Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00918/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2018	**On 17 December 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SALEEM [Q]

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Reza, solicitor, JKR Solicitors

For the Respondents: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Iraq, who arrived in the United Kingdom on 21 August 2008 and who applied for asylum on 22 August 2008. His application was refused and his

subsequent appeal was dismissed by Immigration Judge Camp in a decision promulgated on 30 January 2009. He became appeal rights exhausted on 14 April 2009.

2. The Appellant made further submissions on 12 August 2014. The Respondent accepted that the Appellant had made a fresh claim but refused his asylum and human rights claim on 13 December 2017. He appealed against this decision.

3. His appeal was heard by First-tier Tribunal Judge Parkes on 19 February 2018 and he dismissed his appeal in a decision, promulgated on 12 March 2018. The Appellant appealed against his decision and on 9 April 2018 First-tier Tribunal Judge Birrell granted him permission to appeal.

ERROR OF LAW HEARING

4. The solicitor for the Appellant said that he relied on his skeleton argument and then made some further oral submissions, which I have referred to below, where relevant. The Home Office Presenting Office then replied and conceded that First-tier Tribunal Parkes had misapplied section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

ERROR OF LAW DECISION

5. First-tier Tribunal Judge Parkes dismissed his appeal on both his international protection and human rights but the grounds of appeal relied upon by the Appellant are restricted to the dismissal on human rights grounds.

6. The first ground submits that the manner in which the First-tier Tribunal applied section 117B(6) of the Nationality, Immigration and Asylum Act 2002 was unlawful.

7. Section 117B is headed **Article 8: public interest consideration applicable in all cases** and states that:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> …
>
> (4) Little weight should be given to –

(a) a private life, or

(b) relationship formed with a qualified partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life is established by a person at a time when the person's immigration status is precarious.

(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".

8. In paragraph 23 of his decision, First-tier Tribunal Judge Parkes accepted that there was now DNA evidence which confirms that he is the father of his partner's child. There was a copy of the Appellant's partner's passport in the Appellant's Bundle that confirmed that she is a British citizen. It is accepted that the Appellant's child was born in the United Kingdom, therefore he is also a British citizen.

9. Section 117D of the Nationality, Immigration and Asylum Act 2002 defines a "qualifying child" as

"a person who is under the age of 18 and who -

(a) is a British citizen"

10. Therefore, the Appellant's child is a "qualifying child" for the purposes of section 117B and 117D. In addition, in paragraph 27 of his decision, First-tier Tribunal Judge Parkes found that "given the caring responsibilities that the Appellant undertakes he has a parental relationship with a British citizen child".

11. However, in paragraph 28 of his decision First-tier Tribunal Judge Parkes said:

"I do struggle with the wording of … section 117B(6) because there is no suggestion that the Appellant's child would have to leave the UK if he were to be returned to Iraq. In those circumstances the question of reasonableness does not arise … As there is no question of the Appellant's child being expected to leave the UK and given the

> ambiguous working of the provisions I find that the Appellant does not meet the requirements and is not assisted by them".

12. In the recent reported case of *SR (subsisting parental relationship, s117B(6))* [2018] UKUT 334, the Upper Tribunal found that:

> "The question of whether it would not be reasonable to expect a child to leave the United Kingdom ('UK') in section 117B (6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable "to expect" the child to leave the UK?"

13. First-tier Tribunal Judge Parkes's decision cannot stand in the light of this reported case, which confirms that he misapplied section 117B (6).

14. In paragraph 28 of his decision, First-tier Tribunal Judge Parkes also found that:

> "The public interest in his removal outweighs the best interests of his child which are demonstrated by the application of the usual principles and not by any evidence to show that there are needs over and above that which would be expected".

15. The First-tier Tribunal Judge was required to treat the Appellant's child's best interests as a primary consideration and there is nothing in his decision to indicate that he had done so. It was not sufficient to merely state that the usual principles had been applied. These principles may or may not have included treating his best interests as a primary consideration.

16. In addition, he was required to follow the process approved of in *Kaur (children's best interests/public interests interface)* [2017] UKUT 00014, where the Upper Tribunal found that:

> "(1) The seventh of the principles in the ***Zoumbas*** code does not preclude an outcome whereby the best interests of a child must yield to the public interest.
>
> (2) This approach has not been altered by Part 5A of the Nationality, Immigration and Asylum Act 2002.
>
> (3) In the proportionality balancing exercise, the best interests of a child must be assessed in isolation from other factors, such as parental misconduct.
>
> (4) The best interests assessment should normally be carried out at the beginning of the balancing exercise".

17. The First-tier Tribunal Judge failed to adopt this approach or to provide any reasons for finding that "the public interest in his removal outweighs the best interests of his child".

18. It was not necessary to consider the case of *Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test)* [2017] UKUT 00013 (IAC) as in paragraph 28 of his decision the First-Tier Tribunal Judge only went on to consider sub-section 117B(1) to (5) when he had found that sub-section 117B(6) did not apply.

19. As a consequence, I find that the First-tier Tribunal Judge made material errors of law in his decision.

DECISION

(1) The Appellant's appeal is allowed.

(2) The decision of First-tier Tribunal Judge Parkes is set aside.

(3) The appeal is remitted to the First-tier Tribunal for the consideration of the Appellant's human rights appeal and, in particular, the application of section 117B(6) of the Nationality, Immigration and Asylum 2002, to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Parkes.

Nadine Finch

Signed Date 16 October 2018

Upper Tribunal Judge Finch