Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/50861/2014**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision Promulgated**
On 27th May 2016	**On 1st July 2016**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MA PAZ BURNS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs J Moore, solicitor, Drummond Miller LLP
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence We do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge McGavin, promulgated on 5 August 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 4 December 1987 and is a national of the Philippines. On 24 September 2014 the appellant applied for leave to remain in the UK both as a partner and as a parent.

4. On 3 December 2014 the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge McGavin ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 9 December 2015 Judge Frankish gave permission to appeal stating inter alia

> *"3. There is extensive discussion ([22] – [24]) of the deception allegation the outcome of which appears to be that it is made out. Arguably, however, this is not clearly stated. With a British Citizen husband and two British Citizen children, it is arguable that the lifting of the presumption in s.117B has been insufficiently considered."*

The Hearing

7. (a) Mrs Moore, solicitor for the appellant, moved the grounds of appeal. She told us that although there are four grounds of appeal they all fall under the umbrella of one argument, and that is that the Judge failed to properly apply section 117B(6) of the Nationality Immigration and Asylum Act 2002. She told us that her argument would draw heavily on the case of Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC.

(b) Mrs Moore told us that the Judge had failed to take proper account of the impact of separation between the appellant's children and the appellant. She told us that the question which should have been posed is "*what will happen to the children if the appellant had to leave the UK?"*. She emphasised that the appellant's British citizen spouse cannot meet the financial requirements of appendix FM, and argued that section 117B(6) of the 2002 Act is designed to protect British citizen children from separation in circumstances such as this case.

(c) Mrs Moore told us that the appellant's British citizen husband only had restricted holiday entitlement from his employment, and that the

appellant's British citizen children are now both in primary school in the UK. She relied heavily on a letter from the head-teacher of the primary school. When pressed, she accepted that the appellant's two children have dual nationality, and that no evidence was produced of the education system in the Philippines, but argued that the decision-maker had failed to take a child centred approach to this case. She emphasised that this family has never been separated before, and fears separation.

(d) Mrs Moore told us that the decision contains material errors of law because the Judge failed to properly interpret section 117B(6) of the 2002 Act, and that failure undermines the proportionality assessment and flies in the face of the *ratio* in the case of Trebhowan. She emphasised that, if the appellant returns to the Philippines to seek entry clearance, there is the potential of the separation for between four and six months. She referred us to the respondent's IDIs of August 2015, and told us that there is nothing in either the IDIs or in statute which qualifies the terms of section 117B(6). She stressed the importance of the public interest in protecting children and argued that that public interest is reflected in the wording of section 117 which, she told us, is an absolute.

(e) Mrs Moore reminded us of section EX-1 of appendix FM, and once again reminded us of the importance of taking the British Citizenship of the children as a starting point. She explained that the appellant is the principal carer for the children and that their father worked long hours, traveling to other European countries in the course of his employment. She told us that the impact of the respondent's decision on the appellant's children could not be said to be reasonable. She urged us to set the decision aside and decide the case of new by allowing the appeal.

8. (a) For the respondent, Mr Matthews told us that the decision does not contain any errors, material or otherwise. He told us that the appellant's children are not required to leave the UK: only the appellant is required to return to the Philippines to make an application for entry clearance; in the meantime the appellant's British citizen children can be adequately cared for in the UK by their British father. He was critical of the appellant for pleading her case entirely on a "worst-case scenario", and told us that a balanced view of this case indicated that this family were able to live and work in the Philippines before they decided to uproot the children and start life again in Falkirk.

(b) He told us that, even if it is not reasonable to expect the children to leave the UK, that is not the only public interest factor. He emphasised that other public interest factors do not fall out of account because of the reasonableness test found in section 117B(6) of the 2002 Act. Mr Matthews told us that the decision requires only the appellant to leave the UK and, at that, only to leave the UK temporarily. He told us that the temporary absence from the UK does not constitute "*leaving the UK*" within the meaning of section 117B(6) of the 2002 Act. He asked us to dismiss the appeal and allow the decision to stand.

Analysis

9. Section117B(6) of the 2002 Act provides for the exceptional case where the public interest does not require the removal of a person who is not liable to deportation in a case where (i) he has a genuine and subsisting parental relationship with a child who is either a British citizen or has settled status and (ii) it would not be reasonable to expect the child to leave the United Kingdom.

10. Paragraph 11.2.3. of the respondent's IDIs on Family Migration provides the respondent's decision makers with guidance on cases involving British children. The August 2015 version states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. However, it also states that "*where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer*".

11. For the appellant, it is argued that her two children are British citizens and that the appellant fulfils the requirements of Appendix FM of the Immigration Rules because the appellant has a parental relationship with a British citizen child.

12. In Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC) it was held that (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.

13. This appeal raises the question of whether or not the Judge addressed the reasonableness of the potential for a temporary absence from the UK for two British citizen children. We do not agree with Mrs Moore's argument that the wording of section 117B is in absolute terms and so incapable of anything other than rigid interpretation. It is obvious that the test is the question of reasonableness. Applying the test of

reasonableness calls for an exercise of common sense. It requires consideration of the facts and circumstances pertaining to this family. The simple question to be asked is whether it is reasonable to expect temporary separation between the appellant and her two children.

14. The facts in this case are that the appellant is married to a British citizen and they have two children of primary school age. At the date of hearing the appellant's children were aged 5 and 7 years. In March 2014 the appellant applied for a visit visa claiming that she wanted to come to the UK for one month. At or about the same time, the appellant's British citizen husband received an offer of employment in Falkirk. The appellant entered the UK in April 2014 with her husband and two children, and has remained in the UK since then.

15. As the appellant entered the UK as a visitor, she cannot meet the requirements of appendix FM (paragraph E-LTRP2.1). The appellant has a genuine and subsisting relationship with her two British citizen children. The respondent considered paragraph EX-1, and found that it did not apply because the appellant does not have sole responsibility for her two children.

16. The effect of the respondent's decision might be that the appellant returns to the Philippines leaving her husband and two children in the UK while she makes an application for entry clearance to return to the UK. At the worst that could mean separation for six months. The appellant's youngest child is only 5 years of age. Six months is a long time for a young child; but the evidence in this case is that the appellant's two children are well settled in primary school in the UK. They can live with their British citizen father in the UK. The respondent's decision would require this family to make certain decisions about working hours and childcare, but that is not unreasonable; that is what many British citizens do every day of the working week.

17. If the appellant returns to the Philippines alone, she will not lose contact with her husband and her children. The appellant's children enjoy dual nationality. There is no restriction on their ability to visit the Philippines. The appellant's husband lived and worked in the Philippines until April 2014. The appellant's case has always been that she and her children came to the UK for a one-month visit. If that is true, then their friends & their possessions must still be waiting for them in the Philippines.

18. The effect of the respondent's decision might be that the appellant and her children return to the Philippines and endure a temporary absence from the UK whilst waiting up to 6 months for entry clearance. The importance of the appellant's husband's job has been emphasised. He is a British citizen; he can remain in the UK and pursue his career. He can visit his family in the Philippines and can maintain contact with them by instantaneous communication.

19. The third option is that every member of this family returns to the Philippines and lives together for six months while they wait for the appellant's application for entry clearance to be considered. If the appellant and her family follow this third option, then they remain together. Their entire case is plead on the basis that they cannot face any degree of separation. If that is their "worst case scenario", then the simple decision that they have to make is that the appellant's husband gives up the employment that he did not have at the time of application for visit visa.

20. The worst that can happen to this family is that there might be temporary separation. If what is said by the appellant is entirely true, then the choice that will be made by this family is that the appellant's two British citizen children will return to the Philippines and have a temporary absence from the UK of perhaps six months. We have to ask ourselves whether it would not be reasonable for the children to leave the UK for a temporary period.

21. We consider the evidence that was before the First-tier Tribunal. We take account of the supplementary bundle produced at the hearing before us. The documentary evidence tells us that the appellant's husband travels, because of his employment, throughout Europe. The appellant's solicitor was at pains to point out that the appellant is the primary carer for the children. The children have dual nationality and have lived the majority of their lives in the Philippines, before being uprooted and introduced to the UK education system.

22. What is envisaged is a temporary absence in the company of the parent who provides primary care. We are asked to take such a strict interpretation of section 117B(6) as to find the temporary absence from the UK cannot be reasonable. We cannot attribute that meaning to the ordinary language of s.117B(6) of the 2002 Act. Such a strict interpretation would mean that, in years to come, when the appellant's two children are offered school trips to European countries it would not be reasonable for them to leave the UK because that would involve their temporary absence.

23. The facts in this case tell us that the appellant's two children have lived most of their young lives in the Philippines. They are more familiar with life there than with life in the UK. Their intention in coming to the UK was a temporary absence from the Philippines. That was not viewed as unreasonable. This family's future may well now lie in Scotland, but is it unreasonable for two young children to have another temporary absence, this time from the UK? The only conclusion we can come to is that it is not unreasonable because the children are not required to leave the UK and because if their parents choose to take the children back to the Philippines, their absence from the UK will only be for a period of months. The wording of the subsection looks at the reasonableness of requiring a

British citizen child to leave the UK. That wording relates to leaving the UK permanently, not temporarily.

24. Between [16] and [20] of the decision, the Judge clearly considers section 117B of the Nationality Immigration and Asylum Act 2002. The Judge starts [19] by stating *"nowhere in the reasons for refusal letter does the respondent stated that she considers that it would be reasonable to expect the appellant's children to leave the UK"*

25. The Judge manifestly takes account of section 117B of the 2002 act. There is no error in the Judge's interpretation of section 117B(6) of the 2002 Act. It is clear from a fair reading of the decision that the Judge is mindful of the entire terms of section 117B of the 2002 Act when carrying out the proportionality balancing exercise required in this case. The Judge clearly understood that the realistic alternatives facing this family are either that the two British Citizen children remain in the UK, and await the appellant's return, or they leave the UK with the appellant temporarily.

26. In AQ (Nigeria) and Others 2015 EWCA CIV 250 (at paragraph 62) it was recorded that the respondent did not concede "*that there would never be circumstances in which it would be proportionate to require the British child of a non EU carer to relocate with that carer to a country outside the EU*".

27. In AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that a Claimant child's British nationality nationality was not a trump card. It was necessary to take account of the whole circumstances which included the availability to the child of family life with parents in one of their countries of origin, and the extent to which the Claimant's immigration history involved dishonesty. In AF v SSHD 2013 CSIH 88 it was re-iterated that nationality is not a trump card and the tribunal is required to take into account the full circumstances.

28. The Judge takes account of the impact that removal of the appellant is likely to have on this family. She clearly identifies the crucial aspects of the established family and private life enjoyed by the appellant and carries out a well-reasoned proportionality balancing exercise informed by s.117B(6) of the 2002 Act and by s.55 of the Borders Citizenship and Immigration Act 2009.

29. At [47] & [48] the Judge draws those findings of fact to a conclusion by applying the correct test in law. The Judge has regard to part 5A of the Nationality, Immigration and Asylum Act 2002. That is the correct test in law. The decision contains sufficient findings of fact to support the conclusion that the Judge comes to. The correct test in law has manifestly been applied.

30. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a

decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

31. In this case, there is no misdirection in law & the fact finding exercise is beyond criticism. The decision is not tainted by a material error of law. We find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

32. No errors of law have been established. The Judge's decision stands.

DECISION

33. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date: 1st July 2016

Deputy Upper Tribunal Judge Doyle