Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06217/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 12 March 2019 **On 25 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

QAMAR [I]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Adewoye, Solicitor of Prime Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant a national of Pakistan has permission to challenge a decision of Judge Moore of the First-tier Tribunal sent on 30 November 2018 dismissing his appeal against a decision made by the respondent on 19 February 2018 to refuse leave to remain in the UK.

2. The appellant's grounds of appeal were in essence three in number. It was contended that the judge erred in: (1) concluding that paragraph

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322(1C) of the Immigration Rules applies to his case; (2) failing to properly consider the application of Section 117B(6) of the 2002 Act in relation to the appellant's relationship with his child who has been in the UK for more than seven years; and (3) failing to make a proper analysis of the appellant's application outside the Rules.

3. I am grateful to both parties' representatives for their concise submissions.

4. In relation to ground (1), it is clear that the judge did err in relation to paragraph 322(1C) of the Rules which is a general ground of refusal. This paragraph provides that "where the person is seeking indefinite leave to enter or remain: …" Since the appellant was not seeking indefinite leave to remain but discretionary leave at the relevant time, this paragraph had no application. The judge erred in following the respondent in considering that this general ground of refusal was applicable. However, I am not persuaded that this error had any material effect on the judge's subsequent assessment of the case. Turning to ground (2), the focus of this challenge is on paragraphs 32 and 33 of the judge's decision:

> "32. I am not satisfied that the requirements under Paragraph 276 ADE of the Rules have been met. Whilst the appellant's daughter has lived in the UK for at least 7 years, she would not be leaving the UK, since she would continue to live with her mother as her primary carer. I find it would be reasonable for the appellant to return to Pakistan, where he could continue to maintain contact through modern methods of communication or by letters or by occasional visits if the appellant's daughter so desired. I am also aware that the appellant was sentenced to 15 months imprisonment on 6th August 2006. I am satisfied that there would be no very significant obstacles to this appellant returning to Pakistan notwithstanding that he has resided in the UK since May 2000. It is quite clear from the appellant's immigration history that for many years this appellant has endeavoured to remain in the UK by any means possible, though I accept that between 2011 and 2014 discretionary leave had been granted.
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> 33. In reaching a decision I have paid due regard to the Supreme Court decision in **KO (Nigeria) v SSHD (2016) EWCA Civ 617** and in particular Paragraph 17 – 19. The Supreme Court made reference to Section 117B of the 2002 Act (as amended) in their decision. The question was asked what is reasonable for the child. I find that it would be reasonable for the appellant's daughter to remain with her mother in the UK, with whom she has lived all her life. It would not be reasonable to expect the child to leave the UK with her father but to remain in the UK, once I was satisfied that the appellant had a genuine and subsisting parental relationship with a qualifying child."

5. In submitting that the judge erred in so treating the issue of Section 117B the judge erred, Mr Adewoye prayed in aid two recent decisions of the Upper Tribunal, in particular **JG [2019] UKUT 72** in which the President held that "Section 117B(6) of the 2002 Act requires a court or Tribunal to

hypothesise that the child in question would leave the United Kingdom even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.”. Despite Ms Everett’s forceful submissions to the contrary, I am persuaded that the judge did fall into error in applying Section 117B of the Act in that, if the judge had properly directed himself as to the ambit of this provision, he would have concluded that the appellant came within its terms. It is important to note that the respondent had accepted in the Reasons for Refusal Letter that the appellant had a genuine and subsisting relationship with the child. On the judge’s findings it was unlikely that the child would accompany the appellant abroad. The final sentence of the judge’s decision at paragraph 33 is opaque but the paragraphs makes clear first of all:

(1) that the judge found that it would be reasonable for the appellant’s daughter to remain with her mother in the UK; and

(2) that it would not be reasonable to expect her to leave the UK.

On that basis, applying the guidance given in **JG**, the only answer the judge could give in this case was that the terms of Section 117B(6) had been met. On the given facts in this case the child lived for most of the time with her mother and did not reside with the appellant. In such circumstances to expect her to uproot herself and go with the appellant to Pakistan would be entirely unreasonable.

As regards ground (3), I would observe that whilst in light of my conclusions on ground (2) it is not relevant to the outcome my error of law decision, the points raised rely on mere disagreements with the judge’s findings of fact.

6. For the above reasons I conclude that the decision of the First-tier Tribunal Judge must be set aside for material error of law.

7. I consider that I am in a position to remake the decision without further ado. In light of the judge’s findings as regards the nature of the child’s relationship with the mother, I see no alternative to a conclusion that the appellant satisfies the requirements of Section 117B(6). The child had resided in the UK continuously for more than seven years. It is unreasonable to expect the child to leave the UK. The appellant has a genuine and subsisting relationship with the child. Accordingly, the decision I remake is to allow the appellant’s appeal.

I am allowing it on human rights grounds, in particular Article 8, but in the context stated of the appellant being found to be someone who meets the requirements of Section 117B(6) and someone therefore in respect of whom there is not a public interest in their removal.

I would point out that, had I not felt bound by the proper statutory construction of Section 117B(6) to apply it and so then be engaged in an unvarnished proportionality assessment outside the Rules, I would have reached a different conclusion. The proportionality assessment outside

Section 117B(6) pointed strongly against the appellant. His immigration status was precarious. He had a criminal conviction and a fifteen month custodial sentence imposed in September 2006 which although now over thirteen years ago is a factor pointing to a public interest in his departure. Although the respondent accepted that the appellant had a genuine and subsisting relationship with the child, on the judge's findings the contents of this relationship was thin. There was a dearth of evidence relating to the appellant's personal family circumstances with his present wife NM. But for the Section 117B(6) issue therefore I would have concluded that the judge had sound reasons for concluding that the appellant could not succeed on the basis of Article 8 outside the Rules.

No anonymity direction is made.

Signed Date: 20 March 2019

Dr H H Storey
Judge of the Upper Tribunal