Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11017/2016**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 7 October 2017	**On 12 December 2017**

Before

MR JUSTICE DOVE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BRIAN KINSALE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble
For the Respondent: Mr B Amunwa

DECISION AND REASONS

1. This is an appeal against a decision promulgated by First-Tier Tribunal Judge H Graves on the 24th January 2017. The Judge granted the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the Appellant's decision to remove the Respondent from the United Kingdom.

2. The essence of the Appellant's case was that he had arrived in the United Kingdom on the 25th November 2002 with entry clearance as a student and had subsequently overstayed. He had been granted various forms of leave

to remain up until the 9th December 2012; he applied for no further leave to remain and became an overstayer at that time. On the 7th April 2016 the Respondent decided to remove the Appellant and he appealed against that decision on the basis that he had always supported and had contact with his children. The appeal had an unfortunate procedural history in terms of the production of documentation. The essence of the Appellant's evidence in relation to his three children was recorded by the Judge in the following terms:

"23. In relation to T, and the situation between 2009 and 2010, the appellant said he was having regular supervised contact with T, and that he could not provide more financial support as he was not earning enough at that time. He said there was a CSA assessment but the child's mother decided not to pursue more financial support and instead agreed he should pay what he could and when. T then moved to the USA in 2010 with his consent. Mr Carroll argued that for contact to be supervised there must have been concerns about the child being safe with the appellant and he raised the assault charge in relation to the appellant's other relationship. I intervened and said there may be a number of reasons why contact was supervised and the question should be rephrased. The appellant denied any welfare concerns in relation to his first child and said the mother was reluctant to allow contact. The appellant said he had telephone and Skype contact with T occasionally, the last time being on his birthday.

24. In relation to Ih, the appellant said he had 'played a general role' in his life since birth. He had taken him to and from nursery and school and because he was autistic and had a number of developmental and social and communication problems, the appellant accompanied him on all trips outside the school. He also participated in his various assessments. Ih had recently been moved from his mainstream school, [ ], to a special school in [ ] (or [ ]) called [ ]. The appellant saw him every Saturday and three times each week in the afternoons after school at Ih's house. The appellant said Ih would be devastated if the appellant was removed because of the role he played in his life, although his ability to understand the concept of separation was limited by his learning disabilities. Ih also has a half sister, S, who was in her twenties but also had learning disabilities, was hearing impaired with speech and language difficulties. I asked the appellant what had been done about Ih's unlawful immigration status. He said he believed an application had been submitted at some point January to March 2016.

25. In relation to M, she was living with her mother and the appellant was currently having contact with her on alternate Saturdays. She had also come to stay with the appellant for a week recently, as part of a respite arrangement set up by Social Services, but was not, in fact, living with the appellant. She would see Ih as well as with MM, who was now aged five, if they were present on the days when she saw the appellant. She would also be devastated by the appellant's

removal. She had behavioural problems, which were being addressed by her school, along with the support of Social Services. In cross-examination it transpired that some of the appellant's contact with M had been supervised at a contact centre. He said he had not been to her school except for two visits, he could not remember, but thought they took place in 2013 or 2014 and one in 2015. The appellant clarified his fortnightly contact in fact was staying over weekend contact, from seven thirty on a Friday night to three thirty on a Sunday afternoon. He said he could not meet M's mother in person as she had been given two police cautions for harassment of him. I asked the appellant some further questions and it transpired that he did not have contact with M from 2012 until the recent events in October 2016 when he was involved by Social Services due to concerns about her welfare. He had seen her on two occasions in the preceding four years. He had also stopped paying CSA contributions for her support. He said he had pleaded for contact but had not in fact tried to involve solicitors of the Family Courts to enforce contact.

26. In relation to MM, the appellant said that he did not have any contact with his biological father but regarded the appellant as a father figure, since his birth. He lived with the appellant and Ms M and had a close relationship with the appellant. His mother provided his financial support.

27. I asked the appellant about financial support for his three children. Initially he said he provided financial support to all three children. When asked he could not explain what, how much or when. It then transpired that he did not provide them with financial support."

3. Having received this evidence and in the light of the documentation which was furnished to the Judge she made individual findings in relation to the Appellant's relationship with each of the children in the following terms

"33. In relation to the circumstances of the three children of the appellant, these are that T, the oldest child, does not live in this country, there is no suggestion that he will do so now or in the future and he has, at best, sporadic contact with the appellant by telephone that can be continued from Trinidad and Tobago if necessary. His best interests therefore appear to be largely unaffected by whether the appellant remains here or returns to his home country.

34. The appellant's second child, Ih, does appear to have regular contact with the appellant. I find it curious that despite there being such an apparently supportive and flexible arrangement with the child's mother, yet she did not come to court, despite the importance of the outcome of this appeal for the child's relationship with his father.

35. I also found it difficult to accept the appellant's evidence at face value as to the regularity of that contact. This is partly because Ms M did not

know he was having contact with Ih four times every week as claimed in oral evidence. This is a considerable amount of contact, for a child who has never lived with him, lives with his mother and where the appellant does not have his own funds for travel. The evidence was also somewhat vague about the weekend contact and appeared to be that he did, then that did not have contact every weekend, despite the appellant having said contact was weekly. The appellant also initially claimed Ih had staying overnight contact, but then changed his evidence. I do find the evidence of this appellant unreliable and I find that he was exaggerating his role and the regularity of his contact. However, I accept that he does have a role in Ih's life, in that this is supported by the assessments which comment on his positive involvement, the letter from the school confirming he has been asked to accompany the child on trips, and the statement from the child's mother, (page 48 of the bundle), which says that the appellant does 'regularly' see Ih in the afternoons after school, that he has fortnightly, (but not weekly as claimed), contact on Saturdays but with advance notice contact can be agreed flexibly on other days. The statement also says that the appellant has 'a close bond' with the child and used to regularly do school runs for the child when he was at his previous school and the child would be adversely affected by his removal.

36. I further find that Ih is a vulnerable child, whose immigration status is uncertain or precarious and who suffers from a number of developmental and social difficulties, as a result of a diagnosis of autism. I find that it would be in Ih's best interests to continue to have contact with his father, to have stability and security and that the appellant does and intends to continue to take an active and involved role in his upbringing.

37. In relation to the appellant's third child, M, he has confirmed he had no contact with her for the four years before October 2016, apart from two occasions, and contact only started then as a result of the involvement of other agencies. He does not provide her with financial support and has not done so for many years. There is documentation before me from social services that confirms that promoting contact between the appellant and M is planned by social services as being in the child's best interests, but otherwise there is little or no mention of the appellant having any real role in the child protection investigations or meetings, although it would appear that Social Services had tried to arrange meetings with him.
38. The emails from Social Services quote the appellant's emails saying he has not been afforded contact in preceding years because of obstruction by the child's mother, however, he did not take steps to enforce contact through the courts. Those emails also say that part of the child's difficulties with behaviour are as a result of her not having any contact with the appellant (page 55 appellant's bundle) but there is also mention of the child's mother saying that previous contact with the appellant was 'very loving and constructive' (page 61). Accordingly, I find that at the time of hearing and in the two months immediately preceding the hearing, the appellant has been having contact with his

daughter and that contact is in the child's best interest, particularly as she is clearly going through a period of emotional upheaval and would therefore be in need of security and stable relationships of support.

39. As to the appellant's future intentions about contact with M, it is difficult to make clear findings. It appears not to be disputed that he did seek contact with the child in the four years before the recent events, but did not try to enforce contact through the courts, which it would have been open to him to do. I also found it difficult to accept that appellant's evidence at face value, for the reasons given above. I find, on balance, that it is more likely than not that he intends to continue to pursue contact and a role in M's upbringing, at least in the near future."

The Judge concluded that the Appellant's relationship with MM did not reach the definition of a parental relationship.

4. Having considered the Immigration Rules the Judge was satisfied that the Respondent was not able to meet the requirements of the Immigration Rules and that therefore his appeal could not be allowed on that basis. She went onto consider whether or not the Appellant was able to succeed on the basis of a consideration of Article 8 of the ECHR outside the Immigration Rules. The Judge found that whilst the Appellant did not have a relationship with his partner and her son which reached the definition of "family life" for the purposes of the Article 8 assessment, he nevertheless had a family life with his son I and "to a lesser extent" with his daughter M. The Judge also concluded that he had a family life which attracted the engagement of Article 8 within the UK. She then turned to consider the question of proportionality and reached the following conclusions.

"48. I find it is in the best interests of both children to have contact with both parents. That is all the more compelling as a result of the developmental and other difficulties I has to contend with and in light of the comments of M's social worker who has clearly, in email communications with the appellant, stressed the importance of contact with the appellant to M's well being and sense of self esteem and security. Ih's immigration status is clearly uncertain and Mr Carroll was not in a position to tell me the outcome of his application. Clearly, if he were to be returned with his mother to Trinidad and Tobago, then the appellant could continue contact there, but at present, his status is precarious and unclear. M cannot be required to leave the United Kingdom to pursue contact with her father. Not only is she a British citizen but her mother is settled here as a British citizen and it is patently clear from the communications and documents in the bundle that she would be most unlikely to resettle in the appellant's country so that her daughter could continue contact with the appellant. The child also has a private life in that she has settled in school here and clearly has a relationship with other family members, such as grandparents, according to the documentation from social services.

49. In the above circumstances, where the appellant meets the spirit of the requirements of the Rules at the date of hearing, albeit only barely and not at the date of application or decision, and where it is clearly in the child's best interests to have contact with the appellant that must take place in this country, and where there are no strong counterveiling considerations, such as criminality, I find the balance in terms of proportionality must tip in appellant's favour. In this I consider the statutory factors, which mainly have a neutral impact on this appeal, but in particular s.117B(6), which provides as follows:

'*in the case of 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'

50. The respondent has also conceded before the Upper Tribunal that it is not reasonable, for the purposes of s.117B(6), to expect a British child to relocate abroad, where there is no criminality, to maintain the family unit (Sanade (British children-Dereci) [2011] UKUT 48 (IAC)).

51. As a British citizen under the age of eighteen, the appellant's daughter is a 'qualifying child'. The UK Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4 at paragraph 1, attached particular importance to the British citizenship of United Kingdom based children. As Lady Hale observed, "*Although nationality is not a 'trump card' it is of particular importance in assessing the best interests of any child"* (at paragraph 30). But the citizenship referred to in ZH is not simply citizenship of acquired legal status. As Lady Hale explained:

" they are British, not just through the 'accident' of being born here, but by descent from a British parent; they have an unqualified right of abode here;"

52. Lady Hale went on to say:

"As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language".

53. The appellant is not liable to deportation and Treebhawon and others (section 117B(6) [2015] UKUT 00674 (IAC) is authority for the contention that where the s.117(6) criteria are satisfied, a finding that the public intest does not require removal prevails over the matters set out in s.117(1-3). I have found that at the date of hearing, the relevant date for determining wider issues under Article 8 outside the

Rules, that the appellant has a genuine and subsisting parental relationship with a qualifying child, and so s.117(6) does inform any balancing act as to the public interest in the proportionality exercise.

54. I therefore find, taking all matters into consideration, that the decision to remove the appellant amounts to a disproportionate interference with his rights under Article 8 and those of his children. I am mindful when making that assessment that the factual position may change in the future. I am cautious in my assessment of the future intentions of this appellant. It is a matter for the respondent what leave to grant and not a matter for this Tribunal. I am aware that the respondent typically grants leave in the short term in such cases to allow her to review a family's circumstances, and, for example, review whether contact and an appellant's intention to take an involved role in his child's life has continued past the date leave is granted. It may be for the appellant to establish those circumstances still prevail to the respondent's satisfaction at a later date if he seeks further leave."

5. In the light of these conclusions the Judge found that it was appropriate to allow the appeal under Article 8.

6. The appeal is advanced on three grounds. The first ground is that the Judge relied upon the case of Treebhawon in paragraph 53 of the determination and that this reliance upon that authority gave rise to an error of law in that the decision in that case was inconsistent and materially wrong in the light of the more recent authority of MA (Pakistan) and others v SSHD [2016] EWCA Civ 705. As a consequence the Judge misdirected herself as to the significance of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The second ground depends upon an allegation that the Judge failed to resolve the issue between the parties bearing upon the credibility of the Respondent's relationships with his children. Further as part of this ground it is submitted that the Judge failed to give adequate and appropriate reasons for her decisions in particular in paragraph 39 of the determination. The third and final ground was that the Judge failed to properly approach the case on the basis as one centering upon separation of the Appellant from his children and, rather, focused upon the interests of the children and the impact upon them of having the Appellant removed.

7. In order to evaluate ground one it is necessary to set out the provisions of section 117B(6) and then the respective decisions of Treebhawon and MA (Pakistan). Section 117B(6) of the 2002 Act provides as follows:

'S.117B(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'

8. The case cited by the Judge and relied upon in paragraph 53 of the determination, Treebhawon is, indeed, as the Judge observed, authority for the contention that where the section 117(6) criteria are satisfied, "the finding of that the public interest does not require removal prevails over the matters set out in section 117B(1-3)". This observation is borne out by paragraphs 19, 20 and 21 of the determination in Treebhawon which concludes in paragraph 21 with the following trenchant observation

> "21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) - (3) do not apply."

9. In the case of MA the question of the proper approach to an application of section 117B(6) was considered by the Court of Appeal. At paragraph 21 of the judgment of Elias LJ (the leading judgment with which the other members of the Court of Appeal agreed) he identifies the central submission of the Secretary of State that section 117B(6) was but one of the factors to be taken into account in making an Article 8 determination, and that the other factors identified in s.117B(1)-(5) all had to be taken into account and play a part in the Article 8 determination. In summary an argument was raised in relation to a suggested comparability between section 117C(5) and section 117B(6). It had been argued in the case of MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 that section 117C(5), which provides that where a foreign criminal liable for deportation has a genuine subsisting relationship with a child and the affect of deportation on the child would be unduly harsh, there is an exception to section 117C(3) requirement that the foreign criminal should be deported. In MM the Court of Appeal concluded that that section was not freestanding and its application still required consideration to be given to all of the other public interest questions which might bear upon the issue of whether or not the foreign criminal should be deported. Having considered the competing arguments Elias LJ concluded at paragraph 45 as follows:

> "45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so

> the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

10. It is very clear from what I have set out above that the approach taken in Treebhawon is inconsistent with the position taken by the Court of Appeal in MA. Whilst it does not appear that Treebhawon was cited to the Court of Appeal, nor is there any direct comment upon it, it is in my view very clear that not only are the two approaches from these cases to section 117B(6) inconsistent, but also that the approach taken by the Court of Appeal must take precedence and supersede the decision of the Upper Tribunal in the Treebhawon case. The observation of Upper Tribunal Judge Martin that the case of Treebhawon is "no longer good law following the Court of Appeal's decision in MA"when granting permission to appeal in the present case is in my view apt.

11. It follows that in my view it is inescapable that the Judge misdirected herself in paragraph 53 and she should not have had regard to the decision of the Upper Tribunal in Treebhawon. It is said by Mr Amunwa that in the event that I were to be satisfied that there was an error of law and a misdirection in the substance of paragraph 53, nevertheless the decision of the Judge could be saved on the basis that in paragraph 54 she explains that she has taken all matters into consideration before reaching her decision on proportionality, and also had clearly set out the factors relevant to the other matters within section 117B such as the Appellant's immigration history earlier on in the determination. Thus, he submits, even if there were a misdirection in paragraph 53, nevertheless the language of the determination shows that the Judge, in essence, applied the correct approach or, alternatively, reached the correct decision on the basis of her findings. I am unable to accept that submission. Given the clear misdirection in paragraph 53 of the determination I am unable to accept that the portmanteau phrase "taking all matters into consideration" corrected and succeeded that misdirection of law. Whilst it is right to observe that the Judge did carefully set out the relevant factors from the Appellant's immigration history in the context of her determination, in the light of the misdirection of law it is unclear what part those matters may have played in her resolution of the proportionality issue. It follows that the decision of the Judge must be quashed. In the event that I was of that view, Mr Amunwa confirmed that his submission was that the appropriate form of disposal was for the matter to be sent back to another judge of the First Tier Tribunal other than Judge H Graves for the appeal to be re-determined.

12. In the light of that conclusion it is unnecessary to dwell at length upon the other two grounds upon which the appeal was advanced. Suffice to say that I am not satisfied that there is any substance in either of the Appellant's contentions. In my view the Judge reached carefully reasoned conclusions in relation to the relationship which the Appellant had with each of his children in paragraphs 33 – 39 of the determination. She made a measured appraisal of the Appellant's credibility and resolved the relevant factual issues in relation to the strength and permanence of the nature and quality of the relationships which the Appellant had with each of his children. There is no substance therefore in the Appellant's ground two. So far as ground three is concerned, I am again not satisfied there was any error of law in the Judge's approach. It was plain that her starting point was that the relevant child, M, would not leave the UK. She was right to examine the position in terms of the impact upon that child in her approach to the Article 8 issues. The error arose at a later stage in her reasoning as I have set out above.

13. To conclude I am satisfied that the appeal should be allowed in relation to ground one for the reasons I have set out above and that the decision of Judge H Graves of the 24th January 2017 should be quashed and the appeal referred back to the First Tier Tribunal (Immigration and Asylum Chamber) for re-determination by a judge other than Judge H Graves.

Notice of Decision

The appeal is allowed and the decision of First Tier Tribunal Judge H Graves is quashed and the appeal is remitted back to the First tier Tribunal (Immigration and Asylum Chamber) for re-determination by a judge other than Judge H Graves.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Dove