Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11344/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2018	**On 4 May 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE CANAVAN

Between

J E
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms U Dirie, instructed by G Singh, Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. We do so on the basis that the case involved children in the UK. A failure to comply with this direction could lead to Contempt of Court Proceedings.

Introduction

2. The appellant is a citizen of Nigeria who was born on [ ] 1981. He arrived in the United Kingdom on 26 March 2004. He did so illegally with the help of an agent. On three occasions, the appellant has made applications for an EEA residence card on the basis of his relationship with his brother who is an EEA national, namely on 28 September 2008, 26 March 2010 and 10 November 2010. Each of those applications has been refused.

3. On 11 February 2015, the appellant was served with a 'method of entry' request. He made no return.

4. On 13 July 2015, the appellant was served with a notice that he was liable to be removed as an illegal entrant.

5. On 14 January 2016, the appellant made an application for leave to remain on the basis of his relationship with his partner ("Ms O") and her son ("C1") who is a British citizen.

6. On 13 April 2016, the Secretary of State refused the appellant's application for leave. The reasons were as follows.

7. First, although it was accepted that the appellant was cohabiting with Ms O, the Secretary of State was not satisfied that they had been doing so for the required two years in order for him to qualify as a 'partner' for the purposes of the 'partner' provisions in Appendix FM of the Immigration Rules (HC 395 as amended).

8. Secondly, the Secretary of State was not satisfied that the appellant was a 'parent' in respect of C1 for the purpose of the 'parent' provisions in Appendix FM.

9. Thirdly, the Secretary of State was not satisfied that the appellant met the requirements of the 'private life' Rules in paragraph 276ADE(1), in particular para 276ADE(1)(vi) in that it had not been established that there were "very significant obstacles" to the appellant's integration into Nigeria if he returned.

10. Finally, the Secretary of State was not satisfied that there were exceptional or compelling reasons to justify the grant of leave outside the Rules under Art 8 of the ECHR.

The Appeal

11. The appellant appealed to the First-tier Tribunal. His appeal was dismissed by Judge Moore. First, the judge was not satisfied that the appellant met the requirements of paragraph 276ADE(1)(vi), namely that there were "very significant obstacles" to his integration in Nigeria. Secondly, the judge found that the appellant's removal would not breach Art 8 of the ECHR, in particular he could not rely upon s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") as it

was not established that it would not be reasonable to expect C1 (a British citizen) to leave the UK.

12. The appellant sought permission to appeal on the ground that the judge had misunderstood the meaning of "reasonableness" in s.117B(6) of the NIA Act 2002 because, applying the approach set out in Upper Tribunal's decision in Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 48 (IAC), it was not reasonable to expect a British citizen child (and the child's family) to leave the EU as a matter of European Law. Further, the respondent's own policy reflected that position save in the case of criminality or where a person had a "very poor immigration history" (see IDI, "*Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-year Routes*" (August 2015) at para 11.2.3. As a consequence, s.117B(6) of the NIA Act 2002 applied and so the public interest did not require the appellant's removal and the appeal should have been allowed under Art 8.

13. On 15 December 2017, the First-tier Tribunal (Judge J M Holmes) granted the appellant permission to appeal.

14. The respondent did not file a rule 24 notice.

The Judge's Decision

15. Before Judge Moore, the appellant relied upon para 276ADE(1)(vi) of the Immigration Rules and Art 8 of the ECHR.

16. As regards para 276ADE(vi), Judge Moore found that it had not been established that there were "very significant obstacles" to the appellant's integration on return to Nigeria and so he could not meet the requirements of para 276ADE(1)(vi) (see para 20 of the determination). That finding is not challenged before us and we need say no more about it.

17. Judge Moore then approached the appellant's appeal in three stages.

18. First, he considered whether the appellant, as the parent of an EU national child, had a right to reside in the UK under EU law. The basis for that right is found in the case law of the CJEU in Ruiz Zambrano (Case C-34/09) [2011] ECR I-1177 and Dereci (Case C-256/11) [2011] ECR I-11315.

19. Having set out some of the relevant law, including a helpful summary provided by Hickinbottom J (as he then was) in Sanneh v Secretary of State for Work and Pensions and another [2013] EWHC 793 (Admin), Judge Moore concluded at para 25 that the appellant could not establish an EU right to remain as C1 would not be compelled to leave the UK (and hence the EU) if the appellant were removed to Nigeria because he could live with his mother in the UK. The judge said this:

> "25. In the present case, if the Appellant is compelled to return to Nigeria (and therefore leave EU territory) [C1] will not be compelled to leave as well, because he has an ascendant relative (his mother) who (at present) has the right of residence in the EU,

and she can and will in practice care for him. Further, although compelling the Appellant to leave the UK would entail hardship and disruption for [Ms O], as she would have to make alternative childcare arrangements, I do not consider the consequences would be so severe as to compel her, and therefore [Ms O] (and [C1]), also to leave the UK. Requiring the Appellant to return to Nigeria is therefore not contrary to EU law because it will not infringe [C1's] right as an EU citizen to reside in the UK; his mother can choose whether to stay in the UK or return with the Appellant to Nigeria, she is not compelled to return to Nigeria and therefore neither is [C1]."

20. Secondly, having reached that conclusion, Judge Moore went on to consider Art 8 outside the Rules, in particular the issues of C1's best interests and the public interest issue in s.117B of the NIA Act 2002. At paras 26 to 34 the judge said this:

> "26. I turn now to the question of whether compelling, the Appellant to return to Nigeria would be contrary to Article 8 ECHR, notwithstanding the fact that I have found that such a decision is compatible with the Immigration Rules (and EU law).
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> 27. In this respect, I am required by section 55 of the Borders, Citizenship and Immigration Act 2009 to give primacy to the best interests of the two children in this case and I consider that their best interests would be served by the maintenance of the family unit, particularly in view of the conclusions I have reached regarding the Appellant's relationship with [C1] (see paragraph 36 below). However, there are no legal barriers to prevent the family unit as a whole returning to Nigeria, although it must be taken into account that the family are likely to be better off economically if they remain in the UK as must the fact that [C1] is British citizen and it is not in his best interests to forego the opportunity of growing up and being educated in the UK. This latter matter is addressed specifically below in the context of my consideration of section 117B(6) of the NIA Act 2002.
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> 28. Turning to that Act, section 117A requires that when considering the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2) I must have regard to the public interest considerations set out in section 117B.
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> 29. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. In this case it is to be noted that the Appellant has a very poor immigration history. He entered the UK unlawfully in 2004 and, prior to the application that is the subject of this appeal, made 4 unsuccessful attempts for an EEA residence card on the basis of alleged relationship with an EEA national. On 11 February 2015 he was served with an MOE request to which he did not respond.
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> 30. Section 117B(2) provides that this is in the public interest that persons who seek to enter or remain in the UK are able to speak English. I note that the Appellant is able to speak English, but also that this only is a neutral factor: **Rhuppiah v Secretary of**

State for the Home Department [2016] EWCA Civ 803 at paragraphs 58 – 61.

31. Section 117B(3) provides that it is in the public interest that persons who seek to enter or remain in the UK are financially independent. The Appellant is not financially independent because he is not working and stated in evidence that he has never worked since he came to the UK in 2004. At the present time he is being supported by [Ms O], however in view of his lack of work record or evidence of any skills that would assist him to gain employment, I regard his financial situation as precarious as it is entirely dependent upon the continuing support of [Ms O].

32. Section 117B(4) provides that little weight should be given to a private life or a relationship formed with a qualifying partner that is established when the person is in the UK unlawfully. Both the Appellant's private life and his relationship with [Ms O] were established when he was in the UK law unlawfully.

33. Section 117B(5), which provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious, does not apply.

34. In my judgment the application of the considerations listed in subsections 117B(1) – (4) weight the scales heavily against the Appellant for the purpose of the balancing exercise that must be conducted under Article 8(2) and I do not consider those considerations to be outweighed by the best interests of the children. This is despite the fact I recognise that the implications of the Appellant returning to Nigeria are detrimental for the children; either the Appellant returns to Nigeria on his own and the family is split, or the family return as a unit in which case [C1] is deprived of the benefit of growing up and being educated in the country of his citizenship. Nevertheless, I consider that the primary interest of the children is the maintenance of the family unit and that this remains achievable if the family so choose."

21. As will be clear, the judge found that it was in the best interests of C1 (and indeed his younger sister) to remain together as a family with the appellant and Ms O. Further, the judge found that it was not in C1's best interests as a British citizen to "forego the opportunity of growing up and being educated in the UK". Nevertheless, having considered the public interest issues set out in s.117B(1)–(5) of the NIA Act 2002, he concluded that the best interests of C1 (and his sibling) did not outweigh the public interest despite the detrimental implication for them if the appellant returned to Nigeria alone, or as part of a family unit.

22. Thirdly, the judge turned to s.117B(6) of the NIA Act 2002 which was principally relied upon before the judge by the appellant. Section 117B(6) provides as follows:

"(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."

23. Section 117B(6) sets out three requirements which, if met, have the effect that "the public interest does not require the person's removal". The three requirements of s.117B(6), therefore, are:

(1) the person is not liable to deportation;

(2) the person has a "genuine and subsisting parental relationship with a qualifying child"; and

(3) it would "not be reasonable to expect the child to leave the United Kingdom".

24. There was no issue before the judge in relation to whether or not the appellant was "not liable to deportation": he clearly was not so liable.

25. At para 36, Judge Moore found that the appellant had a "genuine and subsisting parental relationship" with C1 who, as a British citizen, was a "qualifying child" as follows:

> "36. The first question posed by section 117B(6) is a question of fact, namely whether the Appellant has a genuine and subsisting parental relationship with [C1] for the purpose of section 117B(6)(a). According to the evidence of the Appellant and [Ms O], the Appellant has lived with [C1] since 14 February 2015, he cares for him on a daily basis, taking him to nursery, playing with him and feeding him, and has sole custody of him when [Ms O] is at work. Further, [C1's] biological father has extremely limited contact with [C1]. Although that evidence was not subject to cross-examination (because no Home Office Presenting Officer attended the hearing) I found it credible and consistent and I find that, having regard to paragraph 11.2.1. of the Immigration Directorate Instructions (August 2015) the Appellant does have a genuine and subsisting parental relationship with [C1]."

That finding was not challenged before us.

26. Then, at paras 37–40, Judge Moore considered the third requirement under s.117B(6), namely whether it would be reasonable to expect C1 to leave the UK.

27. First, Judge Moore concluded at para 37 that s.117B(6) had "no application" to the case as it only applied where the effect of the decision would "necessitate the qualifying child in question also having to leave the UK". The judge said this:

> "37. The next issue is whether it would be reasonable to expect [C1] to leave the UK, given that he is a British citizen, for the purposes of section 117B(6)(b). In this respect it is notable that section 117B(6)(b) appears to be drafted on the assumption that the removal of the person seeking to rely on this provision (in this case the Appellant) would necessitate the qualifying child in question also having to leave the UK. In this case this assumption

is not correct, since if the Appellant is removed to Nigeria, [C1] could stay in the UK with his mother. I therefore consider that section 117B(6)(b) has no application in this case."

28. Nevertheless, at paras 38–40, the judge went on to consider the application of s.117B(6) on the assumption that it was applicable. He concluded that, in all the circumstances, it would be reasonable to expect C1 to leave the UK and go to Nigeria as part of the family unit. The judge said this:

> "38. However, if I am wrong about this and section 117B(6) does apply, the only circumstances in which the question of whether it is reasonable to expect [C1] to leave the UK becomes relevant are those in which [Ms O] choses to return to Nigeria with the Appellant, and therefore the question of reasonableness has to be assessed in that context. This means that the scenario being envisaged is one in which all four family members return to Nigeria, so that [C1's] family unit would not be split up and he would not be deprived of either adult who care for him on a daily basis. It is true that such a move would reduce the opportunity he has for contact with his biological father, however the finding of fact which I was invited to make, and have made, is that [C1] enjoys extremely limited contact with his biological father, who has married and 'moved on' with his life, while the Appellant has stepped into his shoes. Further it is clear that [C1's] extended family, his grandparents and the majority of his aunts and uncles (and presumably cousins) are also in Nigeria. As regards [C1's] financial security there is no good reason to think that his mother and 'step-father' would not be able to provide him with a reasonable standard of living in Nigeria; his mother, in particular, is returning with the benefit of (*sic*) Master's Degree in Business Administration and this qualification should help her to secure employment. Further, while the move would entail significant disruption for [C1], he is still young, and has not yet started 'proper' school, and therefore it is likely that with the benefit of his family around him he would assimilate to his new surroundings relatively quickly.
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> 39. It is true, however, that [C1] would not have been able to exercise his rights as a British citizen while growing up, and Baroness Hale stressed in **ZH (Tanzania)** at paragraph 32 that this fact should not be played down. However, she also stated that at paragraph 30 that it is not a 'trump card', and I note that section 117B(6) is drafted on that same understanding, since otherwise subsection 117B(6)(b) would be superfluous.
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> 40. In this case I find that it would be reasonable to expect [C1] to leave the UK, despite the fact he is a British citizen because the circumstances which bear directly on his interests, as set out in paragraph 38 above, suggest that the impact upon him of returning to Nigeria is very much at the lower end of the scale of such cases."

29. Then, in para 41 the judge concluded that the appellant's removal to Nigeria "would not be a disproportionate interference with the right to a

private and/or family life under Article 8(2) ECHR" and so he dismissed the appeal.

Summary of the Parties' Submissions

30. Ms Dirie, who represented the appellant, submitted in essence that the judge had wrongly failed to apply the approach set out in Sanade and in the Secretary of State's own IDI, namely that it was not reasonable to expect a British citizen child to leave the UK. In the absence of "criminality" or a "very poor immigration history", she submitted that the judge erred in law in finding that C1 could be expected to leave the UK. The three requirements of s.117B(6) were met and consequently "the public interest" did not require the appellant's removal.

31. Ms Dirie relied upon the Upper Tribunal's decision in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC) that the judge ought to have taken into account the Secretary of State's guidance, even under the new appeal regime since the Immigration Act 2014, and should have allowed the appellant's appeal. She submitted that s.117B(6) was determinative of the appellant's appeal under Art 8.

32. Ms Fijiwala, who represented the Secretary of State, submitted that the judge had correctly applied s.117B(6) and EU law.

33. She submitted that the Court of Appeal in VM (Jamaica) v SSHD [2017] EWCA Civ 255 had demonstrated that the concession made by the Secretary of State in Sanade had been wrongly made. The judge had correctly applied EU law such that the appellant had no EU right to reside because the effect of his removal would not result in C1 being forced to leave the UK (and hence the EU). He could remain in the UK cared for by his mother. In VM (Jamaica), Ms Fijiwala submitted, the Court of Appeal had made it plain that, in those circumstances, it was proper to consider for the purposes of Art 8 whether the family unit (including C1) could be expected to leave the UK by accompanying the appellant to Nigeria.

34. As regards SF and others, Ms Fijiwala submitted that that case, on its facts, was not one where the British citizen child of the appellant had an alternative carer in the UK if the appellant were removed. Ms Fijiwala submitted that the most recent "*IDI (Family Migration: Appendix FM Section.10b: Family Life as a Partner or Parent) and Private Life: 10-year Routes*" (22 February 2018) made clear that the approach in Sanade, based upon a concession by the Secretary of State in that case, had been wrongly made. The issue of "reasonableness" was not resolved merely by the fact that the child was a British citizen.

35. Ms Fijiwala accepted, however, that in para 38 the judge had only considered the impact of the appellant's removal on C1 on the basis that the family would accompany him to Nigeria. She accepted that he had failed to consider any impact upon C1 if the family were split and, in particular, whether the effect of that would result in "unjustifiably harsh

consequences". Although Ms Fijiwala accepted that the judge had, at least in part, considered the public interest in his decision, he had not done so in the context of a potential split in the family.

Discussion

36. We deal first with whether the judge materially erred in law in reaching his decision in respect of Art 8.

Error of Law

37. The appellant's case before the judge was founded under Art 8 of the ECHR. Nevertheless, perhaps prompted by the decision in Sanade and others and the submissions made on behalf of the appellant, the judge dealt with the pure EU law issue of whether the appellant had a right to reside derived from EU law based upon his relationship with C1.

38. Put in that way, the appellant had to establish that the effect of his removal would "compel" C1 to leave the UK and, therefore, the EU (see Patel v SSHD [2017] EWCA Civ 2028). He could only derive an EU right in those circumstances. The judge was, therefore, correct in para 25 to find that the appellant could not establish an EU right as the effect of his removal would not compel C1 to leave the EU. He could, as the judge found, remain in the UK cared for by his mother. As a result of that finding, the judge concluded, in effect, that C1 would not be compelled to leave the EU but, if he did, it would be a matter of choice by his mother and the appellant.

39. Consequently, the appellant's case under Art 8, and in particular under s.117B(6), could not be based upon a "fixed point", namely that C1 would remain in the UK. In VM (Jamaica), albeit in the context of deportation, the Court of Appeal recognised that the case law of the CJEU (and domestic case law applying it) did not confer an EU right to remain in the UK (either for the child or the parent) where the family had a "choice" whether to accompany the appellant rather than as a compulsion (see [60] and also Patel at [72]–[73]).

40. At [64] in VM (Jamaica), Sales LJ (with whom Arden LJ agreed) said this:

> "It follows that the presence of the children in the UK does not, as a result of the operation of EU law, have to be treated as a fixed point for the purpose of proportionality analysis under Article 8. It was legitimate for the FTT in the 2015 FTT decision to consider for the purposes of its Article 8 proportionality analysis whether the family unit could be expected to take the option, which EU law allows the Secretary of State to present to KB and the family, of relocating to Jamaica with VM."

41. Consequently, we reject Ms Dirie's submission that the judge erred in law by considering the issue of whether it was "reasonable to expect" C1 to leave the UK. The appellant's removal would not breach, on the judge's

finding at para 25, his right to reside in the UK and the appellant could derive no EU right through C1.

42. Further, in assessing proportionality, and in particular in applying s.117B(6), the judge was not precluded from considering whether it was reasonable to expect C1 to leave the UK despite the fact that C1 is a British citizen. Although what was said in VM (Jamaica) was said in the context of deportation, it has more general application to any Art 8 case and nothing said by the Court of Appeal justifies its restriction to the deportation context.

43. However, of course, what was said by the judge in para 38 of his determination in respect of s.117B(6) was said notwithstanding his view, expressed in para 37, that s.117B(6) had "no application" because it was "drafted on the assumption that the removal of the person seeking to rely on this provision … would necessitate the qualifying child in question also having to leave the UK."

44. That view, in our judgment, is untenable. First, that appears to reflect the Zambrano issue. Section 117B(6) is not confined to such (EU) cases. That is self-evident from the fact that it can apply to a child who is not a British citizen, but has lived in the UK at least 7 years, to which EU law provides no assistance. Secondly, and self-evidently in our view, s.117B(6) is applicable precisely in the circumstances where there is a choice as to whether the child will leave the UK if the individual concerned is removed. Section 117B(6) is engaged, in our judgment, whether the child will or will not in fact or practice leave the UK. It addresses the normative question – should he be "expected" to do so. That issue looks to the best interests of the child (together with all the circumstances) but also requires the public interest to be balanced against the impact upon the child (see R (MA (Pakistan) and others) v SSHD [2016] EWCA Civ 705 and AM(Pakistan) and others v SSHD [2017] EWCA Civ 180). It is a statutory 'microcosm' of the proportionality assessment under Art 8 but which, it is accepted by the case law, when resolved in an individual's favour is determinative of the issue of proportionality (see MA (Pakistan) at [17]; AM(Pakistan) at [20] and Rhuppiah v SSHD [2016] EWCA Civ 803 at [51]).

45. We were referred to the relevant IDI in force at the time of the decision and appeal "*Family Migration: Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*" (August 2015). It bears a little analysis and consideration of context. It is, of course, guidance or policy in respect of the relevant routes for 'partners' and 'parents' under Appendix FM of the Rules where, for example, para EX.1 is engaged. That applies, inter alia, where there is a "genuine and subsiding parental relationship" with child who is a British citizen or who has continuously lived in the UK for at least 7 years and

> "taking into account their best interest as a primary consideration, *it would not be reasonable to expect the child to leave the UK*" (emphasis added).

46. The same wording is found in the 'private life' provisions in para 276ADE(1)(iv) other Rules. The language of both mirror that in s.117B(6). Appendix FM (in respect of family life) and para 276ADE (in respect of private life) are intended to reflect how the balance will be struck between the right to respect for private and family life and the public interest under Art 8.2 (see, e.g. para GEN.1.1 of Appendix FM). That is also the task of Part 5A of the NIA Act 2002 (see the specific reference in para GEN.1.1). It was common ground before us, perhaps not surprisingly, that the guidance reflected the respondent's policy to the application of s.117B(6) of the NIA Act 2002.

47. Paragraph 11.2.3 of the guidance states:

> "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 the British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano."

48. That passage is, entirely consistent with the legal position since it is only concerned with a decision where the child will be forced to leave the EU. It is a statement of EU law.

49. The guidance goes on to state:

> "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 without parent or primary carer."

50. Ms Dirie placed some reliance upon this wording. However, it is readily apparent to us that is also only concerned with the case where the parent has, in effect, a Zambrano claim because the child would be forced to leave the EU because the "parent" or "primary carer" would be leaving the EU. In other words, the guidance thus far set out is simply reflecting an EU law analysis albeit, in the latter context, reading across the effect of the appellant having an EU law right to remain as leading to a conclusion that it would be "unreasonable" to expect the child to leave the UK.

51. The guidance then goes on to state:

> "It may, however, 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 primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover, amongst others:
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> - criminality falling below the threshold set out in paragraph 398 of the Immigration Rules;

- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

52. Here, the guidance moves beyond an EU law analysis. As is plain on its face, the situation contemplated can only arise where the child "could otherwise stay with another parent or alternative primary carer in the UK or in the EU". In that context, no Zambrano right can be derived by the individual as the child would not be forced to leave the EU. The context is, nevertheless, of a British citizen child and the guidance contemplates a refusal of leave to an individual, in those circumstances, where inter alia the individual has a level of "criminality" albeit falling short of that set out in paragraph 398 of the Rules or a "very poor immigration history".

53. We accept the submission that the guidance sets out the Secretary of State's position, in effect, when determining whether it would be "reasonable to expect" a British citizen child to leave the UK, and also when that child's best interests (including those seen through the lens of British citizenship) may be outweighed, such that a parent cannot rely upon s.117B(6) to establish a breach of Art 8.

54. The importance of a child's British citizenship was emphasised by the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4. The Supreme Court, acknowledging that citizenship carried with it both a right of abode and a range of other benefits and advantages, stated that this was likely to mean that it was not in such a child's 'best interests' to leave the UK. That was a powerful factor in the assessment of 'proportionality' under Art 8 although it was not a 'trump card'.

55. At [31] Lady Hale said this:

> "They are British children; 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; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well."

56. Then at [32], Lady Hale emphasised the importance that should be given to a child's British citizenship:

> "Nor should the intrinsic importance of citizenship be played down. 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. They will have lost all this when they come back as adults."

57. Nevertheless, Lady Hale accepted (at [30]) that in assessing proportionality:

> Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.

58. In similar vein, Lord Hope (at [41]) said this:

> "It was submitted that the fact that the children were British citizens who had never been to Tanzania trumped all other considerations: para 16. That was, as the [Court of Appeal] recognised, to press the point too far. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Lady Hale has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood."

59. Finally, Lord Kerr reflected the same approach to the importance of British citizenship in his judgement at [47]:

> "The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted."

60. Whilst the views expressed in the Supreme Court were not said in the context of s.117B(6) – which had yet to be enacted – they are, in our judgment, of great importance when considering whether it is "reasonable to expect a child to leave the UK" under s.117B(6). There is no suggestion that Part 5A of the NIA Act 2002 (in particular s.117B(6)) seeks to depart from a lawful assessment of Art 8 as previously understood (see MA(Pakistan)). And, further, the importance of a child's British citizenship is reflected in the respondent's own guidance we have set out above. The weight to be given to a child's 'best interests' including their citizenship is only to be outweighed by a parent's 'criminality' or a 'very poor

immigration history'. That, as we shall see is replicated in the respondent's most recent guidance (see below paras 67 and 68). It goes beyond the "strong reasons" that are required to outweigh a child's 'best interests' when applying s.117B(6) to a 'qualifying child' who is not a British citizen but has been continuously resident in the UK for at least 7 years (see respondent's guidance at para 11.2.4 and MA(Pakistan) at [49] ("powerful reasons") in respect of such a child who has been resident for at least 7 years).

61. Applying that analysis to this appeal, we are satisfied that the judge erred in law in two respects.

62. First, the judge wrongly considered that s.117B(6) could not apply as C1 was not forced to leave the UK (see our analysis above, especially at paras 41-42).

63. Secondly, that error was material because in para 38 of his decision when considering s.117B(6), he failed to take into account fully all the circumstances and give proper weigh to the child's best interests, including his British citizenship. The judge premised his assessment on the basis that the family would travel as a unit to Nigeria. As a consequence, he focused upon the position C1 would find himself in with his family in Nigeria. Although he made reference in para 39 to the fact that if C1 went to Nigeria he would on be able to exercise his rights as a British citizen whilst growing up in the UK, in our judgment, he failed sufficiently to factor in the impact upon C1 in those circumstances. Although the judge made reference to the "detrimental" effect on the children of returning to Nigeria, and of C1 being deprived of the benefit of growing up and being educated in the UK, the judge did not give adequate weight, consistent with the approach in ZH(Tanzania), to his finding that he had previously made in paragraph 27 that it was "not in his best interests to forego the opportunity of growing up and being educated in the UK." He failed to give due weigh to the child's British citizenship.

64. Added to which, the respondent's IDI in effect recognised that the deprivation of the opportunity to a child of growing up in the UK as a result of his or her British citizenship was generally only outweighed in circumstances amongst others of "criminality" and "a very poor immigration history". That, of course, was the Secretary of State's policy. It was a relevant factor to assist the judge when applying s.117B(6) (see SF and others; and Hesham Ali v SSHD [2016] UKSC 60, e.g., at [15]-[17] and [46]).

65. In this appeal, apart from the appellant's illegal entry into the UK, there is no suggestion of any criminality. He has never been charged with any offence and, so far as we can see, no evidence of the circumstances of his entry were put before the judge and none were put before us. Perhaps more pertinently, in the absence of further evidence, whilst the appellant's immigration history may be characterised as "poor", we cannot see how the appellant's conduct can be described as giving rise to a "very poor

immigration history" simply by the fact of his illegal entry. The IDI refers to a person who "repeatedly and deliberately breached the Immigration Rules". That is a characterisation which could not properly be applied to the appellant, at least on the evidence in this appeal.

66. We understood Ms Fijiwala to accept that, if s.117B(6) did not apply then the judge had failed to consider the impact upon the appellant's child if he remained in the UK and, specifically, whether the 'split' between the appellant and his child would give rise to 'unjustifiably harsh consequences' (see our para 34 above). Strictly, this does not arise as we are persuaded that the judge's application of s.117B(6) was flawed and, of necessity, the decision must be remade.

67. For these reasons, the judge materially erred in law in dismissing the appellant's appeal under Art 8.

Re-making the Decision

68. At the hearing, we enquired of both representatives whether there was any reason why we should not remake the decision if we were satisfied that the judge erred in law. Both representatives indicated that we should do so and made no further submissions on the merits of the appeal.

69. As a consequence, no submission was made before us that the appellant did not fall within the guidance of August 2015 on the basis of "criminality" or on the basis of a "very poor immigration history".

70. We were referred to the most recent guidance, "*Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*" (22 February 2018). The relevant guidance in respect of whether it would be "reasonable to expect a child to leave the UK" is at pp.74-76 (7 years or more) and pp.76-77 (British citizen). As regards the latter, the guidance no longer refers to the Zambrano decision. It, nevertheless, contemplates the position where a British citizen child would be compelled to leave the UK in similar terms to the earlier guidance P.76):

> "Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply."

71. Further, it repeats, almost verbatim, the substance of the August 2015 guidance in respect of the circumstances which it is envisaged would justify a refusal to grant leave to a parent, where a British citizen child is involved (pp.76-77):

> "In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to

> public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which the grant of leave could undermine our immigration controls, for example the applicant has *committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules*." (our emphasis)

72. Again, this guidance is concerned with the relevant routes for a partner or parent under Appendix FM and not s.117B(6) of the NIA Act 2002 specifically. It was, however, not suggested before us that it did not represent the Secretary of State's policy in applying s.117B(6).

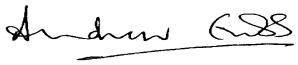
73. Whilst we acknowledge that the guidance is not expressed in exclusive terms, nevertheless the example given – like those in the earlier guidance – do not reflect the appellant's conduct in this case. And, as we have already said, it was not suggested otherwise before us. Whilst we bear in mind the judge's findings in paragraph 38, we also bear in mind his finding in paragraphs 27 and 34 that it was not in C1's best interests to forego the opportunity of growing up and being educated in the UK. C1's best interests and his British citizenship are potent factors in assessing whether it would be 'reasonable' to expect him to leave the UK. They are powerful factors which, drawing on the respondent's guidance, were not outweighed by any criminality or very poor immigration history. We acknowledge the public interest factors set out by the judge at paragraphs 28 to 34. In the absence of any argument to the contrary, we have found the guidance to assist us in determining the assessment of whether it would be "reasonable to expect" C1 to leave the UK (see SF and others at [12]). We give due weight to C1's best interests and nationality; and we also take into account the public interests, in particular the appellant's immigration history. In our judgment, there are insufficiently weighty counter factors to outweigh C1's best interests.

74. We are satisfied that it would not be reasonable to expect C1 to leave the UK and that the requirements of s.117B(6) are met. As a consequence, the public interest does not require the removal of the appellant. His removal would be a disproportionate interference with his art 8 rights and unlawful.

Decision

75. Thus, we conclude that the First-tier Tribunal materially erred in law. We set aside the decision and remake it allowing the appellant's appeal under Art 8 of the ECHR.

Signed



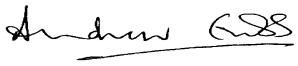
A Grubb
Judge of the Upper Tribunal

4 May 2018

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we make a fee award of any fee which has been paid or may be payable.

Signed



A Grubb
Judge of the Upper Tribunal

4 May 2018