



IAC-TH-LW-V1

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

Appeal Numbers: IA/45733/2014  
IA/45734/2014  
IA/45735/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19<sup>th</sup> January 2016

Decision & Reasons Promulgated  
On 15<sup>th</sup> February 2016

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

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

Appellant

**and**

**P F**

**P O F**

**D O F**

**(ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**

For the Appellant: Ms Fijiwala, Home Office Presenting Officer

For the Respondent: Mr Yousef on behalf of D J Webb & Co, Solicitors, London

**DECISION AND REASONS**

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall refer to the parties as they were before the First-tier Tribunal.

2. The Appellants are citizens of Jamaica born on 7 January 1977, 19 July 1971 and 2 February 2006 respectively. The first two Appellants are husband and wife and the Third Appellant is their son. They appealed against the Respondent's decision of 27 October 2014 refusing them leave to remain in the United Kingdom. Their claims are based on their family and private life and the length of their residency in the United Kingdom. Their applications were considered and refused under Appendix FM and paragraph 276ADE of the Immigration Rules. The Third Appellant's application was further refused under Article 3 ECHR. All three applications were also considered outside the Rules, but it was found that there were no exceptional circumstances which would make it appropriate to allow the Appellants to remain in the United Kingdom outside the Rules. Their appeals were heard by Judge of the First-tier Tribunal S Aziz on 20 July 2015 and allowed under Article 8 ECHR in a decision promulgated on 31 July 2015.
3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Parkes on 18 November 2015. The grounds state that the First-tier Judge failed to give adequate reasons for allowing the claims on the material before him, and why he considered the freestanding Article 8 claim. The grounds state that the Judge at paragraph 54 states that he is considering Article 8 outside the Rules because the Immigration Rules are not a complete code but he does not explain why the Appellants' claims are not covered by the Rules. The grounds state that the Judge failed to give adequate consideration to **MF (Nigeria) [2013] EWCA Civ 1192**. They refer to the Judge erring as the Appellants' circumstances fall into the ambit of the relevant Rules so it was incumbent on the Judge to articulate the reasons why their circumstances warranted consideration beyond this. The grounds refer to public interest and state that the Judge failed to give adequate consideration to public interest and failed to give any consideration to factors such as the financial burden the Appellants impose on the state, the fact that they remained here after their leave expired and they state that the Judge did not adequately deal with the substance of Section 117B and so materially erred in law when considering Article 8 outside the Rules. The grounds assert that the Judge failed to give adequate reasons on Section 55 and the best interests of the child. Reference is made in the grounds to the case of **E-A (Nigeria) [2011] UKUT 315 (IAC)**. The grounds state that the Judge has failed to identify and explain the reasons why the Third Appellant cannot return to Jamaica with his parents and continue his family life there, or why he would be unable to establish a comparable private life there. They state that the Judge failed to adopt a holistic assessment to the facts of the case. The permission refers to **EV (Philippines) [2014] EWCA Civ 874** and states that there is no reference to paragraph 276ADE(iv) of the Immigration Rules as applying to the Third Appellant.
4. There is a Rule 24 response which, in connection with the freestanding Article 8 appeal refers to **Shahzad [2014] UKUT 00085** and states that the Immigration Rules, in the context of family removal cases are not a complete code. The response refers to the Third Appellant having accrued nine and a half years continuous' residence in the United Kingdom and states that at paragraphs 54 and 55 of the decision the Judge deals in detail with whether the case should be considered outside the Rules. With

regard to public interest the response states that the Judge had Section 117B of the 2002 Act at the forefront of his mind when undertaking his proportionality assessment. He refers to Section 19 of the Immigration Act 2014 at paragraph 55 and at paragraph 75 he refers in particular to Section 117B(6) of the 2002 Act. With regard to Section 55 the response states that this ground is merely a disagreement with the Judge's finding. The response refers to paragraph 43 of the Judge's decision which deals with the First and Second Appellants' lives in Jamaica before they came to the United Kingdom and the length of time they were there.

5. The Presenting Officer made her submissions first of all submitting that she is not pursuing the ground of application relating to the Immigration Rules not being a complete code. She submitted that the Judge at paragraphs 52 to 55 addressed this issue and addressed Section 55.
6. The Presenting Officer went on to the second and third grounds. She referred to public interest and submitted that the Judge has not properly applied Section 117. The Presenting Officer referred to the case of AM (Malawi) [2015] UKUT 260 (IAC) at paragraph 13 which states that the mere presence of children in the United Kingdom is not a trump card. She submitted that that is how the Judge has dealt with the child in this case. She then referred to Section 117D and the financial burden on the taxpayers if these Appellants are allowed to remain in the United Kingdom. She submitted that the Judge has not considered this at all. She submitted that when Section 117B is considered there should be no distinction between adults and children so little weight should be given to the Third Appellant in this appeal. She submitted that the Judge has not taken a holistic approach when making his decision. The Judge considered Appellant number three separately and it was only because of this that the three Appellants won their appeals.
7. She submitted that when Section 117A is considered this must apply to all three Appellants. I was referred to the case of Forman [2015] UKUT 412 (IAC) which deals with Sections 117A to C and states that public interest in immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified. She submitted that 117B applies in every case and I was referred to Section 117B(6) which is referred to at paragraph 17 in the said case of Forman. Here it is stated clearly that the correct analysis of Sections 117A and 117B are that they apply in every case where a Court or Tribunal is required to determine whether a decision made under the Immigration Rules breaches a person's right to respect for private and family life under Article 8 ECHR and as a result would be unlawful under Section 6 of the Human Rights Act 1998. The public interest question is whether interference with a person's right to respect for private and family life is justified under Article 8(2) which embraces the entirety of the proportionality exercise. This paragraph goes on to state that the Tribunal concerned has no choice, it must have regard to the listed considerations.

8. I was referred to the case of **Deelah and Others [2015] UKUT 515 (IAC)** which deals with Section 117B. At paragraph 20 it is stated that the characteristic which links the considerations listed in Section 117B(1), (2), (3) and (6) is that of the public interest. It states that public interest is multi-layered and has multiple dimensions. It goes on to state that those aspects of public interest which the legislature has identified as considerations to be taken into account as a matter of obligation, are contained in these provisions and must all be taken into account.
9. The Presenting Officer submitted that when all these factors are considered there must be errors in the First-tier Judge's decision.
10. I referred the Presenting Officer to paragraph 49 of the decision which refers to the First and Second Appellants being able to return to Jamaica. I put to her that the decision in this claim hinges totally on the Third Appellant's situation. The Presenting Officer submitted that the Judge has not considered the Immigration Rules substantively. She has not referred to paragraph 276ADE. What the Judge has done is consider the Appellants' situation outside the Rules only and she submitted that the Third Appellant might have been able to meet the terms of paragraph 276ADE of the Rules because of the length of time he has been in the United Kingdom so the Judge must have made an error by making no detailed assessment about this. She submitted that it is clear that Appellants one and two cannot meet the terms of Appendix FM and if it is then found that the Third Appellant cannot meet the terms of paragraph 276ADE, that is when the claim should be considered outside the Rules but that is not what the Judge did.
11. The Appellants' representative made her submissions noting that the Presenting Officer will not be making submissions on the ground relating to the Immigration Rules forming a complete code.
12. He referred to grounds 2 and 3 and the Presenting Officer's disagreement with the Judge's findings and how much weight should be attached to these findings. He submitted that there is no error of law in the Judge's decision. Ground 2 states that the Judge failed to consider public interest, but he submitted that failure to mention Section 117B is not a legal error as long as the substance of Section 117B is applied. He submitted that the Judge considered public interest and the substance of the Section was applied. The Judge referred to Section 19 of the 2014 Act at paragraph 55 of his decision and he submitted that Section 117B(6) has also been considered by him, although he has not made specific reference to this Section. I was referred to paragraph 47 of the decision which refers to the First and Second Appellants' lives in the United Kingdom being precarious. He submitted that the Judge has clearly given weight to this when making his proportionality assessment. He actually states that the First and Second Appellants can return to Jamaica.
13. I was referred to paragraph 59 of the decision which refers to the First and Second Appellants' appeals being unable to succeed under the Immigration Rules and he submitted that the Judge considered the three applications under the Immigration

Rules and considered public interest. He submitted that the Judge's finding on public interest and under the Immigration Rules was open to him.

14. The representative then referred to the case of **ZH (Tanzania) (2011) UKSC 4** which states that nationality is not a trump card for a child in the United Kingdom. He submitted that the Judge is aware that the child is not British and that negative factors relating to the child's parents can outweigh the child's best interests, but the Judge has found that the best interests of the child are a primary consideration and when the proportionality assessment is carried out, even when the factors against the First and Second Appellants are taken together they do not outweigh the child's best interests. I asked the representative if the Judge actually states that in his decision. He does not. The representative submitted that the Judge then considers paragraph 117B(6), but goes on to find that there is no public interest in the removal of the parents from the United Kingdom and it would be unreasonable to expect the child to leave the United Kingdom.
15. The representative submitted that the first two Appellants are not on benefits in the United Kingdom. I pointed out that the Judge does not appear to have considered free health care on the National Health Service and free education when he considers public interest, but the representative submitted that the Judge raised his concerns as to how the Appellants were supporting themselves and did put his mind to this. He submitted that the Judge gave considerable weight to the child having been in the United Kingdom for nine and a half years. He submitted that the child in six months time can register as a British citizen and this should be given weight, as should his length of residence.
16. The representative then referred me to the case of **EV (Philippines) & Ors [2014] EWCA Civ 874** submitting that although the Judge did not cite this case he has applied the guidance therein. At paragraph 35 of that case it is stated that a decision as to what is in the best interests of children will depend on a number of factors such as:-
  - (a) their age;
  - (b) the length of time they have been here;
  - (c) how long they have been in education;
  - (d) what stage their education has reached;
  - (e) to what extent they have become distanced from the country to which it is proposed that they return;
  - (f) how renewable their connection with it may be;
  - (g) to what extent they will have linguistic medical or other difficulties in adapting to life in that country; and
  - (h) the extent to which the course proposed will interfere with their family life or their rights, if they have any, as British citizens.

He submitted that the judge has considered all of these matters.

17. I asked the representative what is different in this family's situation when it is compared to a family where one of the parents gets a job abroad and the whole family has to go abroad with him. This is something that happens often. The representative submitted that that is a different situation, as in this case the Appellants will be made to leave the United Kingdom. He submitted that the Judge considers to what extent the child is distanced from Jamaica. He submitted that it is clear that the Judge has considered the terms of the said case of **EV (Philippines)**.
18. The representative submitted that the Judge has referred to social, cultural and educational ties to the United Kingdom in his decision and has applied various parts of relevant jurisprudence, particularly to Section 117B(6) when he allowed the appeal. He submitted that his findings were open to him and there is no error of law in the decision.
19. The Presenting Officer submitted that at paragraph 47 of the decision there is no reference to Section 117B. The Judge stresses that the Appellants only ever had temporary leave in the United Kingdom and refers to their private/family life being established while their leave was precarious. He also mentions that it is not clear how they have been supporting themselves since their leave expired. She submitted that the Judge does not appear to have considered the fact that this family could well be a burden on the state. They may already be a burden on the state or they may have been working illegally. She submitted that at paragraph 59 the Judge makes it clear that the First and Second Appellants can go back to stay in Jamaica. They are overstayers. Their private lives were established when they had no leave to remain in the United Kingdom. She submitted that there is nowhere in the 2002 Act which states that Section 117B does not apply to a child. She submitted that the representative has stated that the child is six months away from being able to apply for British nationality, but she submitted that the considerations will be the same, even if he gets British nationality. This would not strengthen the claim. I was again referred to **EV (Philippines)** at paragraph 35. She submitted that the Judge did not consider the factors narrated in this paragraph. She submitted that the Judge should have decided whether this child is at a crucial stage in his education and whether he can integrate into Jamaica. She submitted that the Judge has not assessed proportionality properly relating to the Third Appellant. She has not weighed his rights against public interest and his situation in the United Kingdom.
20. The representative submitted that the Presenting Officer is relying on Section 117B applying to the child. He submitted that limited weight has to be given to a precarious private life and that the first two Appellants have never had a legitimate expectation of being able to remain in the United Kingdom, but that cannot be said for the child. He submitted that it is clear from the Act that the child has always been in the United Kingdom and has had an expectation of being able to remain here. The child had no control over his time in the United Kingdom. He submitted that the Judge has looked at this sensibly and carried out a proper assessment. He submitted

that it is up to me to decide if the decision makes sense and if the Judge has considered all the relevant factors, but based on what was before him he was entitled to come to the decision he did.

### **Decision and Reasons**

21. I have to decide if there is a material error of law in the First Tier Judge's decision. I have to decide if he dealt properly with the application of the Immigration Rules and public interest, taking into account the relevant country guidance. I have to decide if he was right to consider the claims outside the Rules and if, when doing so, he dealt satisfactorily with Sections 117A-D and I have to decide if the child's best interests have been dealt with adequately. The Judge does not require to refer to Sections 117A-D specifically, in his decision, as long as he has considered their substance.
22. It is clear from the decision that had the claim related only to the First and Second Appellants, the terms of the Rules could not have been satisfied and the appeals would have been dismissed (paragraphs 43 to 47 of the decision). At paragraph 49 the Judge states that he sees no reason why the First and Second Appellants could not return to Jamaica to re-establish a life for themselves. The Judge then considers the Third Appellant separately. He has not adopted a holistic approach to the three Appellants' rights and weighed them all against public interest. The Appellants' representative states that the terms of **EV (Philippines)** have been considered by the Judge but when the factors relating to the best interests of the child, listed in that case, are considered the Judge has not taken these into account. The child is 9½ years old, so will have started in primary education when he was five so he has been in primary education for 4½ years. This is not a crucial stage in his education. He has been brought up by Jamaican parents and English is spoken in Jamaica. He will be removed with his parents so his family life will not be affected and he is young and will be able to integrate into society in Jamaica.
23. It is clear that the Third Appellant might have been able to meet the terms of the Rules, (paragraph 276ADE) but the Judge has made no mention of this although he has made it clear that the First and Second Appellants cannot meet the terms of the Rules. The judge should have dealt with all the claims under the Rules before considering Article 8 outside the Rules.
24. All of the issues have to be considered within the Rules and balanced against public interest when proportionality is assessed. The Judge states that there is no public interest in the removal of these Appellants but he has not taken into account effective immigration control or the burden this family are likely to be on the State and the fact that they will be accessing free education and free health care if they remain here. All of these issues are covered by the Rules.
25. Sections 117A and B only have to be considered when Article 8 outside the Rules is dealt with. The judge has not given reasons for there being a good arguable case for the claims to be considered outside the Rules. When Article 8 outside the Rules is considered Sections 117A-D apply to all 3 Appellants. The Appellants' representative

stated that the Judge has not specifically referred to Section 117B (6). He has referred to it at paragraph 75 but he has not explained why he finds it would not be reasonable for the third Appellant to leave the United Kingdom. The Appellants' representative states that the substance of Section 117B is contained in the decision but when the decision is analysed that is not the case.

26. The Judge has referred to a number of matters which must weigh against the Appellants' appeals succeeding, such as the First and Second Appellants only having temporary leave in the United Kingdom and then having no leave at all and the fact that when they had the Third Appellant their status in the United Kingdom was precarious. All these findings have to be taken together and weighed against the child's best interests. The Appellants' representative stated that the Judge did this and found that they do not outweigh the child's best interests but there is nothing in the decision to indicate that the judge has done this. Nowhere in the decision is this mentioned. The Judge has not taken into account various important public interest issues when carrying out his proportionality assessment.
27. A child must not be blamed for matters for which he is not responsible, e.g. the conduct of his parents but there is nothing exceptional in this case and based on what was before the judge it would not be unreasonable for the Third Appellant to go to Jamaica. He will be going with his parents. There are no compelling reasons for this family not returning to Jamaica and having a child should not be regarded as a trump card. That is what the First and Second Appellants have based their claims on and that is why the judge has allowed the appeals. This must be an error.
28. Although the Third Appellant, in six months, can apply for British nationality I do not find that even if he is granted British Nationality this application can succeed. This is the only fact which will have changed.
29. The Judge has not considered the claims properly under the Rules. The terms of the Rules cover all the issues in these claims. The judge has given no good reason for finding that the claims should be considered outside the Rules and when he does consider the claims outside the Rules he has not dealt adequately with the public interest question or the relevant country guidance cases and has not properly considered Sections 117A-D.

### **Decision**

30. I find that there are material errors of law in the First-tier Tribunal's decision.
31. I find that had the judge considered the claims properly under the Rules and had he dealt properly with public interest and the relevant country guidance when making his decision the judge would have reached a different conclusion.
32. The First-tier Tribunal's decision, promulgated on 31 July 2015, must be set aside.



33. No findings of the First-tier Tribunal can stand. Under s.12 (2) (b) (i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member of the First-tier Tribunal chosen to reconsider the case are not to include Judge Aziz.
34. Anonymity has been directed.

**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

Deputy Upper Tribunal Judge I A M Murray