prevent it.

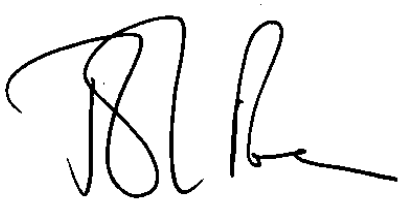
11. However, ss. 117B and C are dealing with different kinds of public interest, and the legislative separation between them is clearly there for a purpose. Nor is it altogether safe to argue from the effect of a negative provision for the benefit of the public, to reach a conclusion on that of a positive one for the benefit of an individual. While s. 117C (3) may be worth thinking about in this context, I do not think it should be allowed to dictate the meaning of s. 117B (6).

12. Returning to s. 117B, it seems to me that its structure is reasonably clear: (1) – (3) say what considerations are in the public interest, while (4) and (5) say which are to be given little weight. (6) says what the public interest does *not* require, and I do not see why it should be treated as if it said no more than that a relationship with a qualifying child in these circumstances was to be one consideration to be taken with others.

13. It follows that I agree with the decision in *Treebhawon*, including the statement of the law put forward at paragraph 22. On the judge's findings of fact in this case, this means that the definition of the public interest in s.

117B (6) did not require this appellant's removal, and so his appeal is allowed.

Appeal allowed



(a judge of the Upper Tribunal)