Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13337/2015**

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On 19 June 2017	**On 20 June 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

NA
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Timson, Counsel
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to the circumstances of the appellant's minor children.

2. The appellant is a citizen of Pakistan. He entered the UK on 12 February 2011 as a student. His leave was extended as a student on two occasions, the latter period ending on 28 June 2014. His application dated 2 May 2014 to remain as a spouse was refused on

13 September 2014. The appellant appears to have become an overstayer at this point but shortly thereafter made a further application to remain on the basis of his family life. That application was refused in a decision dated 1 December 2015, and is the subject of this appeal.

3. The appellant married a British citizen when he had leave to remain as a student in an Islamic ceremony on 17 January 2014. This marriage was registered on 17 March 2014. They have three British citizen children born in 2014, 2016 and 2017 respectively.

First-tier Tribunal decision

4. The First-tier Tribunal noted that the SSHD refused the application under the Immigration Rules on the basis that the appellant relied upon a false English test, thereby breaching the 'suitability requirements' and his relationship with his wife was not genuine and subsisting, thereby breaching the 'eligibility requirements'. The First-tier Tribunal did not accept either of these and found in the appellant's favour that his relationship is genuine and the SSHD had not displaced the burden of establishing deception.

5. The First-tier Tribunal accepted at [36] that

> "it would not be appropriate or reasonable to expect the children, or indeed Mrs B to leave the UK…the best interests of these young children are to be raised in a family home with their father present…"

6. The First-tier Tribunal went on to dismiss the appeal under the Immigration Rules and on human rights grounds, having found there was no need to carry out an Article 8 assessment.

Hearing

7. At the hearing before me there was substantial agreement between the parties. Mr Bates accepted that the First-tier Tribunal made a material error of law when considering the SSHD's policy. Both representatives invited me to remake the decision under Article 8, in light of the First-tier Tribunal's findings of fact.

8. Mr Bates acknowledged that the SSHD's policy clearly applies in the appellant's favour, and that this is an important consideration for the purposes of Article 8.

9. After hearing very briefly from both representatives, I indicated that the appeal would be allowed on human rights grounds, for reasons I now provide.

Error of law discussion

10. I can give my reasons briefly as Mr Bates conceded there was a material error of law such that I should remake the decision.

11. The First-tier Tribunal began its assessment of the appeal by first considering whether the appellant met the Immigration Rules. It is not submitted that the First-tier Tribunal erred in finding that he did not. However, both representatives agreed before me that the appeal was on human rights grounds only.

12. In any event, the grounds of appeal rely entirely upon the First-tier Tribunal's failure to apply section 117B(6) of the Nationality Immigration and Asylum Act 2002. The First-tier Tribunal considered at [46] that section 117B(6) considerations do not arise in the case as there is no basis for going on to consider Article 8 outside the Rules. Both representatives agreed that this is a clear error of law: the appeal was on human rights grounds only and the appellant prima facie met the requirements of section 117B(6) on the First-tier Tribunal's own findings.

13. The First-tier Tribunal accepted that the appellant has a genuine and subsisting relationship with his British citizen qualifying children. As set out above, at [36] the First-tier Tribunal expressly found it would not be reasonable to expect the children to leave the UK.

Re-making the decision

14. Section 117B(6) provides as follows:

> "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."

15. The First-tier Tribunal clearly accepted that (a) is met, and there has been no challenge to this factual finding. It is agreed that the question for me is the reasonableness of expecting the children to leave the UK in accordance with (b). I note the First-tier Tribunal's express finding in this regard. I must however take all the relevant factors into account when assessing reasonableness and not just the impact upon the children – see MA Pakistan v SSHD [2016] EWCA Civ 705. A relevant countervailing factor is the appellant's immigration history. Mr Bates realistically accepted that even if the appellant was an overstayer for a short period, he made concerted efforts to comply with the Immigration Rules and did so in large measure. The First-tier Tribunal rejected the SSHD's contention that the appellant had exercised deception.

16. When considering reasonableness, it is also relevant to take into account the SSHD's policy. Paragraph 11.2.3. of the IDI on Family

Migration provides the SSHD's decision makers with guidance on cases involving British children. The August 2015 version states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. However, it also states that:

> "where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer".

17. The SSHD's decision to refuse the application would require the appellant ('a parent') to return to a country outside of the EU, Pakistan. As such, the SSHD's own policy states that the case must be assessed on the basis that it would be unreasonable to expect the British citizen children to leave the EU with that parent. For the purposes of the policy the question is not limited, as it would be under EU law (see VM Jamaica v SSHD [2017] EWCA Civ 255), to whether the British (and EEA) citizen wife and children would be required to leave the UK. The policy poses an additional question: would 'a parent' be required to leave the UK? That this is so is demonstrated by the guidance in the policy regarding the granting of leave. In such cases, the policy states it will usually be appropriate to grant leave, provided that there is evidence of a genuine and subsisting parental relationship. The policy then states:

> "It may be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> Criminality…
> A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules"

18. The ability of the child to stay with another parent or alternative carer, for the purposes of the policy, is only relevant if there are considerations of such weight to justify separation. As acknowledged by Mr Bates, the First-tier Tribunal erred in law in its application of the policy to the facts of this case. First, there was a failure to acknowledge that the policy addresses a requirement on the part of the non-British citizen to leave the UK. Second, the appellant clearly fits into the category of 'a parent' being required to leave. Third, the requirement to maintain immigration control of itself is not a consideration of such weight to justify separation, for the purposes of the policy. As conceded by Mr Bates, this appellant does not have a very poor immigration history and there is no element of criminality. He squarely meets the terms of the SSHD's policy. This needs to be factored into the proper approach to section 117B, with the inevitable

conclusion that notwithstanding the need to maintain effective immigration controls and having recognised that the appellant does not meet the requirements of the Immigration Rules, it would be unreasonable to expect him to leave the UK. He meets the requirements of section 117B(6).

19. Should it be necessary to do so I also find that after considering all the section 117B factors, including the need for immigration control and the appellant's failure to meet the Immigration Rules, the best interests of his British citizen children and the length and breadth of his family life in the UK taken together with the SSHD's own policy as discussed above, are such that, the appellant's removal would be a disproportionate breach of his right to family life. Mr Bates did not seek to argue otherwise.

Decision

20. The decision of the First-tier Tribunal contains a material error of law and is set aside.

21. I remake the decision by allowing the appeal under Article 8 of the ECHR.

Signed: Ms Melanie Plimmer Dated: 19 June 2017
Judge of the Upper Tribunal