



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: AA/12539/2015
& AA/12523/2015

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke on Trent
On 5 June 2017**

**Decision Promulgated
On 13 June 2017**

Before

**Deputy Upper Tribunal Judge Pickup
Between**

Secretary of State for the Home Department

Appellant

and

**NAM
PNM**

[Anonymity direction made]

Claimants

Representation:

For the claimants: Ms E Rutherford, instructed by Braitch RB Solicitors
For the appellant: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Phull promulgated 7.6.16, allowing the claimants' appeal against the decision of the Secretary of State, dated 16.9.15, to refuse the claim for international protection.
2. The Judge heard the appeal on 13.5.16.
3. First-tier Tribunal Judge Kelly refused permission to appeal on 4.7.16. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kopieczek granted permission to appeal on 29.3.17.

4. Thus the matter came before me on 5.6.17 as an appeal in the Upper Tribunal.

Error of Law

5. I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Phull to be set aside and remade. I reserved my reasons, which I now summarise.
6. In refusing permission to appeal, Judge Kelly agreed that it was arguable that the First-tier Tribunal Judge's assertion that the Immigration Rules do not fully address the private and family life issues in the appeal was insufficient to identify any compelling circumstances to warrant consideration outside the Rules. However, Judge Kelly considered the error immaterial to the outcome of the appeal, given that the test of reasonableness under the Rules and under s117B(6) has been held to be the same (AM (s117B) Malawi [2015] UKUT 0260 (IAC)), and that on its wording s117B(6) provided a discrete regime which states that upon fulfilment of its three conditions, the Tribunal is bound to hold that the public interest does not require the removal of the parent or the child from the UK. Therefore, Judge Kelly considered it not arguable that that the engagement of the First-tier Tribunal with the reasonableness test was incomplete.
7. However, the law has moved on. In the Upper Tribunal Judge Kopieczek found it arguable in the light of the recent case authorities that in allowing the appeals under article 8 ECHR, the First-tier Tribunal Judge's decision failed to reflect the wider public interest considerations inherent in the 'reasonableness' question.
8. As the Court of Appeal held in MA (Pakistan) & Ors v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705, the court is required to have regard to the conduct of the appellant and the wider public interest considerations when considering the reasonableness test under 117B(6), including those set out in the preceding provisions of s117B. It is not a discrete, free-standing, self-contained, determination of the public interest, as Judge Kelly believed it to be, and involves more than simply the interests of the child.
9. Ms Rutherford accepted that in light of MA (Pakistan) she was in difficulties in resisting the appeal.
10. In the circumstances, I find, as asserted in the grounds, that the First-tier Tribunal conducted a child-centric assessment of reasonableness and in doing so failed to take into account the family's circumstances as a whole, together with the immigration history and the other public interest considerations of s117B. I agree and so find that the reasonableness assessment of the First-tier Tribunal was incomplete and did not properly engage with the full facts of the case.

11. The error arises by reason of the decision of the Court of Appeal, promulgated 7.7.16, after the promulgation of the decision of the First-tier Tribunal, and not a decision the First-tier Tribunal Judge could have been aware of. It follows that the finding of an error of law is no reflection on Judge Phull. The case law on the reasonableness test has overtaken the understanding of that test prior to the Court of Appeal's judgement.

Remittal

12. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.
13. In all the circumstances, at the invitation both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

28 July 2017

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Birmingham;
2. The appeal is to be relisted at the first available date;
3. The appeal is to be decided afresh with no findings of fact preserved;
4. The ELH is 3 hours;
5. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Phull;
6. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
7. The First-tier Tribunal may give such further directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did make an order pursuant and given that a child is involved, I continue the anonymity direction.

Fee Award

Note: this is not part of the determination.

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

28 July 2017