Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/20460/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 19 May 2017	**On 2 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

SALIM YAKUB NATHA

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Patel for KG Solicitors

For the Respondent: Mr A Mc Vitie

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

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Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant is a citizen of South Africa born on 26 October 1968.
3. This was an appeal by the Appellant against the decision of First-tier Tribunal Judge Pickup promulgated on 12 May 2017, which dismissed the Appellant's appeal against a refusal of leave to remain on the basis of his private life and relationship with Sufia Patti and her son from a previous relationship (BP) on all grounds .
4. The Appellant granted permission to appeal that decision. At a hearing dated 21 February 2017 Upper Tribunal O'Connor set aside the decision in so far as it related to Article 8 outside the Rules and specifically in relation to his consideration of section 117B(6) of the Nationality Immigration and Asylum Act 2002.
5. The matter came before me for re hearing.

The Law

6. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.
7. The Appellant's appeal is pursuant to Section 82(1) (b) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') which provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim. S84 of the Act provides that an appeal under s82(1)(b) must be brought on the ground that a decision is unlawful under section 6 of the Human Rights Act 1998.
8. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that 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).
9. The S117B considerations are as follows:

"(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."

10. The definition of "qualifying child" is found in section 117D:

> *"**qualifying child" means a person who is under the age of 18** and who- (my bold)*
>
> *(a) is a British citizen, or*
>
> *(b) has lived in the United Kingdom for a continuous period of seven years or more;"*

11. In relation to the weight to be attached to family life where the Appellants status has been precarious I have taken into account Rajendran (s117B – family life) [2016] UKUT 00138 (IAC) the headnote of which reads

> *1. That "precariousness" is a criterion of relevance to family life as well as private life cases is an established part of Article 8 jurisprudence: see e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Jeunesse v Netherlands, app.no.12738/10 (GC).*
> *2. The "little weight" provisions of s.117B(4)(a) and (5) of the Nationality, Immigration and Asylum Act 2002 are confined to "private life" established by a person at a time when their immigration status is unlawful or precarious. However, this does not mean that when answering the "public interest question" posed by s117A(2)-(3) a court or tribunal should disregard "precarious family life" criteria set out in established Article 8 jurisprudence. Given that ss.117A-D considerations are not exhaustive, in certain cases it may be an error of law for a court or tribunal to disregard relevant public interest considerations.*

Evidence

12. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in an appeal and a bundle of documents for the hearing before the First-tier Tribunal and short additional statements dated 18 May 2017 from the Appellant , BP and Mrs Patti.

Submissions

13. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that :

    (a) He acknowledged that that BP was a British Citizen and that the Appellant had a genuine relationship with him.

(b) He accepted that the Appellant has a genuine relationship with a qualifying child.

(c) The countervailing factor in this case was that the Appellant was at all relevant times an overstayer.

(d) He relied on R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) which found that in all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights.

(e) In this case it was reasonable for the Appellant to return to his home country and make an application for entry clearance.

14. On behalf of the Appellant Mr Patel submitted that :

(a) The Appellants partners health was poor and if he left this would have an adverse impact on her.

(b) BP was at a critical stage of his education. He is unable to care for his mother.

(c) BP has also been given an opportunity to participate in a coaching course for 7-8 year olds in respect of which his step father had been very supportive.

(d) The countervailing factor is that the Appellant was an overstayer but his partners health and the best interests of the child tipped the balance in his favour.

Findings

15. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

16. The Appellant is a 48 year old citizen of South Africa who was refused leave to remain in the United Kingdom on the basis of his family and private life.

17. The Appellant appeals the decision of the Respondent on the basis that the decision is unlawful under section 6 of the Human Rights Act 1998.

18. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

19. I accept satisfied that the Appellant and Mrs Patti have a family life in the United Kingdom together with BP Mrs Patti's son from a previous marriage who is now 18 years old having reached that age on 7 May 2017.. Mrs Patti and the Appellant went through an Islamic form of marriage on 10 August 2010 and therefore have now been in a relationship for nearly 7 years.

20. In relation to their family life in order for Article 8 to be engaged I must be satisfied that the removal of the Appellant would interfere with their enjoyment of that family life and I accept that it would because I accept that Mrs Patti and her son would not return with him and would not be required to do so as they are both British Citizens. They may choose to do so but I proceed on the basis that it is reasonably likely they would not and therefore there is a clear interference.

21. I accept that as the Appellant has been in the UK since his visa ran out in 2010 and therefore he has established a private life. The nature and quality of that life is much harder to assess as there is little evidence of engagement with the wider community: no friends attended court in support of his appeal and there was little to suggest activities beyond his family.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

22. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

23. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

24. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy his private and family life.

*I**f so, is such interference proportionate to the legitimate public end sought to be achieved?***

25. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B and I have therefore considered those factors in relation to this appeal together with any other facts that I consider relevant to the proportionality of the decision to remove..

26. I am satisfied that Mrs Patti's son does not meet the definition of child for the purpose of section 117B 6 as he is over 18 and the definition in section117D defines a 'child' as one who is under 18. Therefore section 117B 6 does not apply.

27. I accept that Mrs Pattis son is in full time education and has found that the Appellant has been supportive in relation to his school and extra curricular activities. I accept that they have a close relationship as BP lives at home and it is accepted that the Appellant and Mrs Patti have been in a relationship since 2010/2011 when they married. I acknowledge that he would prefer that the Appellant remain in the UK.

28. I take into account that the maintenance of effective immigration controls is in the public interest and I am satisfied that significant weight should be given to that. I note in this context that while this is not an appeal against the refusal under the Immigration Rules that the Appellant did not meet the requirements of Appendix FM and paragraph 276ADE of the Rules. These challenges were set out in full in the refusal letter and were confirmed in the decision of First-tier Tribunal Judge Pickup and were not challenged in the error of law hearing. Therefore it is a fact that the Appellant did not meet the requirements of the Immigration Rules in relation to a partner, spouse or parent and EX.1 did not apply and these provisions underpin immigration control in the UK . I must therefore give significant weight to the fact that both the Appellants relationship with Mrs Patti and her son were considered under the Rules but they did not entitle him to leave. It is apparent from the documents which accompanied the Statement of Changes that the changes to the Rules were intended to promote consistency, predictability and transparency in decision-making where issues under article 8 arose, and to clarify the policy framework. The changes were said to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck between the right to respect for private and family life

29. I am satisfied that in relation to the Appellants private life it was established at a time when the Appellant was in the UK illegally as clearly the Appellant entered the UK on a 6 month visit visa which expired in August 2010 and he had no other form of leave thereafter and made no attempt to regularise his status until he made an application in 2015. I note that while not a provision of section 117B I am entitled to take into account that the family life that the Appellant enjoys with Mrs Patti and her son was also established at a time when he was in the UK illegally and Mrs Patti knew that the Appellant was in the UK illegally when she met and married him.

30. The Appellant speaks English but that is a neutral factor.

31. The Appellant has not been financially independent since he has been in the UK as he has been living with Mrs Patti and enjoying the benefit of her accommodation which is funded by Housing Benefits and Council Tax Support. I note also in the bundle that there are records of hospital appointments for the Appellant so he has

also been a drain on the NHS enjoying treatment, including a hernia operation, that he has not paid for and was not entitled to.

32. I accept that Mrs Patti suffers from anxiety and depression and is therefore unable to work and could not attend the Tribunal in the morning although her symptoms improve by the afternoon. There is no reference in the medical evidence to what contribution the Appellant makes to her well being and I note that she has suffered these symptoms since 2005 well before their relationship started (Bundle page 144) so it is unclear to me that the Appellants presence has assisted or alleviated her mental health issues other than in general terms. There is no indication of what impact his removal would have on her condition from any independent source and Mrs Patti addresses it in the most general and vague terms in her very brief witness statement. While I am prepared to accept that she would *prefer* the Appellant to remain in the UK on the basis of the evidence before me I unable to find that his removal, particularly if it was for a limited period of time, would have such an impact on Mrs Patti that the removal would be disproportionate: I remind myself that the Appellant bears the burden of proving this is such is his case.

33. I find that permanent separation is indeed not the only choice open to the couple as I am satisfied that the Appellant could return to South Africa to re apply for entry clearance. It was previously found that the Appellant has family there and I am satisfied that they could assist him for the period of time it took to make such an application and that given he lived there previously there would be no particular problems in returning there to make such an application: certainly no such issues were identified to me. There were no facts placed before me to suggest such a temporary separation was disproportionate other than the close relationship with BP and the anxiety and depression suffered by the Appellants partner. I have taken those factors into account Moreover I have reminded myself on R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC). Which found that in all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. There was no evidence before me that such a separation would be disproportionate.

34. I am satisfied that in this case the application failed to comply with the

Immigration Rules and no circumstances were identified why those Rules should not be applied in this case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that Appellants application failed and the Appellant would have to make a new one.

35. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

36. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Conclusion

37. On the facts as established in this appeal, there are no substantial grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.

Decision

38. The appeal is dismissed.

Signed Date 1 June 2017

Deputy Upper Tribunal Judge Birrell