Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21942/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Thursday 13 June 2019	**On Friday 14 June 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

NADEEM [A]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Sunrise Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. By a decision promulgated on 4 March 2019, I found an error of law in the decision of First-tier Tribunal Judge B Morron promulgated on 4 August 2017, itself dismissing the Appellant's appeal against the Respondent's decision dated 9 June 2015. By that decision, the Respondent refused the Appellant's human rights claim based on his private life and, in particular, his family life as the

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father of three minor children. My error of law decision is appended hereto for ease of reference.

2. In accordance with the directions given in my error of law decision, the Appellant filed a supplementary bundle of evidence. I also received a skeleton argument from Ms Revill and written submissions from Mr Melvin. However, Mr Melvin indicated at the start of the hearing that his written submissions had been prepared without sight of the supplementary bundle and were therefore overtaken by that evidence. Mr Melvin accepted that the evidence in the supplementary bundle shows that the Appellant is reconciled with his wife and children and the couple have a further daughter born on 8 October 2018. The Appellant's witness statement is supported by the statement of his wife. Mr Melvin also accepted that their evidence is supported by other documents from the children's schools and photographs which show that the Appellant is in a genuine and subsisting relationship with his children. Therefore, although both the Appellant and his wife were present at the hearing and ready to give oral evidence, Mr Melvin confirmed that he did not dispute their evidence and did not wish to ask any questions. Since I had no questions either, Ms Revill agreed that it was not necessary to call her witnesses.

3. Mr Melvin referred me to the relevant statutory provisions and case-law to which I refer in more detail below. Although it was not clear from the Respondent's letter granting leave to remain to the Appellant's wife and children, the basis on which they had been granted leave (it being said that this was based on her and the children's private life), both Mr Melvin and Ms Revill indicated that there were no factors peculiar to the Appellant's wife which would have generated that grant of leave and that leave must have been granted on the basis that it would be disproportionate to remove the children from the UK. Mr Melvin also accepted that at least one if not more of the children are "qualifying children" having spent more than seven years in the UK. Ms Revill confirmed that in fact all bar the youngest child are "qualifying children".

4. Although Mr Melvin did not expressly concede the appeal, in light of the above, he accepted that it would be unsurprising if the Tribunal were not to allow the Appellant's appeal. I indicated that I proposed to allow the appeal and would provide my reasons in writing for so doing which I now turn to do.

Discussion and Conclusions

5. Section 117B (6) of the Nationality, Immigration and Asylum Act 2002 ("Section 117B (6)") provides as follows:

> "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 relationship with a qualifying child, and
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

6. A "qualifying child" is defined by Section 117D (1) of the 2002 Act as follows:

> "'qualifying child' means a person who is under the age of 18 and who –
> (a) is a British citizen, or
> (b) has lived in the United Kingdom for a continuous period of seven years or more…"

7. Section 117B (6) is in essentially the same terms as paragraph EX.1 of Appendix FM to the Immigration Rules save that, in relation to EX.1, the qualifying period is determined at the date of the application made to the Respondent. It is common ground that, at 1 April 2005, when the Appellant made the application which led to the Respondent's decision under appeal, none of his children had spent seven years continuously living in the UK. As such, I am considering the position applying Section 117B (6) and not under the Immigration Rules.

8. As I have already indicated, Mr Melvin accepted, based on the evidence in the supplementary bundle, that the Appellant has shown that he has a genuine and subsisting relationship with his children. I do not therefore need to set out that evidence. The four children who live in the UK with the Appellant and his wife were born on 20 November 2002, 20 September 2005, 28 July 2010 and 18 October 2018. With the exception of the youngest, all have been in the UK for more than seven years, having returned here last in 2008 (see [10] of my error of law decision). The three eldest children are therefore qualifying children for the purposes of Section 117B (6). That then leaves only the question whether it would be reasonable to expect the children to return to Pakistan.

9. In the case of SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC), UTJ Plimmer had cause to consider the Immigration Directorate Instructions on Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10 – year Routes dated 22 February 2018. At [50] of her decision, Judge Plimmer rejected as "untenable" the construction which the Secretary of State sought to place on the term "reasonable to expect" in this context. Her conclusion as to the meaning of that phrase is encapsulated in [2] of the headnote as follows:

> *"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?"*

10. Judge Plimmer's interpretation was upheld by the Tribunal (The Hon. Mr Justice Lane, President and UTJ Gill) in JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) Rev 1.

11. This provision was also considered by the Court of Appeal in Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661. The Court approved the Tribunal's interpretation in JG and SR (72] to [75]).

Accordingly, the only question is whether it is reasonable to expect the children to return to Pakistan not whether they would in fact have to do so (given that they could in practice remain in the UK with their mother).

12. I have referred at [12] of my error of law decision to the Supreme Court's judgment in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53. The Court of Appeal in AO and AB and the Tribunal in JG summarise the way in which that judgment is to be applied when considering Section 117B (6). I do not need to say any more about that judgment in this case because, as I indicate at [3] above, the Appellant's wife has been given leave to remain based on the position of the children. It must therefore be accepted that it would be disproportionate to remove them from the UK. It follows that it would not be reasonable to expect them to return to Pakistan.

13. For those reasons, the Appellant meets the requirements of Section 117B (6). Although other factors in Section 117B, particularly the Appellant's unlawful presence in the UK for a number of years, would militate against him and in favour of the public interest in removal, once Section 117B (6) is met, the public interest does not require his removal. He is therefore entitled to succeed.

14. For those reasons, the Appellant's appeal is allowed on the basis that he meets the requirements of Section 117B (6) of the Nationality, Immigration and Asylum Act 2002. Accordingly, his removal would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The Appellant's appeal is allowed on human rights grounds

Signed Dated: 13 June 2019
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21942/2015

THE IMMIGRATION ACTS

Heard at Field House
On Friday 1 March 2019

Determination Promulgated

……4 March 2019……

Before

UPPER TRIBUNAL JUDGE SMITH

Between

NADEEM [A]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Sunrise Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND DIRECTIONS

Background

1. The Appellant appeals against a decision of First-tier Tribunal Judge B Morron promulgated on 4 August 2017 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 9 June 2015 refusing his human rights

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claim based on his private life and, in particular, his family life as the father of three minor children.

2. The Judge found as a fact that the children had not lived continuously in the UK for seven years, relying on his factual finding that the children had returned to Pakistan with their mother from July to November 2010. He therefore found that those children had not been in the UK for seven years continuously. The youngest child was born in the UK but, he found, had not lived in the UK for seven years. The children were born in 2002, 2005 and 2010.

3. The Judge went on to consider whether it would be reasonable to expect the children to leave the UK with the Appellant who is accepted to be their father. He is estranged from the children's mother who, with the children, has limited leave to remain in the UK. At the time of the Decision, they had made an application for further leave which remained under consideration. The Judge considered the reasonableness issue under Section 117B (6) Nationality, Immigration and Asylum Act 2002 ("Section 117B(6)). He concluded at [70] of the Decision that it was reasonable to expect the children to return to Pakistan with their parents.

4. The Appellant raises two grounds challenging the Decision. First, he says that the Judge has made a mistake of fact in relation to the period spent by the children in the UK which has infected his finding that they had not been in the UK for seven years continuously. Second, he says that the Judge has erred in his assessment of reasonableness. The initial grounds also included a third ground concerning the procedural fairness of the First-tier Tribunal hearing, but that ground appears to have fallen away – I was not addressed on it.

5. Permission to appeal the Decision was refused first by First-tier Tribunal Judge Mark Davies on 26 January 2018 and then by Upper Tribunal Judge Frances on 5 September 2018. Following an application to the Administrative Court for judicial review of the Upper Tribunal's refusal of permission to appeal, permission to apply for judicial review was granted by Mrs Justice Lang DBE in the following terms so far as relevant:

> "…the FTT Judge's finding that the children were absent from the UK from July to November 2010, and therefore that they had not been continuously resident for the qualifying period, appears to have been a mistaken assumption which ought not to have been made on the evidence before him. The Claimant also seeks to adduce further evidence confirming that they were present in the UK at that time. I am unable to agree with the Upper Tribunal that the FTT also decided the appeal adequately on the alternative basis that the children had been continuously resident for the qualifying period."

6. The Respondent not having sought a hearing of the application for judicial review, the decision of UTJ Frances was quashed on 13 December 2018 and the appeal remitted. Permission to appeal was granted by the Vice President of the Upper Tribunal on 10 January 2019.

7. The matter comes before me to determine whether the Decision contains an error of law and, if I so find, either to remit it for a de novo hearing before the First-tier Tribunal or to re-make the decision.

8. By a rule 24 notice dated 27 February 2019, the Respondent concedes that the Decision contains a material error of law and invites the Tribunal to determine the appeal with a fresh oral hearing.

9. I indicated at the end of the hearing that I found a material error of law on both grounds pursued before me and that I set aside the Decision. I gave directions for further evidence to be filed and served as the First-tier Tribunal hearing took place about eighteen months ago. I indicated that I would give brief reasons for my error of law decision in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

Ground one

10. The focus of ground one is the Judge's finding at [42] of the Decision that the Appellant's estranged wife and children were out of the country in Pakistan between 23 July 2010 and 3 November 2011. However, the evidence recited at [41] is that the wife returned with the two eldest children in July 2008 which the Judge says was consistent with documentary evidence about one of the children attending school until June 2008. The application was made on 1 April 2015. There would still be a difficulty in terms of the children's period of residence as at the date of that application for the purposes of paragraph 276ADE. However, that is not the basis of the Appellant's application. The Judge understood that the children did not return to the UK until November 2010. The hearing was in July 2017. Therefore, applying Section 117B (6), the Judge found that the children's period of residence was insufficient to avail the Appellant. Given the evidence that they returned to Pakistan in 2008 not 2010, that was an error of fact which was material to the Judge's consideration.

Ground two

11. The basis on which permission to appeal was refused by this Tribunal was that the error of fact was not material because the Judge had gone on to consider whether it was reasonable to expect the children to leave the UK and had concluded that it was. The Judge considered this issue at [63] onwards of the Decision. In so doing, he observed at [64] that "in considering whether it was reasonable to expect a child to leave the UK, the Tribunal should not focus simply on the child but should also have regard to the wider public interest considerations, including the conduct and immigration history of the parents." Having undertaken his consideration at [65] to [69] of the Decision, he concluded as follows at [70]:

> "…the Appellant's strongest case relies upon section 117B (6). However, I have found that these are not strictly qualifying children; and, even if they were, weighing in the scales their best interests which are of primary importance on the

one hand with the public interest in maintaining immigration controls on the other, I find that it would be reasonable to expect the children to leave the UK."

12. As the Respondent concedes, that approach is now inconsistent with the test as interpreted by the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53. That judgment was handed down on 24 October 2018 and the Judge, in reaching his findings, relied on what was at the time binding authority from the Court of Appeal. However, the fact remains that the wrong test was applied when considering Section 117B (6) and accordingly the Decision contains an error of law also in that regard.

13. Having discussed with the parties the appropriate course, it was agreed that the decision could be re-made in this Tribunal as the extent of fact finding is limited as are the relevant issues. Given the passage of time since the First-tier Tribunal's decision, I agreed that it was appropriate to give the Appellant time to produce more evidence. I record the information given by Mr Melvin that the Appellant's ex-wife and children have been given further limited leave to remain until 2020. They are being given periods of leave on the ten year' route, their first grant of leave having been in 2014. The factual position is therefore changed since the First-tier Tribunal hearing. Moreover, the children are now older and it would be appropriate for further evidence to be provided in relation to what their best interests now require.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge B Morron promulgated on 4 August 2017. I make the following directions for the re-making of the decision.

DIRECTIONS

14. **Within six weeks from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent (for the attention of Mr T Melvin) any further evidence on which he relies.**

15. **The resumed hearing will be listed on the first available date after eight weeks from the date when this decision is sent. Time estimate is half a day.**

Signed Dated: 1 March 2019

Upper Tribunal Judge Smith