Upper Tribunal
(Immigration and Asylum Chamber)

Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision Promulgated**
On 28 October 2015	
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Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Frances

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOOREEADO TREEBHAWON, KJUL TREEBHAWON, ATISH TREEBHAWON, AKASH TREEBHAWON AND ADESH TREEBHAWON

Respondents

Representation:

Appellant: Ms A Fijiwala, Senior Office Home Presenting Officer
Respondents: Mrs H Arrif, Solicitor, of Arden Solicitors Advocates

(i) Section 117B (6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)–(3).

(ii) Section 117B (4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises.

DECISION AND REASONS

Introduction

1. These conjoined appeals raise interesting questions relating to the construction and application of section 117B (6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which, so far as the panel is aware, have not previously been the subject of adjudication by the Upper Tribunal.

The Appellants

2. The Appellants are a family unit consisting of father, one daughter and three sons. All are nationals of Mauritius. The father is aged 44 and the children's ages range from 11 to 17. Their immigration history is as follows:

(i) The father claims to have entered the United Kingdom, via Dublin, in 2003.

(ii) In November 2007 the oldest child was given leave to enter the United Kingdom and remain for a period of six months. It appears that both she and the children's mother entered around this time.

(iii) In February 2008, in response to formal overstaying measures, the father confirmed that his wife and oldest child were in the United Kingdom, representing that they would be returning to Mauritius where their other three children resided.

(iv) On 04 August 2010 the second and third of the four children entered the United Kingdom.

(v) On 26 December 2011 the youngest of the four children entered the United Kingdom as a visitor.

[There is no mention in the papers of the mother of the family postdating this event.]

(vi) On 01 February 2013 the Appellants' human rights application was refused.

(vii) On 03 April 2013 further representations were made on the Appellants' behalf.

(viii) On 10 June 2014, in response to a request for clarification, the Appellants' representatives furnished further submissions.

(ix) By a decision dated 24 October 2014 on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellants' further human rights application was refused.

Appeal Proceedings

3. The latter decision was challenged by the Appellants by appeal to the First-tier Tribunal (the "*FtT*"). By its decision promulgated on 17 July 2015, the FtT allowed the appeals "*under the Immigration Rules and under Article 8*". Upon scrutiny, the FtT decided that the appeal of the oldest of the four children succeeded under paragraph 276 ADE(1) of the Rules, while the appeals of the other four family members succeeded under Article 8 ECHR outwith the Rules.

4. The Secretary of State applied for permission to appeal on the following two grounds:

(i) The second Appellant could not satisfy paragraph 276 ADE of the Rules, given the date of the decision, giving rise to a free standing error of law. This is allied to a further contention that this error infected the FtT's Article 8 decision in respect of the other four family members.

(ii) The FtT further erred in law in treating section 117B(6) of the 2002 Act as determinative of the public interest question, namely the issue of proportionality under Article 8(2) ECHR and failing to apply the other public interest provisions of the section.

The latter formulation is ours. Permission to appeal was granted on both grounds.

First ground of appeal: the Immigration Rules issue

5. At the material time, paragraph 276 ADE of the Immigration Rules provided:

> *"276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*
>
> *(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and*
>
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
>
> *(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
>
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of*

imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004."

The history, in brief, is that on 09 July 2012, pursuant to HC 194, the Immigration Rules were revised in respect of applications for leave to remain on the ground of private life under Article 8 ECHR (per paragraphs 276 ADE – 276 DH), applications for entry and stay based on family life under Article 8 (Appendix FM) and claims based on Article 8 in the context of deportation (paragraphs 398 – 399B).

6. These provisions of the Rules have generated much jurisprudence during the last two years. In R (Amin) v Secretary of State for the Home Department [2014] EWHC 2322 (Admin) it was held that paragraphs 276 ADE – 276 DH and Appendix FM do not constitute a comprehensive Article 8 Code. Thus it is recognised that a claim based on Article 8 can, in principle, succeed either under the prescriptive Article 8 regimes within the Rules or outwith the Rules, residually. In Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558, the Court of Appeal espoused the test of "*compelling circumstances*" in respect of claims outwith the Rules: see [44] and [77]. In MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 the Court of Appeal, in effect, disapproved the suggestion in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), at [29], that there is an intermediate hurdle to be overcome prior to consideration of Article 8 claims outwith the Rules: per Aikens LJ at [129].

7. In the Secretary of State's decision it was noted that the longest of the sojourns of the four children [the oldest, the second Appellant] in the United Kingdom was six years and five months. As the minimum sojourn prescribed by the relevant provision of the Rules, namely paragraph 276 ADE (1)(vi) is seven years, it was concluded that the four childrens' Article 8 claims under the Rules must be refused.

8. In considering the appeal of the oldest child, the FtT stated:

"*The only issue ……. is whether it would be reasonable to expect* [this child] *to leave the United Kingdom she being under the age of*

18 years ***and having lived continuously in the United Kingdom for seven years****. (It is accepted that at the date the Respondent made her decision* [this child] *had not been living continuously in the United Kingdom for seven years.)"*

[Emphasis added.]

The Judge's ultimate finding was that it would not be reasonable to expect this Appellant to leave the United Kingdom. Accordingly, her appeal was allowed under the Rules. We consider that this conclusion is unsustainable in law, having regard to the seven years residence requirement and the operative date for assessing same, namely the date of the application to the Secretary of State, not the date of the FtT decision: per paragraph 276 ADE(1) of the Rules. The materiality of this error being unmistakeable, the first limb of the first ground of appeal is established accordingly.

9. The second limb of the first ground of appeal is that the error of law which we have found above infected the FtT's decision to allow the appeals of the other four family members outwith the Rules. In the key section of its decision, under the rubric of "My Findings", the FtT devotes most of its attention to the oldest child, the second Appellant. This is followed by a brief final section which yields the following analysis:

(i) All five Appellants enjoy family and private life together.

(ii) Only the second Appellant can succeed under the Rules.

(iii) The removal of the other four family members would interfere with the rights to private and family life in play.

(iv) The issue is proportionality.

(v) The public interest engaged is the maintenance of immigration control in pursuit of the economic wellbeing of the country.

(vi) To require the other four Appellants to leave the United Kingdom would be disproportionate –

…. because family life would be disrupted given that it is reasonable for [the second Appellant] *to remain in the United Kingdom ….* [and] *there would be* [concerns] *and difficulties for the remaining siblings should the first Appellant's health deteriorate. These factors tip the balance in their favour."*

This latter passage may be linked to an earlier section of the decision in which evidence relating to the health and employability of the first Appellant, the father, is recorded.

10. We consider that there is a demonstrably clear nexus between the FtT's decision to allow the second Appellant's appeal on the ground that her case satisfied the requirements of the Rules and the further decision to

allow the other four Appellants' appeals outwith the Rules. The two are inextricably linked. We have concluded that the first decision is unsustainable in law. Given that the cornerstone of the second decision is the legally unsustainable first decision, it follows inexorably that the second decision cannot survive. Its sole and exclusive rationale is the legally untenable first decision. The materiality of this further error of law brooks no argument. Thus all five decisions must be set aside.

Second ground of appeal: the section 117B(6) issue

11. The FtT gave consideration to section 117B(6) of the 2002 Act in the context of considering whether the claims of the 1st, 3rd, 4th and 5th Appellants could succeed outwith the Article 8 regime of the Rules. The decision states:

> "*In considering this I have had regard to and applied* [section 117B(6)] *… which confirms to me that there is no public interest in removing the first Appellant because he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect her to leave the United Kingdom.*"

This is the only reference to section 117B in the entirety of the decision.

12. Section 117B of the 2002 Act provides:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to—*
>
> *(a) a private life, or*

(b) a relationship formed with a qualifying 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 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, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

The new Part 5A of the 2002 Act, comprising sections 117A – 117D, came into operation on 28 July 2014. This is a novel legislative mechanism whereby in the exercise of determining proportionality in Article 8 cases, courts and tribunals are obliged to have regard to Parliament's formulation of the public interest. This flows from the definition of the "*public interest question*" as the question of "*whether an interference with a person's right to respect for private and family life is justified under Article 8(2)* [ECHR]", per section 117A(3).

13. In the evolving jurisprudence of the Upper Tribunal, the new Part 5A regime has been considered in a series of reported decisions. The most comprehensive analysis of its provisions is found in Forman (Sections 117A – C considerations) [2015] UKUT 00412 (IAC), at [17] especially. In that case the Upper Tribunal decided, *inter alia*, that sections 117A and 177B apply in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches any person's rights under Article 8 ECHR. It further held that in considering the public interest question, the Court or Tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2). Other major pronouncements of the Upper Tribunal on sections 117A – 117B are found in AM (Section 117B) Malawi [2015] UKUT 0260 (IAC) and Deelah and Others (section 117B – ambit) [2015] UKUT 00515 (IAC).

14. None of the above decisions addresses the specific issue which arises in the present appeals. We formulate this issue in the following terms:

In a case where a Court or Tribunal decides that a person who is not liable to deportation has a genuine and subsisting parental relationship with a qualifying child, as defined in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and it would not be reasonable to expect such child to leave the United Kingdom, with the result that the two conditions enshrined in section 117B(6) are satisfied, is this determinative of the "public interest question", namely the issue of proportionality under Article 8(2) ECHR?

While acknowledging that this formulation has certain offshoots, giving rise to other issues, we consider this to be the overarching question.

15. In Deelah and Others, the Upper Tribunal provided the following overview of the new Part 5A regime, at [19]-[21]:

> *"19. Next, in construing the provisions under scrutiny, certain observations about the structure and syntax of sections 117A and 117B are appropriate. The draftsman's mechanism of enjoining a decision maker, whether it be a court or tribunal or other agency, to "have regard to" specified matters is of some longevity. It is long established that where this mechanism is employed, the corresponding duty is to obey the legislature's instruction, that is to say the decision maker must have regard to the matter in question. In the typical statutory model, the legislature goes no further. Where this model is invoked this denotes the first stage in the exercise to be performed by the judge or decision maker. The second stage is a product of the common law: it imports a duty to give such rational weight to the matters specified as the judge or decision maker considers appropriate. Within this formulation lies the principle that in the generality of cases involving decisions of this genre the barometer for judicial review, or appeal on a point of law, is the Wednesbury principle. See, for example, Tesco Stores v Secretary of State for the Environment and Others [1995] 1 WLR 759. Lord Hoffmann's formulation of the principles at [56] – [57] and [68], while devised in a planning law context, applies generally.*
>
> *20. The statutory model for which the legislature has opted in sections 117A and 117B is not the typical one. True it is that its first striking element is the familiar one of obliging the court or tribunal concerned to have regard to specified considerations: per section 117A(2). These obligatory considerations are then listed in sections 117B and 117C. As section 117C does not arise in this appeal, I say nothing more about it. As regards section 117B, there is a total of six "considerations". Some of these have the dual identity of statutory considerations and legal principles, being readily traceable to both Strasbourg and domestic jurisprudence. The characteristic which links the "considerations" listed in section 117B(1), (2), (3) and (6) is that of the "public interest". These provisions reflect the reality that the public interest is multi-layered and has multiple dimensions. Those aspects of the public interest which the legislature has identified as considerations to be taken into account as a matter of obligation are contained in these provisions.*
>
> *21. In contrast, the two "considerations" contained in section 117B(4) and (5) are somewhat different from the other four, in the following respects. First, they make no mention of the public interest. They are, rather, concerned with facts and factors which, while bearing on the proportionality assessment under Article 8(2) ECHR, shift the focus from the ambit of the public interest to choices and decisions*

which have been made by the person or persons concerned in their lives and lifestyles. Second, there is a degree of tension between a court or tribunal having regard to a specified factor, as a matter of obligation (on the one hand) and (on the other) giving effect to a Parliamentary instruction about the weight to be given thereto. Indeed, in giving effect to section 117B(4) and (5), the court or tribunal concerned is not, in truth, performing the exercise of having regard to these statutory provisions. Rather, the Judge is complying with a statutory obligation, unconditional and unambiguous, to give effect to a parliamentary instruction that the considerations in question are to receive little weight."

16. In answering the question formulated in [14] above, we begin by subjecting Part 5A of the 2002 Act to the following further analysis:

    (a) Part 5A is expressed to be applicable in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8 ECHR.

    (b) In cases where an interference with such rights is demonstrated, the court or tribunal must, in determining proportionality, have regard to the considerations listed in section 117B in all cases and to the additional considerations enumerated in section 117C in all cases involving the deportation of foreign criminals.

    (c) Turning to section 117B, the first port of call is the cross heading "Article 8: public interest considerations applicable in all cases".

    [Our emphasis.]

    At this juncture of the analysis, the effect of section 117A(2)(a) is that the Court or Tribunal must have regard to everything contained in section 117B.

    (d) Section 117B comprises, in subsections (1) – (3), three unequivocal Parliamentary statements of the content of the public interest: the maintenance of effective immigration controls, the ability to speak English and financial independence. *En passant,* a striking feature of the formulation of the second and third of these statements of the public interest is the exposition of their rationale.

    (e) The next division of section 117B, in subsections (4) and (5), consists of separate statements that "*little weight*" should be given to three specified factors.

    (f) Next, and finally, there is an unequivocal statement of what the public interest does not require in section 117B(6): this is the only public interest pronouncement in section 117B framed in these negative terms.

17. The two "*little weight*" provisions of section 117B do not readily satisfy the appellation of Parliamentary statements of the public interest, in view of the terms in which they are phrased and compared with the formulation of the public interest statements in subsections (2), (3) and (6). Furthermore, the two "*little weight*" provisions relate to matters which, in practice, are invoked by the person concerned, rather than the Secretary of State, namely a private life and/or a relationship formed with a qualifying partner during such person's sojourn in the United Kingdom. As noted in Deelah, at [21], the focus of these discrete statutory provisions is choices and decisions which have been made by the person or persons concerned in their lives and lifestyles. We consider that section 117B(4) and (5) contain a recognition that the factors therein sound on the question of proportionality, where they arise, but are, by unambiguous Parliamentary direction, to be accorded little weight. We further consider that, properly construed, section 117B(4) and (5) are not Parliamentary statements of the public interest. They are, rather, Parliamentary instructions to courts and tribunals, to be applied in the balancing exercise, that little weight should be given to the matters specified where relevant. Thus analysed, the function of the court or tribunal concerned is not simply to have regard to these factors, in cases where they arise. Rather, they must be considered and given little weight. This is in contrast with the classic public law case whereby the decision maker, having discharged the primary duty of identifying all relevant facts and considerations, is free to accord to these such weight as he rationally considers appropriate.

18. The resolution of the second ground of appeal turns on how we construe section 117B(6), considered in its full statutory context. In performing this exercise, we derive no assistance from the construction which we have given to section 117B(4) and (5). We consider it instructive to juxtapose section 117B(6) with its three public interest siblings, namely section 117B(1), (2) and (3). Section 117B(6), notionally, follows these three provisions sequentially. Notably, Parliament has not established any correlation between section 117B(6) and the other three sibling public interest provisions. In particular, section 117B(6) is not expressed to be "*without prejudice to*" or "*subject to*" any of the other three related provisions. Furthermore, section 117B(6) is formulated in unqualified terms: in cases where its conditions are satisfied, the public interest does not require the removal from the United Kingdom of the person concerned. In this respect also it different from its siblings, which contain no comparable instruction.

19. The next notable feature of the new statutory regime is that in section 117B (6) Parliament has chosen to differentiate between those who are, and who are not, liable to deportation. It has provided a separate and special dispensation for members of the latter class. This is harmonious with one of the overarching themes of Part 5A, which is to subject foreign criminals who are liable to deportation to a more rigorous and unyielding regime. In the case of those who are not liable to deportation, Parliament has chosen to recognise that, where the specified conditions are satisfied, a public interest which differs from those public interests expressed in Section 117B(1)-(3) is engaged. The most striking feature of this discrete

public interest is its focus on one of the most vulnerable cohorts in society, namely children. The focus is placed on the needs and interests of these vulnerable people. Furthermore, the content of this public interest differs markedly from the other three, all of which are focused on the interests of society as a whole. In enacting Section 117B(6), Parliament has given effect to a public interest of an altogether different species. Notably, this new statutory provision is closely related to and harmonious with what has been decided by the Upper Tribunal in a number of cases, namely that there is a free standing public interest in children being reared within a stable family unit. The effect of Part 5A of the 2002 Act is, of course, that this discrete public interest must yield to more potent public interests in certain circumstances.

20. In section 117B(6), Parliament has prescribed three conditions, namely:

(a) the person concerned is not liable to deportation;

(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and

(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.

21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply.

22. It would further appear that the "*little weight*" provisions of section 117B(4) – (5) are of no application. If Parliament had been desirous of qualifying, or diluting, section 117B(6) by reference to either section 117B(4) or (5), it could have done so with ease. It has not done so. Fundamentally, there is no indication in the structure or language of Part 5A that in cases where, on the facts, section 117B(4) and/or (5) is engaged, the unambiguous proclamation in Section 117B(6) is in some way weakened or demoted. To this may be added the analysis in [18] - [21] above. Clearly, there is much to favour this construction. However, conscious of the limits of the judicial function, we decline to provide a definitive answer to this discrete question, for two reasons. First, we received no argument upon it. Second, it does not clearly fall within the grant of permission to appeal.

23. Similarly, the issue of the interplay between Section 117B(6) and the Immigration Rules does not arise directly in this appeal. In this context, we draw attention to the leading reported decision of the Upper Tribunal,

Bossade (Sections 117A-D: Inter-relationship with Rules) [2015] UKUT 415 (IAC). In that case, the Upper Tribunal held that, ordinarily, a court or tribunal will first consider an appellant's Article 8 claim by reference to the Immigration Rules, the purpose of this exercise being to decide whether the relevant qualifying conditions are satisfied by the person concerned. This exercise is performed without reference to Part 5A. The latter regime is engaged directly only where the decision making process reaches the stage of concluding that the person does not satisfy the requirements of the Rules. Thereafter, in any consideration of the case outwith the framework of the Rules, and subject to the application of the Razgar tests, Part 5A will fall to be applied in the decision maker's determination of the proportionality question. It follows that in any case where the parent concerned is unable to satisfy the requirements of the Rules section 117B(6) may conceivably apply: all will depend on the facts as found by the tribunal.

24. We apply the analysis and conclusions above to the decision of the FtT in the following way:

(i) The FtT committed no error of law in giving no consideration to Part 5A of the 2002 Act in deciding whether the case of the second Appellant satisfied the requirements of the Rules.

(ii) The FtT committed no error of law in giving consideration to section 117B(6) of the 2002 Act in deciding whether the claims of the other four Appellants could succeed outwith the Article 8 regime of the Rules.

(iii) The FtT's application of Section 117B(6), which did not involve consideration of any of the other provisions of Section 117B, was similarly free of error.

(iv) Accordingly, the second ground of appeal fails.

Decision

25. For the reasons explained in [8] – [10] above, the first ground of appeal succeeds. Accordingly, we set aside the decision of the FtT. The decision will be re-made in this forum.

Direction

26. The Appellant's bundle of evidence, indexed and paginated, will be lodged with the Upper Tribunal and served on the Secretary State by 08 January 2016 at latest.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 07 November 2015