Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32510/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2017	**On 20 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

WINSTON [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert of Counsel, instructed by Turpin & Miller Solicitors (Oxford)
For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica whose date of birth is given as 20 March 1964. The appellant entered the United Kingdom as a visitor with a visa valid for six months between 4 April 1998 and 4 October 1998. On 19 September 1998 he applied for leave to remain as a student and this was granted until 30 September 1999. On 31

July 1999 the appellant married [DR], a British citizen. He applied for leave to remain as a spouse on 10 March 2000 but his application was rejected.

2. On 3 July 2002 the appellant was convicted at Oxford Crown Court for conspiracy to supply class A controlled drugs. He was sentenced on 4 July 2002 to ten years' imprisonment. He was not recommended for deportation. On 22 March 2006 the appellant was issued with an ICD.0242 warning letter informing him that the Home Office had not decided to take any action against him on this occasion but may do so if there are any further convictions.

3. The appellant's original spouse application from 2000 was reconsidered on 25 February 2008 and he was granted one year probationary spouse leave between 25 February 2008 and 25 February 2009. The appellant made a further spouse application on 31 March 2009 which was refused on 5 October 2009. This was reconsidered on 5 March 2010 and he was granted further leave to remain between 13 June 2010 and 13 June 2012.

4. The appellant made a further spouse application on 10 July 2012 and was granted further leave to remain under the two year transitional arrangements between 5 March 2013 and 5 March 2015. On 10 February 2015 the appellant was convicted at North London Magistrates' Court of battery and was given a suspended imprisonment term for three months which was wholly suspended for twelve months. He was also asked to pay £300 costs and an £80 victim surcharge.

5. The appellant made the present spouse application on 5 March 2015. The appellant has two children born in the United Kingdom who are British citizens, [SR], who was born on [ ] 2000, and [JR], who was born on [ ] 2007.

The appeal to the First-tier Tribunal

6. The appellant appealed against the respondent's decision to refuse to grant leave to remain to the First-tier Tribunal. In a decision promulgated on 8 June 2017 First-tier Tribunal Judge Beg dismissed the appellant's appeal. The Tribunal found that it would not be disproportionate to remove the appellant from the United Kingdom. Any interference in the appellant's Article 8 rights would both be legitimate and proportionate. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 3 July 2017 First-tier Tribunal Judge Andrew granted the appellant permission to appeal.

The hearing before the Upper Tribunal

7. The grounds of appeal assert that First-tier Tribunal Judge Beg misdirected herself because she failed to give weight to Parliament's direction under Section 117B(6) that the public interest does not require the appellant's removal. Reliance is placed on the case of **Treebhawon and others (section 117B(6)) [2015] UKFUT 00674 (IAC)**. It is asserted that it is clear that once the judge had found that the appellant had satisfied the criteria under Section 117B(6) his removal was no longer in the public interest.

8. In oral submissions Mr Gilbert referred to paragraphs 23, 26 and 36 of the First-tier Tribunal's decision. It is implicit in the judge's finding that the children were not expected to leave the United Kingdom that the judge considered it was not reasonable for the children to leave the United Kingdom. He submitted that the Secretary of State in the Reasons for Refusal Letter had also accepted that it was unreasonable for the children to leave the United Kingdom as it says in that letter "this is because your children are not required to leave the UK, they will continue to reside with their mother, in the same family unit as currently".

9. He referred to the case of **AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180** at paragraphs 16, 19 and 20 and submitted that it is clear that once a child has satisfied the seven year Rule it would be unreasonable for the child to leave the United Kingdom. It has been accepted that the appellant has a genuine and subsisting parental relationship, that the children are qualifying children, and the children are not expected to leave the United Kingdom as held in **AM (Pakistan)**. As the answer to those three questions is yes the conclusion must be that Article 8 is infringed. He submitted that the Court of Appeal in paragraph 19 in **MA (Pakistan)** supports that assertion.

10. He also submitted that the wider public interest issues can only come into play via the concept of reasonableness. In this case, he submitted, that the judge has considered the wider public interests outside the concept of reasonableness test. He submitted that the judge brought these considerations outside that discrete aspect of the case.

11. When asked if Mr Gilbert still relied on paragraphs 21 and 22 of **Treebhawon** Mr Gilbert indicated that he was no longer relying on those paragraphs.

12. Mr Tufan submitted that the 2015 decision in **Treebhawon** has been overruled in **Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC)**. The Court of Appeal confirmed the ratio of **MA (Pakistan)** in the case of **AM (Pakistan)**. He submitted that the public interest and conduct of the parents is relevant to the assessment of whether or not it is reasonable to expect children to leave the United Kingdom.

13. The appellant received a ten year sentence of imprisonment. Despite the warning letter issued by the Home Office the appellant continued to commit criminal offences. The appellant owes over £30,000 in fines that have not been paid.

14. The Secretary of State cannot require or force the children to leave the United Kingdom. However, he submitted that this does not equate to an implicit acceptance on the part of the Secretary of State that it is not reasonable to expect the children to leave the United Kingdom. There is no implied finding by the judge that it is unreasonable for the children to leave the United Kingdom.

15. In reply Mr Gilbert submitted that the only consideration of the wider public interest that is permitted is when considering the reasonableness test. If it is not reasonable for the children to leave the United Kingdom that is the end of the matter, Article 8 is

infringed. The judge was not considering the wider public interests under the consideration of reasonableness.

Discussion

16. The appellant does not meet the suitability requirements under the Immigration Rules. The case was advanced and was considered by the First-tier Tribunal outside the Immigration Rules. Having found that the appellant had a genuine and subsisting relationship with a qualifying child the essential issue in this case was whether or not it is reasonable to expect the children to leave the UK.

17. In **MA (Pakistan**) the court of appeal considered how a court should approach the reasonableness test. The approach in **Treebhawon** (the 2015 decision) (i.e. that s117B(6) precluded consideration of the public interest issues in 117B(1)-(3)) was not approved. The court held:

> "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."[emphasis added]

21. It is clear that when assessing reasonableness under s117B(6) the conduct of the appellant and matters relevant to the public interest should be taken into consideration. The appellant's ground in reliance on the 2015 decision in **Treebhawon** in this regard must therefore fail.

22. Mr Gilbert relied on a passage from **AM (Pakistan)** at paragraph 20 where it was held:

> "20…But the court also held that section 117B(6) was a self-contained provision in the sense that where the conditions specified in the subsection are satisfied, the public interest will not justify removal. The wider public interests considerations can only

come into play via the concept of reasonableness in section 117B(6) itself. In the light of this decision, the Secretary of State no longer pursues the second ground of appeal."

18. His submission was that the judge had considered the wider public interest outside the reasonableness test and that this was not permissible as once the conditions in s117B(6 had been satisfied that was the end of the matter. Whilst this submission is correct it can only be relevant if the conditions in s117B(6) have been found to be satisfied.

19. The judge's findings were:

> "36. I find that the appellant's relationship with his biological children is a genuine and subsisting relationship. I take into account the letter from St Jude and St Paul's School dated 22 February 2017 from head teacher John Pearson-Hicks. He confirms that the appellant occasionally collects Jaden from school. However I find that the appellant has never been the sole carer of the children. The person who has looked after them since their birth has been [DR]. Whilst as a general proposition it is in the best interests of children to live with both parents, in this instance the children do not live with their father. **The children are not expected to leave the United Kingdom to live with the appellant**. [DR] is not in a subsisting relationship with the appellant. I find that given the appellant's criminal offences particularly in relation to the supply of Class A drugs, there is a strong public interest in this case. I accept that the appellant speaks English although he is not financially independent at the present time. In **Hesham Ali (Iraq) [2016] UKSC 60** which was deportation appeal, Lord Reed held that in approaching the question of whether removal is a proportionate interference with Article 8 rights, only a claim which is very compelling will outweigh the public interest. [emphasis added]
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> 37. I find that whilst the appellant has a private life in the United Kingdom, his private life was established at a time when his immigration status was precarious. As such, little weight must be attached to it. I find that he built up his private life in the full knowledge that he could be removed from the United Kingdom. In cross-examination he accepted that he received a letter from the Home Office informing him that if he committed further criminal offences, the Home Office would then seek to remove him from the United Kingdom. He said he understood the contents of the letter. The letter which is dated 22 March 2006 states 'I should warn you therefore that should you receive any further convictions at any point in the future, we are likely to give very serious consideration as to whether to pursue deportation proceedings'.
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> 38. I also take into account the letter from the Probation Service which appears at page 3 of the appellant's bundle, the licence and notice of supervision. In assessing the evidence as a whole, I take into account the evidence given by [DR] regarding the medical conditions of the appellant's children and his relationship with them. However I find that the appellant's criminal offences involving the supply of drugs attracts public revulsion and tip the balance against him. Consequently, I find that any interference in the appellant's Article 8 rights will be both legitimate and proportionate. I find that immigration control is in the public interest."

20. The judge has simply referred to the fact that the children are not expected to leave the United Kingdom. The provision in 117B(6) has two aspects. The first is that the child is either a British citizen or qualifying child and secondly that it must be not be reasonable to expect the child to leave the United Kingdom. If the test was simply that a child could not be required to leave the United Kingdom then that additional reasonableness requirement would be otiose because a British citizen child cannot be required to leave the United Kingdom. Mr Gilbert's submission was that it is implicit from the judge's comment that the children are not expected to leave the UK that the judge has made a finding that it is not reasonable to expect them to leave the UK. I do not accept this submission. The judge has failed to make a finding on whether it or not it would be reasonable to expect the children to leave the UK.

21. This is a material error of law as, although the judge does consider carefully all the factors that she might have taken into consideration when reaching a decision on reasonableness, those factors have not been applied to an assessment of the reasonableness of the children leaving the UK and no conclusion was reached.

22. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

23. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

24. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge Beg pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

25. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal is allowed. The case is remitted to be heard de-novo before any judge other than Judge Beg.

Signed P M Ramshaw Date 11/9/17

Deputy Upper Tribunal Judge Ramshaw