Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50080/2014

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 2 May 2017	**On 8 June 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R L B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr G Hodgetts instructed by South West Law

DECISION AND REASONS

1. The anonymity order made in our decision promulgated on 10 March 2017 remains in force. The order was imposed, and remains in force, in order to protect the anonymity of RLB's children.

2. For convenience, we will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of the United States of America who was born on [ ] 1984. In 2009, the appellant began a relationship with a British Citizen ("JB"). They married in the United Kingdom in April 2011. They have three children, "A1" born on [ ] 2011, "A2" born on [ ] 2013 and "A3" born on [ ] 2015. All three children are British Citizens.

4. The appellant served in the US Military. As a consequence, during the course of his relationship with JB, he spent much of his time in the USA. JB lived in the USA (although not necessarily with the appellant) between March 2012 and February 2013 along with A1. They returned to the UK in late February 2013. Shortly after, JB discovered that she was pregnant. The appellant came to the UK as a visitor on 15 October 2013 shortly before A2 was born. Thereafter, he overstayed his leave and has remained in the UK since that date.

5. On 19 August 2014, the appellant and JB were interviewed by Immigration Officers and the appellant was served with a notice of removal under s.10 of the Immigration and Asylum Act 1999.

6. In September 2014, the local social services became involved with the appellant and his family following contact from the police. This arose because of information received from the USA concerning the appellant's conduct there in May-October 2012. That conduct involved sexually explicit contact with women and young girls through internet chat rooms. Some of those with whom he was in contact were underage. A civil investigation took place in the USA and subsequently the appellant was discharged from the US Military for misconduct.

7. The appellant was told by the social services that he should inform JB of the investigation in the US or the children (A1 and A2) would be removed and placed in care. When he did so, the relationship with JB came to an end and they separated on 29 September 2014. JB suffers from mental health problems and A1 and A2 went to live with JB's parents.

8. Currently, as a result of Family Court proceedings A1 and A2 live with their maternal grandparents under Child Arrangement Orders. A3, who was born in February 2015, is subject to a care order and initially resided with JB. However, since January 2017, because of a deterioration in JB's mental health, A3 has been placed with foster parents.

9. The appellant, pursuant to an order of the Family Court, has supervised contact with A1 and A2 on 10/12 per year basis. Although the appellant does not formally have contact with A3 pursuant to a court order, A3 has accompanied A1 and A2 on occasions of supervised contact with the appellant. JB has contact with A3 four times a week.

10. At the hearing, we were told that the appellant has applied to the Family Court for custody of all three children, in particular in relation to A3. That application, we were told, was made on 26 April 2017. A copy of the application is in the papers.

11. On 10 October 2014, the appellant was detained in order to remove him. However, on 10 November 2014, the appellant applied for leave to remain relying upon Art 8 of the ECHR and, in particular, his relationships with his children.

12. On 8 December 2014, the Secretary of State refused the appellant's claim for leave under Art 8 and made a new decision to remove him under s.10 of the IA Act 1999. The appellant was released from detention in January 2015.

The Appeal

13. The appellant appealed to the First-tier Tribunal. His appeal was heard on 26 May 2016 by Judge Loughridge. He relied upon Art 8 and principally upon his relationships with A1 and A2. He did not then rely on any relationship with A3, who at that time lived with JB, and he accepted JB's position that she did not wish the appellant to have any contact with her or A3.

14. Judge Loughridge allowed the appellant's appeal under Art 8. First, he concluded that the appellant could not succeed under the relevant rules in Appendix FM because his history of sexual activity conducted via the internet with, inter alia, underage girls meant he fell within the suitability requirement in S-LTR.1.6.1 in that it made his "presence … in the UK … not conducive to the public good" so that it was "undesirable to allow [him] to remain in the UK". Secondly, Judge Loughridge accepted that the appellant had a "genuine and subsisting parental relationship" with A1 and A2 who were each a "qualifying child" as defined in s.117D(1) of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002"). Applying s.117B(6) of the NIA Act 2002, Judge Loughridge found that it was not "reasonable to expect" either A1 or A2 to leave the UK and, as a result, the public interest did not require the appellant's removal. Thus, the judge allowed the appeal under Art 8 outside the rules.

15. The Secretary of State sought to appeal that decision. Permission was initially refused by the First-tier Tribunal but on 17 November 2016, the Upper Tribunal granted the Secretary of State permission to appeal.

16. The appeal came before us on 27 February 2017. In our decision promulgated on 10 March 2017, we concluded that the judge's decision to allow the appeal under Art 8 involved the making of a material error of law in that the judge had failed to take into account the "public interest" in determining whether it was reasonable to expect A1 or A2 to leave the UK as required by the Court of Appeal's decision in R (MA and Others) (Pakistan) v SSHD [2016] EWCA Civ 705 which post-dated Judge Loughridge's decision.

17. As a consequence, we set aside Judge Loughridge's decision and directed that the appeal be relisted before the Upper Tribunal in order to remake the decision under Art 8.

The Hearing

18. The hearing to remake the decision took place on 2 May 2017 when the appellant was again represented by Mr Hodgetts of Counsel and the Secretary of State was, on this occasion, represented by Mr Kotas, a Senior Home Office Presenting Officer.

19. Mr Hodgetts indicated that he did not intend to call any oral evidence and that the appeal should proceed on the basis of submissions and the documentary evidence before us.

20. In that latter regard, in addition to the bundles of documents before the First-tier Tribunal ("FTT1" and "FTT2"), Mr Hodgetts sought permission to admit before us three further bundles ("UT1", "UT2" and "UT3" respectively) under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269 as amended) and a position statement from the local social services dated 27 April 2017. Mr Kotas indicated that he had no objection to these documents being admitted and, on behalf of the Secretary of State sought permission to admit into evidence email correspondence from the USA relating to the investigation of the appellant there. Mr Hodgetts did not object to the admission of this email having taken instructions from the appellant.

21. In the circumstances, we considered it proper to admit the new evidence under rule 15(2A).

The Submissions

22. On behalf of the appellant, Mr Hodgetts put the appellant's case on two bases under Art 8 of the ECHR.

23. Mr Hodgetts principally placed reliance upon s.117B(6) of the NIA Act 2002.

24. Mr Hodgetts submitted that the appellant had a "genuine and subsisting parental relationship" with each of A1, A2 and A3 who were each qualifying children. It was in their best interests to retain contact with the appellant. He submitted that these matters had been accepted by the Senior Presenting Officer before the Upper Tribunal at its earlier hearing.

25. Mr Hodgetts accepted that in the light of MA (Pakistan) the "reasonableness" of whether A1, A2 and A3 should leave the United Kingdom had to be determined in the light of the public interest.

26. Mr Hodgetts relied upon the following factors:

(1) All three children are British;

(2) A2 and A3 were born in the UK and had never left the UK. A1 was also born in the UK and had only spent time between March 2011 and February 2013 elsewhere, in the USA;

(3) The three children currently had a stable existence; A1 and A2 living with their maternal grandparents and A3 with a foster family;

(4) If they moved to the USA, their circumstances would be unstable and insecure in the light of the appellant's circumstances.

27. Mr Hodgetts relied upon the Family Court's decision (HHJ Horton) dated 23 February 2016 (pages 5-6, UT3) that the ten times per year contact with the children was not sufficient to "develop the sort of relationship that these children should eventually have with their father" ([42]). He relied on the judge's acceptance that it was in the interests of the children to have a "good quality, long lasting relationships with both their parents" ([43]).

28. Mr Hodgetts relied upon Judge Loughridge's finding that the appellant presented a "low" risk to underage girls in the UK. Mr Hodgetts submitted that the evidence demonstrated that the appellant had engaged with his risk of re-offending and he relied upon the evidence from a therapist Dr Smith (at pages 59-60, UT2) and the more recent evidence from Dr Smith dated 28 April 2017 (at pages 21-22, UT3) that the appellant had undergone further sessions.

29. Mr Hodgetts submitted that it was simply the case that the children could not go to the USA. Mr Hodgetts relied upon the Family Court's judgment where it was stated by HHJ Horton, if the appellant were deported to the USA (at [45]):

> "Contact to the children should only take place in this country, unless the children's carers themselves take the children to the United States therefore, whilst the father is in the United States, the only contact I can endorse is that suggested by the local authority, which as I understand it is indirect."

30. Mr Hodgetts also referred to the "Position Statement" dated 27 April 2017 from the solicitor to the Child Protection Team for the social services responsible for the children that there was, in effect, no prospect whatsoever of the court allowing the children to live with the appellant in the USA.

31. Mr Hodgetts submitted that, applying s.117B(6), it was, as a result, not reasonable to expect the children to leave the UK.

32. Alternatively, Mr Hodgetts submitted that it would breach Art 8 not to allow the appellant to remain in the UK in order to pursue and take part in the Family Court proceedings which he had begun on 26 April 2017 seeking custody of all three children. He relied upon the Upper Tribunal's decision in RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 (IAC).

33. Mr Kotas submitted that s.117B(6) did not apply as A1, A2 and A3 were not being required to leave the UK. Further, he submitted that the judge in the family proceedings had not ruled out the possibility of the children

going to the USA. The appellant was not without means and the children would be going to an English speaking country. Having regard to the public interest based upon the appellant's misconduct, Mr Kotas submitted that it would be reasonable in all the circumstances to expect the children to leave the UK and s.117B(6) did not apply.

34. Mr Kotas submitted that the appellant did not meet the requirements of the rules and his family life had been established whilst his status was "precarious". Having regard to all the circumstances, Mr Kotas submitted that it would be proportionate to remove the appellant.

Discussion

35. Whilst Mr Hodgetts only relied upon s.117B(6) of the NIA Act 2002, we must approach the issue of whether a breach of Art 8 has been established in a structured way applying the 5-stage test in R (Razgar) v SSHD [2004] UKHL 27. We must consider the rights of the whole family including his children and their grandparents (see Beoku-Betts v SSHD [2008] UKHL 39).

36. We are satisfied that Art 8.1 is engaged as the appellant's removal will seriously interfere with the family and private life of the appellant, his children and their grandparents if he is removed to the USA. We accept that the decision is in accordance with the law. It was not suggested before us that the appellant could succeed under the Immigration Rules. Further, the appellant's removal will be for the legitimate aims of effective immigration control and preventing crime and disorder.

37. The crucial issue is that of proportionality. That issue requires a fair balance to be struck between the public interest and the rights and interests of the appellant and others protected by Art 8.1 (see Razgar at [20]). In R(MM and others)(Lebanon) v SSHD [2017] UKSC 10, the Supreme Court reminded us at [43] that the "central issue" is:

> "Whether a fair balance has been struck between the personal interests of all members of the family in maintaining their family life … and the public interest in controlling immigration".

38. We must take into account the "best interests" of the children as a primary, but not determinative, consideration (see ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74 at [10]).

39. In carrying out that balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in s.117B of the NIA Act 2002 (s.117A).

40. Section 117B is in the following terms:

> "**117B. Article 8: public interest considerations applicable in all cases**
>
> (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."

41. The public interest in this appeal, including that reflected in the fact that the appellant cannot meet the requirements of the Rules, is entitled to "considerable weight" (see MM and others at [75]; and also Hesham Ali v SSHD [2016] UKSC 60 at [46] *et seq* and R (Agyarko and another) v SSHD at [46]-[48]). The search is for "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see Agyarko at [48]).

42. First, the public interest in effective immigration control is engaged (s.117B(1)).

43. Secondly, the appellant speaks English so that the public interest in s.117B(2) is not engaged but the fact that the appellant's speaks English does not provide a positive right to leave and is, at best, a neutral factor (see Rhuppiah v SSHD [2016] EWCA Civ 803 at [59]-[61]).

44. Thirdly, we were no expressly addressed on the issue of whether the appellant was financially independent for the purpose of s.117B(3). We are content to assume that he is but that too is a neutral factor (see Rhuppiah above).

45. Fourthly, we accept that the appellant's private life has developed whilst he has either been in the UK unlawfully or whilst his presence was precarious and so is entitled to "little weight" (s.117B(4) and (5)). However, the way Mr Hodgetts put the appellant's claim was on the basis of his family life with his children rather than his private life in the UK. (Section 117B((4) only applies to 'family life' with a partner.)

46. We turn now to s.117B(6) of the NIA Act 2002 upon which Mr Hodgetts placed reliance. It is helpful to remind ourselves of the wording of s.117B(6) which provides as follows:

> "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."

47. As regards that provision, two propositions follow from the Court of Appeal's decision in MA (Pakistan). First, if the appellant falls within the terms of s.117B(6) then his removal is not in the public interest and, as a result, his appeal under Art 8 would succeed. Secondly, in determining whether it would "not be reasonable to expect" the children to leave the United Kingdom, not only their circumstances must be taken into account, but also the public interest (here represented primarily by the appellant's accepted misconduct) must be factored in. The Court of Appeal approved the approach in its earlier decision of MM (Uganda) v SSHD [2016] EWCA Civ 450 when considering, in the context of a deportation case, s.117C(5) and the requirement that the effect of deportation on a partner or child should be "unduly harsh" in order for the public interest not to require deportation of a person sentenced to a period of imprisonment of less than four years. At [45] in MA (Pakistan), Elias LJ (with whom King LJ and Sir Stephen Richards agreed) stated:

> "In my judgment, if the court should have regard to the conduct of the applicant in 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)."

48. That approach was, of course, the basis upon which we set aside the First-tier Tribunal's decision as it had not been applied by the First-tier Tribunal in this appeal.

49. We do not accept Mr Kotas' submission that s.117B(6) cannot apply as the children will not be required to leave the UK. It cannot, in our view, be

interpreted in this narrow way. The answer is plain from the wording itself. The paradigm case to which it applies is when the appellant seeks to rely upon his or her relationship with a child who is a British citizen. Such a child can never be required to leave the UK – he or she is not subject to immigration control. All that can be asked, and answered, is whether such a child can be expected to leave.

50. Is Mr Hodgetts then correct in his submission that if the children cannot leave the UK then *ipso facto* it would "not be reasonable to expect" the children to leave the UK?

51. In our judgment, that is not the correct approach in principle to s.117B(6). First, Mr Hodgetts submission was, in part, based upon a contrast between s.117C(5) and s.117B(6). He submitted that the former, in the deportation context, contemplated the possibility of an inevitable split in the family but only if that split had an "unduly harsh" impact upon a child (or partner) would the public interest not require deportation. By contrast, he submitted s.117B(6) focused on whether it would be reasonable for the child to "leave" the UK and, if it was not so, then removal was not in the public interest. Mr Hodgetts submitted that, in effect, if the Secretary of State wished the appellant to leave the UK then she could make a deportation decision based upon his misconduct. Whilst the latter possibility is always open to the Secretary of State, it is not, in our judgment a necessary pre-requisite for "removal" of an individual where a qualifying child cannot accompany or follow the individual abroad.

52. First, Mr Hodgetts submission reads, in our judgment, too much into the different wording of s.117C(5) and s.117B(6). It fails to recognise, as the decisions of the Court of Appeal acknowledge, that the two provisions exhibit common features in the context of deportation and removal respectively. We have already referred to the analogy drawn by the Court of Appeal in MA (Pakistan) between the two provisions. Of course, we accept that the concept of an "unduly harsh" impact rather than whether leaving the UK would be "reasonable" places a greater onus upon an individual seeking to resist deportation rather than removal. But, in our judgment, we see nothing in the differential wording of the two provisions to support Mr Hodgetts bald proposition that if a child cannot leave it is not reasonable to expect it to do so.

53. Secondly, and leading on from what we have just said, at its heart Mr Hodgetts submission conflates the practicality of a child leaving the UK with the normative question of whether it is reasonable to expect it to do so. In our judgment, the now unequivocal case law of the Court of Appeal – which is binding upon us - requires a balancing exercise, taking into account the public interest, to be carried out in determining whether it would be reasonable to expect a child to leave the UK. That, demonstrates that the practicality of (or even legal prohibition upon) leaving the UK is not a determinative factor in reaching a conclusion on whether it is "not reasonable" to expect a child do so. Mr Hodgetts submission, if correct, would in a case where a child cannot leave the UK

result in the application of s.117B(6) to prevent an individual's removal without any consideration of the public interest. As regards the latter, such an approach would run counter to that set out in MA (Pakistan) (approved in AM (Pakistan) and others v SSHD [2017] EWCA Civ 180).

54. Consequently, we reject Mr Hodgetts submission that, even if the evidence establishes that A1, A2 and A3, cannot leave the UK that is not, in itself, determinative of whether or not it is "reasonable to expect" them to do so.

55. We now turn to consider the application of Art 8, in particular s.117B(6) to the facts. Many, if not most, of the facts in this appeal are not in dispute.

56. It was accepted by Judge Loughridge that the appellant has a "genuine and subsisting parental relationship" with A1 and A2. That is not challenged. The appellant has, since January 2017, also had contact with A3 through, as we understand it, the informal arrangement of A3 accompanying the other children at times of contact. It was not suggested before us that, as a result, the appellant had anything other than a "genuine and subsisting parental relationship" with A3. We accept that relationship exists. Of course, as British citizens, each child is a "qualifying child" by virtue of s.117D(1) of the NIA Act 2002.

57. Mr Kotas did not seek to argue before us that it was other than in each of the children's "best interests" to retain contact with the appellant. That was clearly the position of HHJ Horton in his judgment of 23 February 2016 in the family proceedings. As we have already seen, he ordered that the appellant should have contact with A1 and A2 on ten occasions each year. A3 was not part of those proceedings but nothing in the evidence before us leads us to conclude that any different decision would have been made in relation to A3. We have seen in the documents reports from the social workers in relation to the supervised contact with A1, A2 and A3 (pages 1-44, UT1). It suffices to say that these are positive and entirely consistent with contact being in the children's best interests.

58. We accept that the present position is that none of the children are able to leave the UK, in particular to accompany or join the appellant in the USA. In relation to A1 and A2, HHJ Horton at [45] of his decision considered the position of A1 and A2 if the appellant was deported. He said this:

> "I have also considered the position if the father is deported to the United States. The circumstances that may be in play then are almost impossible to predict. I do not know whether he will be allowed back into this country on another Visa having failed to return after this one. I do not know whether the United States military will take action against him, whether he will be subject to any penalties or restrictions over there. All I can say at this stage, doing the best I can, is that I am quite satisfied that given the particular difficulties that there are in this case that contact to the children should only take place in this country, unless the children's carers themselves take the children to the United States. Therefore, whilst the father is in the United States, the only contact I can endorse is that suggested by the local authority, which as I understand it is indirect. These days there are, as we are only too aware in this case, numerous ways of maintaining indirect contact electronically, and

> subject to necessary safeguards that contact could be explored if the father is deported to the United States."

59. In the "Position Statement" dated 27 April 2017 the solicitor in the social services Child Protection Team makes plain that any application by the appellant to take the children to the USA would be "strenuously opposed by the Local Authority" and in the writer's view "based on thirty eight years' experience in family law" such an application "would not succeed" (para 6). The writer then sets out a number of factors, including the appellant's likely unsettled situation in the USA, his 'misconduct' which had not been sufficiently "robustly addressed" by therapy via the internet, the appellant's "very little experience" of parenting children in particular as a single full-time carer and, in any event, the children's move to the USA, when they are currently settled in the care of the maternal family, was not indicative that their welfare would be better served by moving to the USA with the appellant.

60. Consequently, we accept that it is in the best interests of the three children to maintain contact with the appellant. We also accept that it is not in the best interests of the children to move to the USA and, in the light of the evidence before us, there is no realistic prospect that a court would permit that based on the evidence available to us. We also accept that the present position is that the three children cannot leave the UK in order to accompany or join the appellant in the USA. The evidence, which we accept, leads us to conclude that the appellant is unlikely to obtain an order from the Family Court to achieve that end.

61. In reaching a finding on whether it would be "reasonable" to expect the three children to leave the UK, we take account of that reality. We also take into account that the children are British Citizens and currently enjoy a stable environment with their maternal grandparents (A1 and A2) and with a foster family (A3). We note that the Family Court may be asked to place A3 with his siblings or seek to place him with a view to adoption. In either event, A3's future depends upon the Family Court's assessment of his "best interests" in the UK. We accept that if the appellant were permitted to take the children to the USA, relatively speaking their environment would become unstable by contrast to their position in the UK.

62. We must, in addition, have regard to the public interest in making our evaluation of whether it would be "reasonable" to expect them to leave the UK as MA (Pakistan) mandates. In that case, the Court of Appeal recognised that a child's "best interests" did not dictate whether it would be "reasonable" for them to leave the UK (see [47]). Further, whilst the determination of a child's "best interests" did not permit consideration of the "conduct and immigration history of the parents" ([47]), as part of the public interest those matters were relevant in determining the question of "reasonableness". However, the fact that a child was a "qualifying child" (in that he or she had been in the UK for seven years, *a fortiori* a British

Citizen) was the starting point that "leave should be granted unless there are powerful reasons to the contrary" (see [49]).

63. What then is the public interest relied upon by the Secretary of State in this appeal? First, of course, the appellant has been an overstayer since his visit visa expired on 15 April 2014. He only sought to regularise his stay in the UK after he was served with a notice of removal and detained in November 2014.

64. Secondly, Mr Kotas relied upon the appellant's admitted misconduct in 2012 in the USA. This misconduct involved sexual activity with young girls via the internet. Judge Loughridge dealt with the appellant's conduct, in the context of the suitability requirement in the Immigration Rules, as follows at paras 38-39:

> "38. It is important not to lose sight of the seriousness what the Appellant has done, notwithstanding that the conduct in question was back in 2012 and he has now shown remorse. HHJ Horton has referred to "sexual activity conducted via the internet with underage girls" and goes on to say that the Appellant "to his credit, has admitted to such activity". His admission in his witness statements in these proceedings actually falls slightly short of saying that he knew, at the time of initiating online sexual activities, that any of the other participates were underage. Specifically, his admission is that one of the girls, who was actually 12/13 years old, said in her profile that she was 17 and only told him her true age once online sexual activity had already started. However, what is clear is that the Appellant was reckless, and he acknowledges that he should have made sure that none of the girls he contacted and engaged with in sexual activities was underage. There is sometimes a thin line between recklessness and intent, and in my view in the context of S-LTR.1.6. it makes little if any difference which side of the line the Appellant falls.
>
> 39. There is scant jurisprudence on S-LTR.1.6. Mr Hodgetts submits that the Respondent's policies direct decision-makers to a Criminality Guidance document, and appear to suggest that what is needed must involve criminality. I am not convinced that this necessarily helps the Appellant because his admitted conduct can readily be said to involve criminality, even though he has never been formally charged or convicted. …. The fact that HHJ Horton has commented "there is a suggestion that [the Appellant] has sought to draw back from [his] admissions and to minimise his responsibility for his actions", and "there is a sexual risk to be addressed" causes concern, as do references to the Appellant's impulsive behaviour, which is clearly ongoing rather than merely historic. I accept Mr Hodgetts' submission that the sexual risk is low but the fact is that the Appellant's presence in the UK gives rise to a risk to underage girls in this country."

65. It would appear, and the contrary was not suggested before us, that the appellant was dishonourably discharged from the US Military as a result of his conduct.

66. As regards to the current position, we were shown an email forwarded by the UK police and from a Military Justice attorney in the Office of the Staff Judge Advocate's Office in Ft Bragg. That email appears to acknowledge

that there is an ongoing investigation by the civilian police in relation to the appellant's conduct including an exploitation case and the possession and possibly production and distribution of child pornography. It is not clear to us that this undated email is contemporaneous. It refers in the final substantive paragraph to the appellant going "AWOL … over a year ago". As Mr Hodgetts submitted, the appellant went AWOL in 2013. Whilst, of course, that is "over a year ago" the context might suggest that the writer meant by the phrase "over a year ago" that it had happened "just over a year ago" and that the email was written just over a year after the appellant went AWOL. That would date the email as some time in 2014 and it would not, therefore, be contemporaneous. We see some force in Mr Hodgett's submission. We were not provided with any further material which would allow us to date the email from the Office of the Staff Judge Advocate. We note that Judge Loughridge (at [41]) doubted whether, as a consequence of the appellant being allowed to leave the USA without difficulties in October 2013, the appellant was of interest to the civilian authorities in the USA. On the basis of the evidence before us we are unable to find that there is any ongoing criminal investigation or otherwise into the appellant's 2012 conduct in the USA.

67. However, the appellant's past conduct remains and it involved serious misconduct which, as Judge Loughridge found in para 39 and which was not gainsaid by Mr Hodgetts, was serious criminal activity involving at least one underage girl.

68. Judge Loughridge found that the appellant's risk of re-offending, and therefore risk to underage girls in the UK, was "low". Mr Hodgetts prayed in aid the appellant's therapy sessions with Dr Smith. These are on-going. HHJ Horton noted that for the appellant there "is a sexual risk to be addressed and, in particular, the emotional issues that are raised and which need looking at by him" (see para 30 of the judgment). Dr Smith's letter dated 21 February 2017 (at pages 59-60, UT2) identifies that the therapy is on-going and does not "include an assessment of risk". It notes that the appellant is committed to the process and "can be critically insightful" and offered goals for the future "focusing on abuse issues in relationships and how to meet emotional, relational and sexual needs in pro-social ways." As we already noted, in his letter of 28 April 2017, Dr Smith notes that, having previously ended, a further two one hour sessions in March and April have taken place.

69. Whilst we acknowledge the appellant's on-going therapy, it is self-evident that that therapy has not been completed and there is no evidential basis for us to reach any different conclusion. Mr Hodgetts did not invite us to do so. We note the reservation made in the letter dated 27 April 2017 from a solicitor in the local authority Child Protection Team, no doubt based upon his 38 years' experience in family law, that:

> "It is understood that he has undertaken some internet counselling which the Local Authority does not consider to be adequate, robust or challenging to address [the appellant's] issues. The internet is [the appellant's] chosen

> 'modus operandi' for his offending, and in which he is skilled at presenting a persona whilst concealing his true intent."

70. Taking into account all the evidence, we are satisfied that the appellant continues to represent a "low" risk of re-offending. However, whilst low, the consequences of any re-offending would be very serious exposing potentially underage girls to sexual exploitation on the internet. The public interest reflected in the seriousness of the past offending and the risk of future offending is no less in this case than it would be if the appellant were facing deportation. We accept, however, that the threshold for satisfying the "reasonableness" test in s.117B(6) is lower than that of "undue harshness" in s.117C(5) of the NIA Act 2002.

71. Carrying out the balancing exercise, we have regard to all the circumstances we have set out above both in relation to the appellant and A1, A2 and A3 and the public interest. Taking them all into account, we have reached the conclusion that the public interest outweighs the personal circumstances of the appellant and the children such that it is not established that it would be "not reasonable to expect" the children to leave the UK.

72. Having reached that finding, we reject Mr Hodgetts submission that the appellant succeeds in establishing a breach of Art 8 by virtue of the application of s.117B(6) of the NIA Act 2002.

73. Taking the circumstances as a whole, as we have set out above, the appellant's removal is proportionate having regard to all the circumstances. We bear in mind the "best interests" of the three children and the public interest in effective immigration control and in the prevention of crime and disorder which is engaged in this case because of the appellant's 'misconduct'. We bear in mind that, as HHJ Horton noted in his judgment, if the appellant were removed then appropriate indirect contact could be maintained from the USA via the internet. We note the judge's comments concerning the importance of direct contact to maintain the current relationship between the appellant and his children and, potentially, the need for more if those relationships are to develop (see paras [40] and [42]). Such contact may not be excluded for ever as the children grown up. We give primary consideration to those interests whilst acknowledging that some contact, albeit indirect, can be maintained from the USA as envisaged by the judge. Nevertheless, the impact upon the children and the appellant which will result if he is removed to the USA is outweighed by the public interests reflected in the appellant's serious misconduct and future risk, albeit "low", of re-offending in the UK but which would result in serious offending against underage girls in the UK. We are not satisfied that there are any "compelling" circumstances that produce an <u>unjustifiably</u> harsh consequence so as to outweigh the public interest.

74. For these reasons, we reject the appellant's primary case that his removal to the USA would breach Art 8 of the ECHR.

75. Mr Hodgetts alternative position was that it would a breach Art 8 to remove the appellant in the short-term because he has made an application to the Family Court for custody of his three children and his removal would prevent his involvement in those proceedings.

76. The relevant case law is contained within the appellant's authorities bundle before the First-tier Tribunal. It begins with the Court of Appeal's decision in MS (Ivory Coast) v SSHD [2007] EWCA Civ 133, then RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 (IAC), Mohan v SSHD [2012] EWCA Civ 1363 and concluding with Mohammed (Family Court Proceedings – Outcome) [2014] UKUT 00419 (IAC). The correct approach was set out by the Upper Tribunal consisting of McFarlane LJ, Blake J and UTJ Martin in RS (which was subsequently approved by the Court of Appeal in Mohan). The head note in RS summarises the position as follows:

> "1. Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider:
>
> i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
>
> ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child?
>
> iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?
>
> 2. In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?
>
> 3. Having considered these matters the judge will then have to decide:
>
> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
>
> ii) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision on MS (Ivory Coast) [2007] EWCA Civ 133?
>
> iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family

> proceedings is the maintenance of family contact between him or her and a child resident here?"

77. We answer the points in Q1 as follows:

1(i) The outcome of the contemplated family proceedings is not likely to be material to the immigration decision. The best interests of the children are not, in truth, a matter of dispute before us. On the evidence before us, there is no realistic prospect that the appellant will attain anything other than access to his children in the family proceedings. There is no prospect of the children going with him to the USA. The position is therefore likely to remain as at present or there is the possibility of A3 being subject to adoption and the consequent loss of any access by the appellant.

1(ii) Consequently, on the basis of the public interest we have already identified earlier, the public interest in his removal is compelling irrespective of the outcome of those proceedings.

1(iii) It was not suggested before us that the appellant has commenced family proceedings in order to delay or frustrate his removal or not to promote his children's welfare.

78. Turning to Q3, in Mohammed at [22] the Upper Tribunal stated that:

> "The guidance is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation."

79. In resolving that issue, we bear in mind what has been said on behalf of the local social services in the letter of 27 April 2017. We also take account of a record of a meeting of the local authority dated 28 March 2017 (at pages 1-4, UT2). Whilst it is unlikely that any decision in the family proceedings will materially enhance the appellant's relationship with his children, there is the prospect that an adoption order may be sought in relation to A3 by the local authority. That we were told by Mr Hodgetts would be opposed by the grandparents and by the appellant. It is not clear to us whether this possibility would form part of the proceedings begun by the appellant. The report of the meeting of the local authority notes that the plan in relation to A3 was "somewhat vague in its description and detail". It is far from clear to us that this option is being actively pursued by the local authority and would form part of the proceedings begun by the appellant seeking custody. We were not provided with any further information concerning the appellant's application which we were told had been made on 26 April 2017 other than a copy of the application is at pages 17-54 of the UT2. Given the limited information that we have before us concerning a potential adoption plan for A3 being pursued by the local authority, and bearing in mind that the family proceeding begun by the appellant are unlikely to result in a decision which would have any impact upon the decision to remove the

appellant, we have concluded that the appellant's removal would not breach Art 8 on the alternate basis put forward by Mr Hodgetts.

80. We would add that Mr Hodgetts did not invite us to adjourn our proceeding pending resolution of the family proceedings.

Decision

81. For the reasons set out in our earlier decision promulgated on 10 March 2017, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.

82. We remake the decision dismissing the appellant's appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 1 June 2017

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appellant's appeal, no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 1 June 2017