



IAC-AH-DN-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/09902/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> August 2018**

**Decision & Reasons Promulgated  
On 03<sup>rd</sup> September 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**THARANGA [A]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Coleman instructed by S Satha & Company  
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of Judge Swinnerton made following a hearing at Hatton Cross on 9<sup>th</sup> February 2018.

**Background**

2. The appellant is a citizen of Sri Lanka born on 14<sup>th</sup> May 1976. He arrived in the UK in February 2005 and claimed asylum some twelve years later in March 2017. He was refused and his appeal came before Judge Swinnerton who dismissed his claim that he would be at risk on return to Sri Lanka.

3. He sought permission to appeal against that decision but permission was not granted, the Immigration Judge concluding that proper reasons had been given for finding inconsistencies in the appellant's account. The conclusion that he would not be at risk upon return was properly reasoned and sustainable.
4. However, the appellant also sought to argue that his removal would breach his Article 8 rights. He met his present partner in 2014 and they began living together in May 2015. They went through a religious ceremony in June 2017 and the judge accepted that the appellant was in a genuine relationship with his partner.
5. She has a daughter who is now 16. The judge said that he took into account the Section 55 duty to ensure that immigration decisions were made having regard to the need to safeguard and promote the welfare of children, and that it was generally in the best interests of children to have stability and continuity in their social situation and education. He accepted that the appellant was in a genuine parental relationship with J and that his removal would have a disruptive effect upon her life and family. However, a balance had to be struck between allowing the appellant to remain and the respondent's requirement to maintain effective immigration control, and in the circumstances of this case he decided that the balance of the argument lay with the respondent.
6. Permission to appeal was sought on the grounds that the judge had adopted a flawed approach to Section 117B(6) of the 2002 Act to which he did not refer.
7. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 27<sup>th</sup> June 2018 on that ground.

### **Consideration as to Whether There is a Material Error of Law**

8. Mr Walker accepted that the judge's failure to refer to or to apply Section 117B(6) amounted to an error of law such that the decision would have to be remade.
9. On the substance of the decision, he made no arguments and acknowledged, given the facts as found by the Immigration Judge, that the case law pointed to the appeal being allowed.

### **Findings and Conclusions**

10. Mr Coleman helpfully provided the latest Family Migration Appendix FM Section 1.0(b) family life as a partner or parent and private life: ten year route published by the Home Office on 22<sup>nd</sup> February 2018 together with the decisions in PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 and MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088.
11. Section 117B(6) reads:
  - “(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 UK.”

12. The sole issue here relates to reasonableness.
13. At paragraph 30 of the decision in MT and ET, the Tribunal considered the question of the best interests of the children in that case. The Tribunal said that both the age of the child and the amount of time spent by the child in the UK will be relevant in determining where the best interests lie.
14. At paragraph 33 they said:

“On the present state of the law as set out in MA we need to look for powerful reasons why a child who has been in the UK for over ten years should be removed.

In the present case there are no such powerful reasons. Of course, the public interest lies in removing a person such as MT who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Bird’s decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET’s case, MT’s conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the UK on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the UK. None of this is to be taken in any way as excusing or downplaying MT’s unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of powerful reason that would render reasonable the removal of ET to Nigeria.”

15. At paragraph 38 of the decision in PD, the Tribunal considered the same question. At paragraph 39 they said:

“We remind ourselves that the test to be applied is that of reasonableness. Although legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling factors – have no application in the exercise we are performing. Self-evidently the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned.”

16. The relevant Home Office policy, where the child is a British citizen is as follows:

“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 a 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. 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

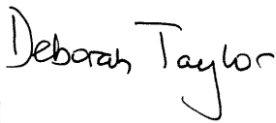
remain. The circumstances envisaged included those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”

17. The Tribunal in MT and ET found that significant overstaying, which is the case here, came nowhere near the kind of powerful reasons which would render reasonable the removal of the child to Nigeria.
18. In this case J is a British citizen who has spent all of her life in the UK. She is 16 and about to start her A level course. There is no challenge to the judge’s findings that she enjoys a genuine parental relationship with the appellant. In these circumstances it would clearly not be reasonable to expect her to leave the UK. Accordingly, the appellant is entitled to succeed.

**Notice of Decision**

19. The original judge erred in law. The decision is set aside but is remade as follows, the appellant’s appeal is allowed.

No anonymity direction is made.



Signed

Date 26 August 2018

Deputy Upper Tribunal Judge Taylor