



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00666/2018

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 9<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 18<sup>th</sup> July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SAQIB [R]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss F Ramzan of Counsel instructed by Nationwide Law Associates

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant is a citizen of Pakistan born 23<sup>rd</sup> February 1972. He appeals against a decision of Judge Alis (the judge) of the First-tier Tribunal (the FTT) promulgated on 19<sup>th</sup> February 2018 following a hearing on 14<sup>th</sup> February 2018.

2. The Appellant entered the UK as a visitor with a visa valid until 14<sup>th</sup> August 2011. He claimed asylum on 28<sup>th</sup> June 2011. That application was refused on 22<sup>nd</sup> July 2011 and his subsequent appeal was dismissed on 7<sup>th</sup> October 2011.
3. The Appellant remained in the UK and made further submissions which were refused without a right of appeal. He lodged further submissions on 19<sup>th</sup> July 2017 making a human rights and international protection claim. This application was refused on 4<sup>th</sup> January 2018 and the Appellant appealed to the FTT.

### **The First-tier Tribunal Hearing**

4. At the hearing the Appellant clarified that he did not pursue his appeal on protection grounds, but argued that to remove him from the UK would breach Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). He relied specifically on section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) arguing that he has a genuine and subsisting relationship with his British son. The judge heard evidence from the Appellant, and found that the Appellant does have a son who is a British citizen who was 6 months old at the date of hearing. It was found that the Appellant did not live with the mother of his son, but a Child Arrangements Order had been made by the Family Court in Manchester on 11<sup>th</sup> December 2017. The judge accepted that the Appellant had family life with his son and that he had daily contact.
5. The judge found that the son's mother supported the Appellant's application to remain, and that it would be in the best interests of the child, as a British citizen, to remain in the UK. It was found that the Appellant is not the primary carer. The judge found at paragraph 22 that it would not be reasonable to ask the Appellant's son and his mother to leave the UK. The judge found that the Appellant had a "very poor immigration history" and concluded that immigration control is in the public interest, and on the facts of this case it would not be disproportionate to remove the Appellant from the UK. The appeal was therefore dismissed on human rights grounds.

### **The Application for Permission to Appeal**

6. The Appellant applied for permission to appeal. The grounds were prepared by solicitors who did not represent the Appellant before the FTT. They are somewhat repetitive, but in essence complain that the judge erred in considering section 117B(6). It was submitted that the judge had accepted that the Appellant had a subsisting relationship with his son, and that he had a court order confirming contact, and it was found that the best interests of the son would be to remain in the UK.
7. It was submitted that the judge had contradicted himself by finding that it would not be reasonable for the son to leave the UK, but had then dismissed the appeal, though it would seem that the judge had found that the requirements of section 117B(6) were satisfied.

## Permission to Appeal

8. Permission to appeal was granted by Judge Pedro in the following terms;
- “2. The grounds assert that the judge erred, inter alia, in misdirecting himself regarding the application of section 117B(6) of the 2002 Act.
  3. Wider public interest considerations may be taken into account in determining reasonableness but once it is considered to be unreasonable then section 117B(6) applies. Whilst the judge has concluded that the Respondent’s decision was proportionate [40] it is arguably unclear whether or not the judge concluded that it would be reasonable to require the Appellant’s child to leave the United Kingdom having accepted at [22] that it would not be reasonable to expect the Appellant’s child and mother to do so.
  4. The grounds disclose an arguable error of law capable of affecting the outcome.”

## The Upper Tribunal Hearing

9. Miss Ramzan relied upon the grounds contained within the application for permission to appeal. It was submitted that the Appellant’s immigration history could not be described as very poor. It was submitted that it was difficult to follow the decision of the FTT, in that a finding had been made at paragraph 22 that it would not be reasonable for the child to leave the UK, but the judge had then gone on to dismiss the appeal.
10. Mr Bates submitted that the judge may have erred in making the finding at paragraph 22 that it was not reasonable for the child to leave the UK, but this was not material. The judge had correctly considered the wider public interest, and was entitled to take the view that the child would not have to leave the UK. It was submitted that the judge was entitled to find that the Appellant had a very poor immigration history, which amounted to a powerful reason for not granting leave to a parent of a qualifying child, which was the test in MA (Pakistan) [2016] EWCA Civ 705.
11. I asked Mr Bates whether he had considered MT and ET Nigeria [2018] UKUT 00088 (IAC) in which it was found that the parent of a qualifying child with an immigration history similar to that of the Appellant, did not amount to powerful reasons for refusing leave to remain. Mr Bates’ response was that the conclusion on that issue by the President of the Upper Tribunal, was not the main reason why MT and ET was a reported decision. Mr Bates’ view was that the judge was entitled to find on the facts of this case that the Appellant had a very poor immigration history, which could amount to powerful reasons for refusing him leave to remain.
12. In response Miss Ramzan pointed out that the Appellant did not have any criminal convictions, and it could not be said that he had a very poor immigration history.
13. I indicated that I intended to reserve my decision to reflect upon the submissions in relation to error of law. Both representatives submitted that if an error of law was

found, which was material, the decision could be re-made on the basis of the evidence that had been before the FTT, and there would be no need for a further hearing.

### **My Conclusions and Reasons**

14. The decision of the FTT has been prepared with care, but I am persuaded that the judge erred in law in considering section 117B(6) for the following reasons.
15. I set out below section 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.”
16. It is not in dispute that the Appellant’s son is British. The judge found that the Appellant had established family life with his son, who was 6 months of age at the date of the FTT hearing.
17. The judge found, and it has not been disputed, that the Appellant was not the primary carer of the child, as the Appellant did not live with his son, and his son’s mother. It is the case that a Child Arrangements Order was made by the Family Court on 11<sup>th</sup> December 2017, and thereafter the judge found that the Appellant has daily contact with his son.
18. The findings made by the judge are contained at paragraphs 20 – 40 of his decision. The only issue before the judge was section 117B(6). At paragraph 22 the judge finds;

“22. I accept that it would not be reasonable to ask the Appellant’s child and mother to leave this country but whilst I accept the Appellant has a genuine and subsisting relationship with his son, and that is a significant factor to have regard to, it is nevertheless not the only factor.”
19. The judge then goes on consider the best interests of the Appellant’s son, which would normally be considered prior to making a decision as to whether it would be reasonable to expect a qualifying child to leave the UK. The judge at paragraph 26 finds that it would be in the best interests of the child as a British citizen to remain in the UK. At paragraph 27 the judge finds that the best interests assessment does not automatically resolve the reasonableness question, and that where a child’s best interest is to remain in the UK, it may still not be unreasonable to require either the child or the parent to leave. That finding cannot be faulted, but the judge has already made a finding that it would not be reasonable to expect the child to leave the UK.
20. At this point in the decision the judge has therefore found that the Appellant is not liable to deportation, he has a genuine and subsisting relationship with a qualifying child, it would be in the child’s best interests to remain in the UK, and it would not be

reasonable to expect the child to leave the UK. Therefore, the judge has found that the requirements of section 117B(6) are satisfied but then goes on to dismiss the appeal. This, in my view is an error of law.

21. Having found that it would not be reasonable for the child to leave the UK, the judge dismisses the appeal because the Appellant has a very poor immigration history. This should have been considered when deciding whether or not it would be reasonable to expect the child to leave the UK. With reference to the conclusion as to the Appellant's very poor immigration history, the judge did not have the benefit of the guidance in MT and ET which was published after the judge made his decision in this case.
22. I find the error of law to be material, and therefore set aside the decision of the FTT and proceed to re-make it.
23. The issue it is whether it is reasonable to expect the child to leave the UK. In considering this I follow the guidance in MA (Pakistan) [2016] EWCA Civ 705.
24. The Tribunal must not focus on the position of the child alone but must have regard to the wider public interest, including the immigration history of the parent. The fact that the child is British is a weighty consideration and was described in ZH (Tanzania) [2011] UKSC 4 as being of particular importance although not a trump card.
25. At paragraph 49 of MA (Pakistan) it is stated that when considering section 117B(6) in relation to a qualifying child, the fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons. First, because of its relevance to determining the nature and strength of the child's best interests, and second, because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary. I find that a child who is a qualifying child by reason of British citizenship, is analogous to a foreign national child who has accrued seven years' residence. I therefore find that the guidance in MA is that leave should be granted so that a British child can remain in the UK unless there are powerful reasons to the contrary.
26. In considering powerful reasons I take into account the guidance in MT and ET. At paragraph 34 the President of the Upper Tribunal found that the parent of a child who was seeking leave to remain had received a community sentence for a criminal offence of using a false document to obtain employment, and was described as abusing the immigration laws of the UK. The parent in that case had overstayed following entry clearance as a visitor, made a claim for asylum that was found to be false, and had then pursued various legal means of remaining in the UK. The behaviour of that parent was described as unlawful, but the immigration history was found to be not so bad as to constitute the kind of powerful reason that would render reasonable the removal of the child from the UK. The child in that case had accrued more than seven years' residence in the UK but was not a British citizen.
27. I also consider the Respondent's guidance on whether it is reasonable to expect a British child to leave the UK, in accordance with SF and Others (Albania) [2017] UKUT

00120 (IAC). This is not the guidance that was before the FTT, but is the updated guidance published on 22<sup>nd</sup> February 2018. That guidance indicates at page 73 that if departure of the parent or primary carer would not result in the child being required to leave the UK because the child will always be likely to remain living in the UK with another parent or primary carer, the question of whether it is reasonable to expect the child to leave the UK will not arise. I was not referred to caselaw on this point and I do not accept that I need not consider reasonableness, even if it is possible or likely that the child would remain in the UK if the parent had to leave. In my view in this case it is likely that the child would remain in the UK with his mother even if the Appellant had to leave. However, I find that the wording in section 117B(6) indicates that I must consider whether it would not be reasonable to expect the child to leave the United Kingdom. I therefore conclude that I must consider reasonableness.

28. The Respondent's guidance goes on at page 76 to indicate that where a child is a British citizen it would not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal unless the conduct of the parent or primary carer gives rise to public interest considerations of such weight as to justify their removal and the British citizen child could remain in the UK with another parent or alternative primary carer. The circumstances envisaged include an individual who has committed significant or persistent criminal offences falling below the threshold 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.
29. The Appellant does not have any criminal convictions. He is therefore in a more advantageous position than the parent considered in MT and ET. He is in a similar position to the parent in that case by having entered the UK as a visitor, and then having overstayed and made an asylum claim, which was dismissed. He is in a similar position having remained in the UK following the dismissal of his asylum claim and becoming appeal rights exhausted. Again, his history is similar in that he has made further attempts to remain in the UK by making applications for leave.
30. Having placed very significant weight upon the conclusion reached in MT and ET, I do not find that it can be said that the Appellant has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.
31. I therefore conclude that it would not be reasonable to expect the Appellant's British son to leave the UK and the appeal falls to be allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

No anonymity direction was made by the FTT. There has been no request made for anonymity to the Upper Tribunal and I see no need to make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

10<sup>th</sup> July 2018

**TO THE RESPONDENT  
FEE AWARD**

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal which was not before the initial decision maker.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

10<sup>th</sup> July 2018