Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31825/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd March 2018	**On 10th May 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MICHAEL OSAYEME ONARIASE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Youssefian, instructed by Fadiga & Co solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Grant promulgated on 4 April 2017, in which the Appellant's appeal against the decision to refuse his application for leave to remain private and family life grounds was dismissed.

2. The Appellant is a national of Nigeria, born on 19 April 1994, who claims to have arrived in the United Kingdom in March 2003 as a minor to join his parents. He was included as a dependent on his father's application for

indefinite leave to remain made on 20 April 2007 which was rejected shortly thereafter due to an incomplete form. A further application on 8 June 2007 including the Appellant as a dependent was rejected because there was no provision for dependents in the category applied for, and the appeals against that decision were ultimately dismissed. A similar application was made on 28 June 2008 which is also refused and again something similar made on 15 December 2009 was considered void. On 3 December 2009 the Appellant was notified of his liability to detention and removal and was in fact later detained under immigration powers on 24 October 2012 (and subsequently released).

3. On 21 January 2013, the Appellant raised the issue of having a UK born child to a British Citizen (born on 30 October 2010) in a mitigating circumstances interview and claimed to have been in relationship with the mother for six years (although the couple separated in February 2013). In addition to which there are a number of letters between 2012 and 2014 which together were considered as an application for further leave to remain on the basis of private and family life, which was refused by the Respondent on 24 July 2014.

4. The Respondent did not accept that the Appellant met the suitability requirements for leave to remain under Appendix FM of the Immigration Rules on the basis of 8 criminal convictions for 9 offences with a range of sentences. The convictions included robbery and physical violence. The Respondent considered that the Appellant continued to pose a serious risk to the community and his continued presence in the United Kingdom was not considered to be conducive to the public good. He did not therefore satisfy the suitability requirements for a grant of leave to remain under the Immigration Rules.

5. The Appellant was no longer in a relationship with his former partner such that he would not meet the requirements for leave to remain on that basis and as to his son, there was no evidence substantiating his claim to have ongoing contact with his son. The Respondent considered that his son's best interests were to remain in the United Kingdom with his mother. In relation to private life, it was accepted that the Appellant had been in the United Kingdom for approximately 11 years and had attended school here, but he had not had any lawful leave to remain since 2003 and could not be granted leave to remain under paragraph 276ADE of the Immigration Rules as he failed to meet the suitability requirements.

6. The Appellant's appeal against the refusal was initially allowed by First-tier Tribunal Judge Amin in a decision promulgated on 25 March 2015, but that was set aside by Upper Tribunal Judge Kamara on 19 August 2016 who remitted appeal back to the First-tier Tribunal for a de novo hearing.

7. Judge Grant then dismissed the appeal in a decision promulgated on 4 April 2017 on human rights grounds. Judge Grant firstly considered whether the Appellant could meet the suitability criteria in S-LTR.1.5 and 1.6 of Appendix FM of the Immigration Rules and found that he could not.

As such he could not rely on Appendix FM or paragraph 276ADE of the Immigration Rules for a grant of leave to remain within the rules. The case was therefore considered outside of the rules under Article 8 of the European Convention on Human Rights with primary consideration given to the best interests of the Appellant's son pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. The detail of this part of the decision is set out further below.

The appeal

8. The Appellant sought permission to appeal on three grounds, only the first of which was granted permission to appeal on 10 November 2017. The ground of appeal on which this case proceeds is that the First-tier Tribunal erred in law in its application of section 117B(6) of the Nationality, Immigration Act 2002 (the "2002 Act"), failing to apply this as a self-contained provision which, if satisfied, would lead to an appeal succeeding under Article 8 of the European Convention on Human Rights without more. In the present case the First-tier Tribunal found that section 117B(6) was satisfied and erred in going further to undertake a separate balancing exercise to determine the proportionality of removal under Article 8.

9. The Respondent filed a rule 24 notice in which she opposed the appeal on the basis that the First-tier Tribunal has directed itself appropriately and was entitled to factor in the public interest under section 117B(6) of the 2002 Act. It was further argued that any error of law was not material because on the facts there was never an expectation that the child in question leave the United Kingdom that she could remain here with her mother as primary carer. In addition, the Respondent sought to argue that the First-tier Tribunal failed to give adequate reasons for its findings that the Appellant is in a genuine and subsisting parental relationship with his son, failed to have regard cross examination of the Appellant and failed to give reasons or examples of the actual parental role played or responsibility for the child's upbringing. In these circumstances the Respondent submitted that on the scant evidence referred to by the First-tier Tribunal, it was not open to her to conclude as she did so that the appeal could not succeed under section 117B(6) of the 2002 Act in any event.

10. At the oral hearing, the Respondent continued to rely on the rule 24 notice as submitted but did not expand upon all of the points contained therein and there was some degree of agreement between the parties that this is a case where a material error of law should be found and the decision remade by the Upper Tribunal. The submissions of the parties focused on the application of section 117B(6) of the 2002 Act to the facts of the present appeal.

11. On behalf of the Appellant, it was acknowledged that the fact that a child was a British citizen was not a trump card under section 117B(6) of the 2002 Act but on the clear findings in this case that there is a genuine

parental relationship between the Appellant and his son, whose mother is primary carer and who is also a British citizen that it would in fact be unreasonable for this child to leave the United Kingdom. It was highlighted that in this case the decision was taken to refuse leave rather than any decision to deport such that section 117C of the 2002 Act did not apply. If it did, there would have been different consideration as to whether it would be unreasonable to separate the parent and child, but that is not the route the Respondent has taken.

12. Counsel for the Appellant also submitted that the Respondent's reliance on the fact that the Appellant's son was never expected to leave the United Kingdom was a circular argument. The reason why it was never expected that he left the United Kingdom with his father was simply because it would be unreasonable to expect him to do so.

13. The Home Office Presenting Officer relied on the wording in section 117B(6) of the 2002 Act and submitted that whether a person is expected to leave the United Kingdom had been part of that provision since the beginning, there had been no change of policy and it was necessary to consider whether or not in fact a child was expected to leave the United Kingdom and if not, that section could not be engaged.

Findings and reasons

14. To determine this appeal, it is necessary to set out in detail the process of reasoning and findings by the First-tier Tribunal. The consideration of Article 8 outside of the Immigration Rules begins at paragraph 43 of the decision. Having noted in paragraph 44 that it is settled law that it is in the best interests of a child to live with both parents, and when not possible, to live with one parent and have ongoing contact with the other; Judge Grant set out her conclusions in the relation to the best interests of the Appellant's son in paragraph 45 of the decision as follows:

> *"The appellant's son is the child of a British mother and is a British citizen. It would not be reasonable for the child to have to leave the United Kingdom to live with the appellant in Nigeria when he has lived for all of his young life with his mother who is his primary carer. I accept it is not in the child's best interest to be separated from his mother and wasn't in his best interests to be separated from his father which is the effect of removing the appellant to Nigeria. The child's best interests form a weighty consideration in the balancing exercise on proportionality."*

15. Judge Grant then went on to set out section 117B of the Nationality, Immigration and Asylum Act 2002 and considered each of the factors in turn. In relation to section 117B(6), it was confirmed that she had found the appellant to have a genuine and subsisting relationship with a qualifying child. Reference was then made to the Court of Appeal's decision in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 which held that that regard should be had to the conduct of the appellant and other matters relevant to the public interest

when considering the question of reasonableness under section 117B(6). The decision then continued as follows:

> *"50. Whilst it is not reasonable to expect the child to leave the United Kingdom there are other matters relevant to the public interest not least the appellant's offending, and his failure to meet the requirements of the Immigration Rules on suitability grounds.*
>
> *51. Having weighed the best interest of the child into the proportionality balancing exercise and having given consideration to the section 117B factors including specifically 117B(6) and having found it is not reasonable to expect the child to relocate to Nigeria, I find it is in the child's best interest to remain with his mother and half sibling, and continue to have contact with the appellant's family in the United Kingdom. I find that it is in the public interest for the appellant to be removed Nigeria. He is not a reformed character, he is a young man who has caused serious harm and has family in Nigeria including his brother Philip who can help him to adapt to life in his own country which he left aged 8. In balancing the factors in favour of the appellant and the best interests of his son with the countervailing public interest in removal, I find the balancing exercise on proportionality falls in favour of the respondent."*

16. I find the First-tier Tribunal's approach to the determination of the appeal on Article 8 grounds demonstrated from paragraph 43 onwards (as set out above) discloses a clear error of law. The First-tier Tribunal appears to have completely muddled up the concepts of best interests and whether it is reasonable for a qualifying child to leave the United Kingdom and what factors should be taken into account in that assessment under section 117B(6) of the 2002 Act, appearing to reach a conclusion on this point without taking into account material considerations as to the public interest but instead going on to take these into account separately in the balancing exercise under Article 8 of the European Convention on Human Rights. In so doing, in particular, the repeated statements that it would be unreasonable for the child to relocate to Nigeria in light of his best interests and having been raised by his mother since birth in United Kingdom erroneously jump to a conclusion on section 117B(6) without any consideration of the wider public interest matters at all, which Lord Justice Elias in MA (Pakistan) confirmed was required. However, when these factors are taken into account in the round together with the best interests of the child, the conclusion reached in favour of the Respondent is one which could have been reached following a lawful assessment of the application of section 117B(6) of the 2002 Act.

17. The structure of a sequential analysis in this way also fails specifically to recognise that section 117B(6) of the 2002 Act is a self-contained provision where the wider public interest consideration can only come into play via the concept of reasonableness within the section itself, see paragraph 20 of Lord Justice Elias's judgement in AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180.

18. However, despite the clear errors in structure of the First-tier Tribunal's decision, I find that Judge Grant has considered and made findings as to the best interests of the child and ultimately has considered relevant material and factors to determine the question of whether it is reasonable to expect him to leave the United Kingdom, albeit doing so under the wrong provision using the balancing exercise for the purposes of Article 8 of the European Convention on Human Rights, rather than within the concept of reasonableness in section 117B(6) of the 2002 Act itself as she should have done. The same factors considered by Judge Grant in the present appeal as part of the balancing exercise for Article 8 are as relevant to the analysis under section 117B(6) on the facts of this case and for the reasons set out in MA (Pakistan).

19. The facts found were essentially that the Appellant had a genuine and subsisting parental relationship with his son, based on regular and ongoing contact with him (the Appellant's claim was that he collected him from school once a week, saw him most weekends and at other times had telephone or FaceTime contact with him), the Appellant's son's best interests were, as is generally accepted, to maintain a direct relationship with both parents in the same country and remain in the primary care of his mother. The Appellant's son is a British citizen who has lived all of his life with his mother in United Kingdom such that it will not be in his best interests to leave and live with the Appellant in Nigeria. The last point was put on the basis of it being unreasonable for him to leave the United Kingdom, which in the circumstances of the structural errors in this decision, can lawfully be read as a matter of best interests, the point which was being considered at that time in paragraphs 44 and 45 decision (as opposed to any lawful assessment of the concept of reasonableness in section 117B(6) of the 2002 Act).

20. In terms of the assessment of whether it would be reasonable for the Appellant's son to leave the United Kingdom (albeit under the erroneous heading of a proportionality assessment Article 8) the relevant matters considered were the best interests of the child, as noted above as well as the wider factors. These included the public interest of the Appellant's removal because he is not a reformed character, he is young man who has caused serious harm (with fuller findings made on these points in relation to the Appellant's criminal history and the findings on his inability to meet the suitability criteria in the Immigration Rules) and who has family in Nigeria who can help him to adapt and reintegrate there. As confirmed in MA (Pakistan) those points are material to the assessment of reasonableness under section 117B(6) of the 2002 Act. That is not to say that the exercise required under section 117B(6) is the same as the assessment of proportionality under Article 8, just that on the facts of this appeal, the same material considerations applied to the assessment under both.

21. On the facts as found by the First-tier Tribunal, to which in the public interest of removal could also be added the Appellant's poor immigration history, a conclusion that the Appellant did not fall within section 117B(6)

of the 2002 Act, because it was not in all of the circumstances unreasonable to expect his son to leave the United Kingdom, was one which if made following the correct approach and under the right provision of section 117B(6), as opposed to under Article 8, was one which was open to the First-tier tribunal to make in this appeal for the reasons essentially given in paragraph 51 of the decision.

22. For these reasons, I find that although First-tier Tribunal erred in law in its approach to the structure of consideration of relevant material in this case, mistakenly analysing it under a broader proportionality assessment under Article 8 as opposed to within the self-contained provision in section 117B(6) of the 2002 Act, the correct factors were, on the facts of this case, taken into account and if analysed properly under section 117B(6) of the 2002 Act, the same conclusion (one which was open to the First-tier Tribunal on the facts) would have been reached under the correct provision. It is arguable that the error was not therefore material to the outcome of the appeal - if the Appellant did not fall within section 117B(6) it is not suggested that he could otherwise have succeeded under Article 8 more broadly. However, given the nature of the errors, I find that it is more appropriate to allow the appeal, set aside the decision of the First-tier Tribunal and substitute a decision dismissing the appeal on the correct legal basis as set out above and for the reasons already given. In summary, that even taking into account the Appellant's son's British citizenship and best interests to remain in the United Kingdom with his mother and to have direct contact with the Appellant, it is not unreasonable for him to leave the United Kingdom to maintain such direct contact in light of the Appellant's immigration and offending history, including that he has previously caused serious harm and was not found to be a reformed man.

23. In these circumstances it is not necessary to consider further the Respondent's contention in her rule 24 notice that there were inadequate reasons given for the finding that there was a genuine and subsisting parental relationship, nor to resolve the dispute about the meaning of 'expected' in section 117B(6) of the 2002.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and replace it with a decision dismissing the appeal on all grounds.

No anonymity direction is made.

Signed  Date: 25th April 2018

Upper Tribunal Judge Jackson