IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09588/2019 (V)**

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype	**Decision & Reasons Promulgated**
On 2 December 2020	**On 21 December 2020**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JEAN [K]

Respondent

Representation:

For the Appellant: Mr Z Malik, Counsel
For the Respondent: Mr D Bazini, Counsel

DECISION AND REASONS (V)
Given *ex tempore*

1. The Secretary of State for the Home Department ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FtT') promulgated on 17 June 2020, in which it allowed the respondent's appeal on human rights grounds (Article 8 of the ECHR). I shall refer to the respondent during the course of this decision as K.

2. The FtT did not make an anonymity direction and one has not been sought before me. There has been no application for international protection and although K has four children, all born in the United Kingdom ('UK') between 2008 and 2019, I make little reference to them.

Background

3. K is a citizen of the Democratic Republic of Congo ('the DRC'). He married his wife, also a citizen of the DRC, in 2007, when they were both living in the DRC. I have been told that she was granted refugee status in 2010 in the UK, at a time when K worked as a lawyer in the International Criminal Court ('ICC') in The Hague. He took a position as a case manager in the defence team of Jean-Pierre Bemba. K's wife and children resided in the UK whilst he worked in The Hague.

4. K was charged in November 2013 with offences relating to the Rome Statute, detained and bailed. In December 2014 he entered the UK, having been granted entry clearance to join his family members here, whilst dealing with the charges against him under the Rome Statute. The skeleton argument submitted on behalf of K before the FtT states that the reason given for granting K entry clearance outside the Immigration Rules ('the Rules') was as follows: "*separation from your family for an indeterminate period is on the balance of probabilities unjustified*."

5. The SSHD's summary of K's immigration history is set out in the covering page to the SSHD's bundle before the FtT. Just pausing there, it is regrettable that during the course of these proceedings there has been no comprehensive chronology prepared by either party. I have done my best to piece one together from the various documents before me. I note that there must have been some delay in the international criminal proceedings because there was no final conviction until 17 September 2018. Between 2014 and 2018 K made a number of applications to remain outside of the Rules, which were all granted. He therefore benefitted from rolling six-month periods of leave up until his leave was curtailed in a decision dated 30 November 2018. In that decision the SSHD noted that K had been granted leave outside of the Rules since December 2014 and more recently on 30 July 2018, but that he was found guilty on 17 September 2018 of nine counts of giving false testimony when under obligation to tell the truth and 12 counts of corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence. He was, however, found not guilty of presenting evidence that the party knows to be false or forged. He was sentenced to eleven months of imprisonment but that was deemed to have been served whilst he was in pre-trial detention. The SSHD therefore considered that the requirements of the concession which K had hitherto benefitted from ceased to apply upon his conviction and said this:

> "In the particular circumstances of your case it has been concluded that the need to maintain the integrity of the immigration laws outweighs the possible effect on

> you that might result from you having to re-establish family life outside the UK. It is noted that prior to your grant of limited leave outside of the Rules you lived for a substantial period of time away from your family whilst working at The Hague in the Netherlands. It is considered that you have previously voluntarily chosen to live and work away from your family and therefore given the severity of the offences for which you have been found guilty at the ICC it remains that the need to maintain the integrity of the immigration laws outweighs the prospect of you re-establishing family life outside of the UK."

6. That meant that K's leave was curtailed with immediate effect on 30 November 2018. However, he had an outstanding application to remain on the basis of family reunion. Different dates are given for this application in the papers but it appears that it was dated 30 November 2017 and received by the SSHD on 11 December 2017. I shall refer to this as the 2017 application. The 2017 application was refused in a decision dated 3 May 2019. In that decision the SSHD made it clear that K's application for family reunion in the UK was refused and gave three reasons in bullet points. The first bullet point states that K had ceased to meet the legal requirements of the concession, bearing in mind his conviction at the ICC. The second bullet point refers to section 55 of the Borders, Citizenship and Immigration Act 2009 concerning the best interests of the children and repeats the point that was made in the notice of curtailment that K had previously voluntarily chosen to live and work away from his family and could do so again. The third bullet point says this:

> "Your background, behaviour, character, conduct or associations shows you should not be granted entry clearance or leave to enter or remain in the UK for one or more of the grounds set out in paragraphs 320 and 322 of the Immigration Rules."

Procedural History

7. K appealed the decision dated 3 May 2019 refusing his application for limited leave to remain as the partner of a person granted refugee status pursuant to Rule 352A, to the FtT. This appeal has a lengthy and rather unhappy procedural history, as summarised within the FtT's decision at [3] to [8]. It is relevant to note that there were at least two Case Management Review ('CMR') hearings before the FtT and it also a 'for mention' hearing before those CMRs. At the for mention hearing on 12 August 2019 the SSHD's representative indicated that although the SSHD's bundle had been issued on 9 August 2019, she remained without it and decisions needed to be made as to whether the matter would be remaining with the Presenting Officers' Unit or Treasury Counsel might be instructed.

8. At a CMR on 9 September 2019 the Presenting Officer representing the SSHD indicated that the decision under appeal dated 3 May 2019 was brief and in his view deficient but he had no authority to withdraw it. He indicated that there was a need to give a rational decision which properly particularised the SSHD's position as to K's position vis-à-vis his wife and children, the children's best interests and Article 8. He therefore requested an adjournment of the listed hearing date. K's representative, Mr Cole, did not object to this and directions

were given accordingly. The FtT noted at [6] of its decision that the SSHD "*would within three weeks consider supplementing or withdrawing their decision [dated] 3 May 2019*".

9. On 25 October 2019 a second CMR was held. Again Mr Cole appeared on behalf of K and another Presenting Officer, Mr Spence appeared on behalf of the SSHD. The SSHD's representative relied upon a further letter dated 25 September 2019 which says this:

> "Further to the direction issued on 10 September I write on behalf of the Secretary of State to confirm that the decision dated 3 May 2019 is maintained, supplemented by the additional information annexed to this letter. To further clarify, paragraph 322(1C)(iii) of the Immigration Rules is relied upon. The Secretary of State has today been notified of the birth to the appellant's wife on [xxx] of a child who may be entitled to British citizenship. The birth of this child does not outweigh the substantial reasons for refusal as set out in the letter of 3 May 2019 and the additional information annexed to this letter. This matter will be fully argued at the substantive hearing."

10. On behalf of the appellant Mr Cole indicated that he was in a position to serve the relevant evidence and a skeleton argument in response to this further letter from the SSHD and directions were made to that effect. At this CMR, Mr Cole queried whether Treasury Solicitors would be instructed as this was raised as a possibility at the 'for mention' hearing, but Mr Spence, the presenting officer who appeared on behalf of the SSHD, confirmed that the Presenting Officers' Unit in Leeds would be dealing with the matter. Directions were made for the parties to comply with.

11. On the Friday before the hearing (6 March 2000), Mr Spence applied (by way of email) for an adjournment of the hearing which had been listed for Monday 9 March 2020. That referred to Mr Cole having submitted a skeleton late in breach of directions and the SSHD needing further time to fully consider the position and arguments in response and that had not been possible within the short timeframe. That email is stamped as having been received by the Tribunal on 9 March, which was the date of the hearing. It therefore went before the FtT Judge who heard the appeal. The judge referred to the application for an adjournment at [12] of the decision – this makes it clear that Mr Spence no longer sought an adjournment and said that work had been done in London over the weekend and they were ready to proceed, save that the FtT was invited to mark the file as the SSHD having withdrawn her decision.

FtT Hearing and Decision

12. The FtT recorded Mr Spence's application to mark the file as the SSHD having withdrawn the decision under appeal in the following terms at [14]:

> "Mr Spence requested that the matter should be marked withdrawn as the Secretary of State would like to revisit the file and give further consideration to her decision, particularly as regards the children where case law may have further developed of late. It is not the Secretary of State's position that she is

> asking for the matter to be marked withdrawn because this is with a view to the grant of limited or discretionary leave to remain. It is simply so the Secretary of State can revisit this matter once more."

13. The FtT then recorded Mr Cole's objections to that application at [16] to [21], which I will turn to later on in this decision. Suffice it to say for now, the FtT did not consent to treating the decision as withdrawn. After a decision was made on this, Mr Spence resurrected the application for an adjournment which had been made on the papers. That was objected to by Mr Cole and refused by the FtT. The FtT referred to the earlier indication at the beginning of the hearing that the SSHD was ready to proceed – see [32] to [36] of the FtT's decision. The decision to refuse the adjournment has not been the subject of an appeal and I need say no more about it.

14. The FtT then summarised the evidence, noting that the SSHD's representative did not cross-examine K or his wife and made no submissions. The FtT then set out its findings of fact by reference to two particular parts of the relevant legal framework. The FtT first accepted that K met all the relevant requirements of Rule 352A, i.e. as a person seeking leave to remain in the UK as a partner of a person granted refugee status. The only matter that had been raised on behalf of the SSHD to dispute this related to paragraph 322(1C)(iii) of the Rules, as relied upon in her letter dated 25 September 2019. I need not say much more about this because it has been accepted on behalf of the SSHD that 322(1C)(iii) only applies to persons seeking indefinite leave to enter or remain ('ILR') and K was seeking limited leave to remain. It follows that the only reason relied upon by the SSHD in support of the position that K did not meet the requirements of the Rule 352A fell away. It followed that the FtT found that K met the requirements of Rule 352A and that was prima facie sufficient to allow his appeal on human rights grounds - see TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109.

15. The FtT nevertheless went on to consider the appeal by reference to section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and found that on the undisputed factual matrix, both provisions within sub-section (6) applied to this case i.e. K had a genuine and subsisting parental relationship with his minor "qualifying" children and it would not be reasonable to expect them to leave the UK. The appeal was therefore allowed on Article 8, ECHR grounds.

Appeal to the Upper Tribunal ('UT')

16. The SSHD submitted an application seeking permission to appeal to the UT in grounds dated 17 August 2020. Those grounds were lodged 47 days late but it was submitted that there was a significant public interest in this case because K had been convicted in the ICC and the UK should not be a safe haven for such individuals. The grounds relied upon were three-fold. The first ground challenged the FtT's approach to the withdrawal of the decision under appeal. The grounds submitted that the FtT failed to direct itself and apply ZEI & Ors (Decision withdrawn - FtT Rule 17 – considerations: Palestine) [2017] UKUT 292

(IAC) ('ZEI'). Ground 1 submitted that had the Tribunal considered the position lawfully and in accordance with ZEI, its analysis of whether there was good reason for the appeal not to be treated as withdrawn would have been different.

17. The second ground of appeal related to the FtT's approach to Rule 352A. Two points are made. It was first contended that Rule 352A did not apply because of the wife being a British citizen. That has been abandoned as this was based upon a mistaken belief that the wife was a British citizen when she has been a refugee at all material times. The second point was that the FtT should have considered Article 1F even though that was not explicitly raised within the decision under appeal or the further September 2019 letter or by the SSHD when arguing the matter before the FtT. The third ground of appeal submitted that the FtT was wrong to find that section 117B(6) benefitted K, without considering the remainder of the factors set out in Part 5A of the 2002 Act.

18. FtT Judge Parkes granted permission to appeal and extended time. He observed:

> "Although the judge referred to Rule 17(2) it is arguable that he approached the obligation to treat the decision as withdrawn from the wrong angle and erred in having regard to the appellant's wife's citizenship and the appellant's own conviction at the ICC."

K submitted a reply in response to the grounds of appeal that was drafted by Mr Bazini, who has appeared on behalf of K before me. I shall turn to the contents of that reply in more detail in due course.

19. At the hearing before me Mr Malik relied upon a comprehensive skeleton argument in which he submitted that the FtT erred in law in its approach to the withdrawal issue and this was a material error of law. Mr Malik no longer placed any reliance upon the matters contained in the remainder of the pleaded grounds of appeal. He was correct to do so. K's wife has never been a British citizen. As to the Article 1F point, it is very difficult to see how the FtT could be said to have erred in law when Article 1F was not raised in any shape or form within the decision under appeal, that is to say the decision dated 3 May 2019, and then when the SSHD was given the opportunity to clarify her case and produce an additional letter of 25 September 2019 or at the hearing. As to section 117B(6), Mr Malik accepted that the factual matrix that underpinned this conclusion was not in dispute and was entirely open to the FtT.

20. It follows that I need only address ground 1 – the FtT's approach to the withdrawal of the SSHD's decision.

Legal Framework

Procedure Rules

21. Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ('the 2014 Rules') provides as follows at sub-section (2):

> "The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision."

22. Rule 17(2) has been considered by a panel of the UT consisting of the Vice President in ZEI and the headnote of the decision summarises its contents as follows:

> "Rule 17 clearly envisages that in general the appeal is to be treated as withdrawn. It will continue only if a good reason is identified for allowing it to proceed despite being an appeal against a decision that will not have effect in any event. The appellant needs the opportunity to advance a case why he considers an appeal should not be treated as withdrawn and the SSHD needs the opportunity to respond. The Tribunal has no power to require the Secretary of State to give or even to have a good reason for her decision. The list below cannot and should not be regarded as a comprehensive account of all reasons that might be urged on judges but we trust that as well as giving guidance on the arguments discussed the reasoning may be adapted to other cases.
>
> (i) The following are not likely to be considered good reasons:
> - The parties wish the appeal to proceed.
> - The applicant is legally aided and if he has to appeal against a new decision, he will not (or will probably not) be legally aided because the legal aid regime has changed.
> - The withdrawal is for reasons the judge considers inappropriate is very unlikely to be a good reason to proceed. An example is that of a Presenting Officer who seeks adjournment of a hearing and when that is refused, withdraws the decision.
> - The witnesses are ready to be heard and can only with difficulty or expense be gathered again.
>
> (ii) The following are likely to be capable of being a good reason.
> - The appeal regime has changed since the first decision, so that if a new decision is made in the same sense, the rights of appeal will be reduced.
> - Undue delay by the respondent.
> - The appeal turns on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant's favour.
> - If there has already been a considerable delay in a decision the appellant is entitled to expect, the fact that children are affected."

Part 5A of the 2002 Act

23. The introduction of Part 5A into the 2002 Act imposes a statutory duty upon a court or tribunal to pay regard to the considerations listed in section 117B.

They include in summary, the public interest in "the maintenance of effective immigration controls" (subsection (1)); the public interest in those seeking to enter being able to speak English (subsection (2)), and be financially independent (subsection (3)); the little weight to be accorded to private life or relationships established when a person was in the country unlawfully (subsection (4)), or when immigration status was precarious (subsection (5)); and sub-section (6), which states:

> "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."

24. In cases concerning the deportation of 'foreign criminals', a heightened burden is placed upon those seeking to avoid removal in the form of additional considerations set out in section 117C of the 2002 Act. The effect of the additional criteria in section 117C is to add additional weight to the public interest question and thereby to reduce the relative weight that is to be attached to any private or family life that the appellant has acquired. A foreign criminal is defined at section 117D(2). The SSHD has at all material times accepted that K was not a 'foreign criminal' and not 'liable to deportation' for the purposes of the 2002 Act, and in the premises, reliance upon section 117B(6) was open to him.

Discussion

24. During the course of the hearing before me I indicated a provisional view to Mr Bazini that the FtT had made a clear misdirection in law in its application of Rule 17 and in failing to follow the guidance in ZEI. It seemed to me, as I said to Mr Bazini, that the appeal rather turned on the materiality of that error of law. Mr Bazini maintained that when the FtT's decision was read as a whole there was no error of law. I deal firstly with whether or not the FtT erred in law before turning to materiality.

25. I accept Mr Malik's submission that the FtT's reasoning for declining to treat the decision under appeal as withdrawn contains an error of law. That is very clear from a straightforward reading of [27], in which the FtT said this:

> "The reasons given at the hearing (not in writing) by the respondent, I found, were not 'for good reason'. I prefer the reasons and arguments as put forward by Mr Cole, as to the chronology, attendance of parties ready to proceed and lack of good reason sitting behind the respondent's application today."

26. I agree with Mr Malik that the error of law in that reasoning is obvious - the FtT proceeded on the basis that the issue before it was whether the reasons for withdrawal provided by the SSHD constituted a good reason, when Rule 17 does not require the SSHD to establish that the withdrawal is for good reason. Rather, as the panel pointed out in ZEI at [15], the Tribunal had no power to

require the SSHD to give (or even to have) a good reason for her decision. As the panel stated at [17] of ZEI:

> "Thus, the task before the FtT is not to consider whether there is a "valid reason" for withdrawal but instead whether is a "good reason" why the mandatory effect of Rule 17(2) should not apply when application has been made by the appellant for the appeal not to be treated as withdrawn."

In my judgment the FtT misdirected itself in law by inverting the proper approach to Rule 17 and therefore erred in law. Mr Bazini invited me to find that the decision read as a whole did not disclose an error of law because what the FtT was in fact doing was accepting the good reasons for continuing as offered by Mr Cole. The difficulty with that submission is that it was not altogether clear that Mr Cole was offering any specific good reason for proceeding as opposed to objecting to the approach adopted by the SSHD. Mr Cole provided reasons why the SSHD's approach was the wrong one. When the decision is read as a whole I do not consider it to be tolerably clear that the FtT properly directed itself to the burden resting upon K to establish a good reason for the appeal not to be treated as withdrawn as opposed to the SSHD establishing a good reason to withdraw.

27. I now turn to materiality which, as I indicated to the representatives during the course of the hearing, was the matter that troubled me the most. I heard detailed submissions from both representatives on the point. Mr Malik invited me to find that the matters that were put forward on the part of Mr Cole could not be said to be good reasons when ZEI was properly considered. He went through each of the reasons at [16] to [21] of the FtT's decision to make his point.

28. Mr Bazini invited me to find that even if ZEI was applied the FtT would have reached the same conclusion. In other words, there was no material error of law because the conclusion to proceed with the hearing and not accept the appeal as withdrawn was an inevitable one, on the FtT's findings. Mr Bazini submitted that the particular (undisputed) facts disclosed three 'good reasons' not to treat the appeal as withdrawn: delay; the impact on the children and; the fact that this appeal involved a 'slam dunk' for K, in other words, it was inevitably to be allowed and was equivalent to there being a 'pure point of law'. As set out above, the panel in ZEI considered each of these factors as "*likely to be capable of being a good reason*". I acknowledge that does not mean that a Tribunal must inevitably find a good reason where any of these exist. I shall deal with what was inevitable in this case later on but I first turn to each of the factors, and what was said about them in ZEI.

29. As to delay, the panel said this at [19(d)] of ZEI:

> "There has already been undue delay by the respondent. This may be a good reason or it may not. It is capable of being a good reason in cases where the appellant has, by proper process, sought a decision on an application. The most obvious example is a paid-for application duly made. If there has been a long delay, which will be lengthened further by awaiting a new decision, that may be

> a good reason to proceed with an appeal against the withdrawn decision. But this argument cannot be a good reason if the decision is one the timing of which is wholly for the respondent. The most obvious example is a removal or deportation decision, whether or not combined (as it would now have to be in order to carry a right of appeal) with a human rights or protection decision."

30. Mr Malik submitted that there had not been undue delay on the part of the SSHD. He invited me to consider both the length of delay since the 2017 application as well as the nature of the case itself. As Mr Malik indicated, the final conviction was not recorded until 17 September 2018 and that would explain why there was a delay from the 2017 application – the outcome of the criminal proceedings was a matter that the SSHD was entitled to await before determining the family reunion application. Mr Bazini asked me to note that the conviction had actually accrued in 2016 and therefore the SSHD was well aware of the court processes for a much longer period even though the conviction was not finalised as a result of the appeals process until September 2018. I note in that respect that the skeleton argument before the FtT relied upon by K set out that he was finally convicted on 17 September 2018. No reference was made to any previous conviction in 2016. In any event, whether K was convicted in 2016 or he was convicted in 2018 after a final appeal process, it does not seem to me to matter much, because there remained an explanation for the delay up until September 2018.

31. Then one comes to the decision of May 2019, which was about just under three quarter of a year after the 2018 conviction. Within a few months the matter was listed for mention and the FtT clearly case-managed the matter with a degree of vigour - the FtT reviewed the matter in August 2019, September 2019 and October 2019. At each of these stages the SSHD had an opportunity to clarify, amend or withdraw her decision against K. After the CMR in September 2019, the SSHD gave express consideration to withdrawal and amendment. The decision dated 25 September 2019 contains a clear and unambiguous confirmation of reliance upon the initial decision with supplementary reasoning added. The matter then came before the FtT for a full hearing on 9 March 2020.

32. When considering the issue of delay one must bear in mind that by the time of the hearing the SSHD had been given numerous opportunities to review the case and update her position, yet on the day of the hearing it was being contended that this process needed to continue. Mr Malik invited me to find that this was a complex matter involving a conviction at the ICC and that what probably happened here was that there was an insufficient grasp of the complexity of the case at an early stage. That might well be right but what it does not do is explain the nature and extent of the delay in the SSHD clarifying her case when there were so many opportunities to do so. The presenting officer's unit was clearly alive to the possibility of seeking assistance from the Government Legal Service (who used to be known as 'Treasury Solicitors'). The complexities of the case were well known for a lengthy period: the appellant was given entry clearance and then rolling periods of leave pending the ICC proceedings. This was not the type of situation where for the first time a party identified the complexity of the case or a change of circumstances at the FtT

final hearing. Here, the SSHD was given many opportunities to clarify her case over a relatively lengthy period.

33. I also note that this was not a removal case. This was an application that was made by K and the timing therefore cannot be said to be akin to a removal or deportation case. Although there may not have been a good explanation for the delay in clarifying the case or finalising the position up until the date of conviction and for a reasonable period beyond that, i.e. up to the decision of May 2019, the SSHD clearly acted with undue delay after that point in failing to clarify which aspect of the Rules she relied upon in order to refuse the application that had been made. Although the overall delay itself cannot be said to be very lengthy, the delay in clarifying the SSHD's position given the particular procedural history was significant. That was the overall effect of Mr Cole's submissions, and was accepted by the FtT. At [27] the FtT accepted the chronology outlined by Mr Cole. That chronology inevitably involved the delay in clarifying the SSHD's position I have summarised above. Although the FtT did not specifically state in the terms suggested in ZEI that there had been 'undue delay', I am satisfied that that is in fact what the FtT accepted.

34. That delay needs to be viewed together with the fact that there are four children in this case, who were each born in the UK and spent the entirety of their lives in lawfully residing in the UK. The panel said this about children at [19(h)] of ZEI:

> "Children are affected by the decision, the appeal, the withdrawal and the wait for a new decision. This is a special case of (d) above. If there has already been a considerable delay in a decision the appellant is entitled to expect, the fact that children are affected may make a good reason better. But if the decision is one that the appellant has no right to timetable, particularly if the appellant is already in breach if immigration law, the effect on children is unlikely to make very much difference, it being remembered that the context is still that the withdrawn decision will not itself have any effect at all."

35. I note that K's wife drew attention to the adverse impact of delay upon the children in her witness statement. The good reason of undue delay in the clarification of the SSHD's case was made better because four children were affected by it. In addition, K remained at all material times lawfully in the UK: he was granted entry clearance, rolling periods of leave and although his leave was curtailed, he continued to have the benefit of an in-time application to remain pursuant to Rule 352A.

36. I now turn to Mr Bazini's third and in my view most significant and attractive point. Had the FtT directed itself to the proper test as explained in ZEI, it would have inevitably concluded that there was a clear and straightforward good reason why the matter should not be treated as withdrawn – K's appeal had to be allowed on Article 8 grounds because the undisputed factual matrix before the FTT pointed in one direction: (i) he met the requirements of Rule 352A and in any event, (ii) he met the requirements of section 117B(6) of the 2002 Act. Mr Malik accepted that the facts were not in dispute in relation to

those two matters. It is helpful to illustrate this by reference to the proper approach to section 117B(6). Section 117C does not apply here because it is undisputed that K is not a 'foreign criminal', as defined at section 117D. In addition, K's criminal conduct played no role here, as it was not contended that he was a person 'liable to deportation'. Although Mr Malik's skeleton argument before me indicated that the SSHD "*is minded to make a decision to deport*" K on the basis that "*his criminal conduct proven at the ICC is conducive to the public good*", that was not the position before the FtT. Instead, in the full knowledge of K's 2018 convictions, the SSHD opted to treat him as a person not liable to deportation from the date of the initial May 2019 decision refusing the 2017 application and again after being given the opportunity to clarify her case in September 2019. It followed that for the entirety of the FtT proceedings, section 117B(6) applied and on the undisputed factual matrix K met its requirements. The SSHD has not maintained reliance upon the challenge in the written grounds of appeal that the FtT erred in not applying the remainder of Part 5A of the 2002 Act, having found that the requirements of section 117B were met. That submission is plainly erroneous in law because section 117B was to be treated as a 'self-contained' provision - see KO (Nigeria) v SSHD [2018] UKSC 53; [2018] 1 WLR 5273 at [17] as applied in Younas (section 117B (6) (b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) at [108] to [110].

37. In these circumstances, I invited Mr Malik to accept that the appeal before the FtT was bound to succeed on the undisputed facts and that this was a situation akin to the 'pure point of law' referred to at [19(e)] of ZEI, when the panel said this:

> "…It seems to us that the appellant's expectation of success may be a good reason if, but only if, the appeal turns on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant's favour."

38. The appeal before the FtT did not turn on a 'pure point of law'. The applicable law was not in dispute and remains undisputed. The application of the undisputed facts to that framework was also undisputed. However as the panel noted in ZEI, the list of categories should not be regarded as a comprehensive account and this was a case that was certainly to be decided in K's favour under the Rules and pursuant to section 117B(6). That in my view gave rise to a 'slam dunk' good reason, as submitted by Mr Bazini, irrespective of the delay point. Mr Malik asked me to note that the panel in ZEI could not have been considering a factual matrix such as this which involved a person who has been convicted at the ICC to a not insignificant sentence of eleven months. That misses the point that notwithstanding his criminal offending, K met the Rules and section 117B(6).

39. At the FtT hearing, Mr Spence on behalf of the SSHD opted not to cross-examine K and his wife and not to make any submissions. That approach seems to be contrary to the SSHD's own policy on what Presenting Officers should do in circumstances where an appeal is not treated as withdrawn - see

[12] of ZEI, which refers to the relevant Home Office policy document, Withdrawing decisions and conceding appeals (Home Office, 4 June 2015), that states that "*where an appeal is not treated as withdrawn, a HOPO should participate in the appeal as normal*". That may well have been updated but that was the SSHD's position as it was before ZEI.

40. Drawing all these matters together, although I accept the FtT clearly erred in law at [27] of its decision and clearly failed to apply the guidance in ZEI that error of law is not material because given the way in which the SSHD chose to run her case and given the three factors taken together, that is delay, delay involving children and this being a matter with no factual disputes that was bound to succeed, had the FtT applied the guidance in ZEI it was inevitable that it would have reached the decision that there was indeed a good reason not to accept the withdrawal. That good reason may not have been as clearly articulated by Mr Cole in the submissions as recorded by the FtT, but when the decision is read as a whole and when the undisputed evidence available to the FtT is considered holistically, I am of the clear view that on a proper application of ZEI, the FtT would have only reached one decision – there were good reasons to allow the appeal to proceed. Although generally speaking, when requested by the SSHD, an appeal is to be treated as withdrawn, in the circumstances of this case the FTT's findings were such that, it would have inevitably identified good reasons for the matter to proceed.

Decision

41. It follows that the SSHD has not made out ground 1, the only ground that she has sought to maintain, and her appeal against the FtT's decision is dismissed.

Signed: *Ms M Plimmer* Dated: 14 December 2020
Upper Tribunal Judge Plimmer