Upper Tribunal
(Immigration and Asylum Chamber)

Ahmed (rule 17; PTA; Family Court materials) [2019] UKUT 00357 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2019	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HASEEB AHMED

(ANONYMITY ORDER NOT MADE)

Respondent

Representation :

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr C Jacobs, instructed by Bushra Ali Solicitors

(1) Where P is the respondent to the Secretary of State's appeal in the Upper Tribunal against the decision of the First-tier Tribunal to allow P's appeal, P cannot give notice under rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 so as to withdraw his appeal, since P has no appeal in the Upper Tribunal. In such a situation, the giving of notice under rule 17 to withdraw P's case will, if the Upper Tribunal gives consent, have the effect of leaving the Secretary of State's appeal to the Upper Tribunal unopposed and therefore may well lead to a reasoned decision from the Upper Tribunal, setting aside the decision of the First-tier Tribunal.

(2) If an application by a party for permission to appeal against a decision of the First-tier Tribunal has been granted by that Tribunal, but the application was made late and time was not extended by the granting judge, the other party may raise the timeliness issue before the Upper Tribunal, as described in Samir (FtT permission to appeal: time) [2013] UKUT 00003 (IAC), provided the Upper

Tribunal has not reached a substantive decision. The issue may not, however, be raised after the Upper Tribunal has reached such a decision. Rule 6 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 means that the grant of permission by the First-tier Tribunal is to be treated as valid, notwithstanding the procedural irregularity, with the result that the ensuing decision of the Upper Tribunal is, likewise, valid.

(3) If a party intends to rely before the Tribunal on material emanating from proceedings in the Family Court, that party must ensure that the material can be disclosed, without any breach of restrictions on the disclosure of such material. Failure to do so may amount to contempt of the Family Court. Judges in the Immigration and Asylum jurisdiction must be alert to this issue.

DECISION AND REASONS

A. INTRODUCTION

1.
This is the judgment of the Tribunal, to which we have both contributed. Although the substantive law in this case is jurisprudentially unremarkable, the procedural aspects are another matter.

2.
The respondent, hereafter claimant, is a citizen of Pakistan born in 1986. The claimant entered the United Kingdom in December 2010, with entry clearance as a student. Further leave in that capacity was granted in 2012, to last until June 2014. In February 2013, however, that leave was curtailed. The curtailment decision attracted a right of appeal but no appeal was lodged.

3.
In May 2014, the appellant submitted an application for leave to remain, based upon his marriage to a British citizen, present in the United Kingdom, with whom he had had a child, born in Bristol in December 2013, who was also a British citizen.

B. THE SECRETARY OF STATE'S DECISION

4.
On 20 October 2014, the Secretary of State refused the claimant's application. Paragraph 7 of the decision observed that, in order for the claimant to be eligible for consideration for limited leave to remain under Appendix FM and paragraph 276ADE of the Immigration Rules, the claimant must not be excluded on the grounds of suitability under Appendix FM S- L T R.1.1 . - 3.1. The reason why the Secretary of State concluded that the claimant failed in this regard was because his case fell for exclusion under S-LTR.2.2. This applies where, w hether or not to the applicant's knowledge: -

"(a) f alse information, representations or document s have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application."

5.
Paragraph 8 of the decision stated that Educational Testing Services (ETS) had confirmed to the Secretary of State that the claimant's Test of English for the International Communication (TOEIC) Programme had been undertaken by deception and , as a result, the claimant's subsequent grant of leave, which was dependent upon him having passed that test, had been obtained by deception. In

particular, the Secretary of State took the view that “an anomaly with your speaking test indicated the presence of a proxy test taker”.

6.
The decision moved to consideration of the claimant’s spouse, and whether his relationship with her qualif ied the claimant for leave to remain by reason of the “family life” aspects of Appendix FM. The Secretary of State concluded that the claimant’s spouse did not meet the definition of “partner” in Appendix FM because - leaving aside the fact that the claimant could not satisfy the suitability requirements of the R ules – the claimant had not shown that he and the spouse were in a genuine and subsisting relationship.

7.
The Secretary of State’s decision then turned to the issue of whether the claimant wa s eligible for leave to remain under Appendix FM on the basis of family life as a parent. Here, the Secretary of State concluded that the claimant had failed to adduce evidence to show that he had a genuine and subsisting relationship with the child. As a result, the Secretary of State concluded that the claimant had failed to show compliance with the requirements of E-LTRPT.2.3. and 2.4. of Appendix FM.

8.
Quite apart from the earlier findings regarding paragraph 276ADE (private life), the Secretary of State considered that the claimant failed to meet the substantive requirements of that provision. Looking outside the ambit of the R ules, the decision stated that the Secretary of State did not consider that leave to remain fell to be given to the claimant by reference to Article 8 of the ECHR. The claimant had attempted to obtain leave to remain by deception, which was a factor weighing in the proportionality balance.

C. THE CLAIMANT’S APPEAL TO THE FIRST-TIER TRIBUNAL

9.
The claimant appealed against the Secretary of State’s decision. His appeal was heard at Newport on 31 July 2015 by First-tier Tribunal Judge O’Rourke. Having heard the claimant and his spouse give oral evidence, the judge concluded their evidence was “unsatisfactory and unreliable”. The reasons were set out at paragraph 14 of the decision. In particular, the judge found that the evidence of the wife “was not that of a wife keen to bolster her husband’s appeal and to secure his continue d residence with her. Her evidence was … evasive and hesitant and in direct conflict with the contents of her witness statement”. This, and other matters recorded by the judge, caused her to “query whether she was under duress in attending to give evidence at this hearing”.

10.
Concerning the issue of whether the claimant had employed a proxy to take his TOEIC test, the First-tier Tribunal Judge said as follows:-

“There was insufficient evidence before me to decide whether or not the [claimant] had fabricated his TOEIC test. The evidence was too generic and the methodology adopted by ETS has been open to challenge in recent cases. Without more specific evidence, focused on the [claimant] I make no finding on this point.”

11.

The judge was, however, able to make a finding regarding whether the relationship of the claimant and his spouse was genuine and subsisting. She found it was not ; in particular because it was “clear to me that the sponsor certainly does not regard herself as in such a relationship”.

12.
The judge, however, allowed the appeal under the Immigration Rules, for the following reasons:-

“17. In respect of their children, it is accepted that the [claimant] is [H’s] father. There was no evidence before me to indicate that, regardless of the quality of the relationship between him and his wife and the credibility of his evidence generally that he did not have a genuine and subsisting parental relationship with his daughter and indeed this issue was unchallenged at this hearing. Therefore, contrary to the [Secretary of State’s] decision, paragraph EX.1(a) does apply in the [claimant’s] case. He has a genuine and subsisting parental relationship with a child under the age of 18, who is a UK citizen and is resident in the UK. Due to her age and the likelihood that her mother firstly, would not permit the child to be separated from her and the child’s step-brother and second ly would be very unlikely to accompany the [claimant] to Pakistan, it would not be reasonable to expect the child to leave the UK. On that basis, therefore, the [claimant] meets the requirement of the Rules.”

D. SUBSEQUENT EVENTS

13.
In September 2015, the Secretary of State applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The grounds contended that the First-tier Tribunal Judge had erred in law in finding that the Secretary of State had not discharged t he burden of proof in demonstrating that this [claimant] used deception. The grounds submitted that the witness statements and extract from a spreadsheet, filed by the Secretary of State, detailed extensively the investigation undertaken by ETS in the claimant’s case –

“along with thousands of other applicants, and the process of identifying those tests found to be “invalid” … The FTT should have had due consideration to the specific evidence which i dentifies this [claimant] as an individual who has exercised deception, together with the witness statement outlining the investigation process”.

14.
The grounds further submitted that the claimant “does not meet the suitability requirements of Appendix FM of the Immigration Rules. As such, the [claimant’s] application cannot succeed even with reference to EX.1”.

15.
On 12 January 2016, First-tier Tribunal Judge P J M Hollingworth granted permission. His reasons were as follows:-

“An arguable error of law has arisen in relation to the construction placed by the Judge on the evidence submitted by the [Secretary of State] in relation to the issue of whether the [claimant] had used deception.”

16.
The hearing before the Upper Tribunal was listed for 27 January 2017 in Newport. On 19 January 2017, Bushra Ali Solicitors wrote to Field House under the heading “Private & Confidential – Urgent ”. The body of the letter read as follows:-

“ **NOTICE TO WITHDRAW**

Please kindly be advised we have been instructed by the above named in this matter. We have already sent to your office a signed form of authority but send it through once again for ease of reference.

Please find attached herewith a signed notice of withdrawal by the above named requesting that the hearing of 27 January 2017 be vacated and the appeal be treated as withdrawn on the basis that the above named is to make an application to the Home Office seeking Leave to Remain based upon contact awarded by the family court to him with his daughter.

We await your urgent confirmation that the appeal ha s been treated as withdrawn as only then will the application be submitted to the Home Office.

We thank you in advance for your assistance.”

17.
The obvious point about this letter was, of course, that the claimant could not be asking for his appeal to the Upper Tribunal to be withdrawn. The claimant had no such appeal. It was the Secretary of State who had been given permission by the First-tier Tribunal to appeal against First-tier Tribunal Judge O’Rourke’s decision to allow the appeal against the Secretary of State’s refusal to grant leave to remain.

18.
The Upper Tribunal, accordingly, treated the letter of 19 January 2017 as an application under r ule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 by the claimant to withdraw his case. The effect of that was that the Secretary of State’s appeal was unopposed. The Upper Tribunal therefore set aside the decision of the First-tier Tribunal, on the grounds identified in the application for permission and grant of permission , and substituted a decision dismissing the claimant’s appeal against the Secretary of State’s decision refusing leave.

19.
The claimant was unhappy with the Upper Tribunal’s decision. His solicitor s sought on his behalf to have the matter reinstated under r ule 17(3), which led to the Upper Tribunal writing to the solicitors in May 2017 requesting confirmation that, in that event, it needed to be understood that the appeal would have to re-decided, carrying as that did the risk that the eventual decision “ will be a reasoned one in the Secretary of State’s favour ” . On 25 August 2017, the solicitors wrote to say that the ir intention was to seek permission to appeal to the Court of Appeal against the decision that had been made on 20 March 2017.

20.
Permission to appeal was refused by the Upper Tribunal but , on renewal to that court, it was granted in November 2018. By consent, the claimant’s appeal was allowed and the matter was remitted to the Upper Tribunal. The court held that the Upper Tribunal had been wrong to treat the correspondence from the claimant’s solicitors as a notice of withdrawal and that, in any event, there was no basis for the Upper Tribunal to set aside the First-tier Tribunal’s decision allowing the Secretary of State’s appeal.

21.
It is, of course, not our place to comment upon the Court of Appeal’s decision. It is, however, necessary to point out that the unfortunate process we have just described stems from the claimant’s solicitors’ letter of 19 January 2017.

22.
At the hearing on 18 September, we asked Mr Jacobs (who had drafted the grounds of appeal to the Court of Appeal) to explain what had been meant by the letter of 19 January 2017 and what the Upper Tribunal was being asked to do. With admirable candour, Mr Jacobs responded that he did not have an answer to th ose question s . Certainly, we are not aware of any statement from the solicitors which might shed light on the matter. The closest we get is this , from the statement of truth of the solicitor dated 11 April 2017:-

“(22) [The claimant] is in such a situation whereby he has a genuine and subsisting relationship with a British child and is enjoying contact with the child … as a result of which he want ed to proceed with making an application to the Home Office see k ing a right to remain on this basis.

(23) The [claimant] understands that he could not continue to pursue an appeal and at the same time make an application to the Home Office as a result of which appeal proceedings needed to be concluded.

(24) He appropriately set out in his notice of withdrawal that the reason why he was seeking to withdraw the appeal was because of his change in circumstances and contact being awarded with his British daughter by the family court. He has specifically explained that he wished to proceed with making an application to the Home Office on this basis.”

23.
Thus, the claimant’s motivation in having his solicitor write the letter of January 2017 was to bring the current appeal proceedings to an end, which would enable him to make a fresh application for leave to the Secretary of State. His solicitor s , however, ought to have pointed out to the claimant that the Upper Tribunal could not, on that basis, itself bring the proceedings to an end. Nor could the Upper Tribunal compel the Secretary of State to withdraw her appeal. If those basic points had been appreciated, it is unlikely that the Court of Appeal would have been troubled and much time and (no doubt) expense would have been saved.

E. STATUS OF THE SECRETARY OF STATE’S APPLICATION FOR PERMISSION TO APPEAL

24.
That was not, however, the only unusual procedural aspect of this case. In his skeleton argument, filed and served on 17 September 2019, Mr Jacobs submitted, as a preliminary issue, that the Secretary of State’s application for permission to appeal to the Upper Tribunal was out of time and should, accordingly, not be admitted. The determination of First-tier Tribunal Judge O’Rourke was promulgated on 5 August 2015. The application, made to the First-tier Tribunal, was submitted on 16 September 2015. That is outside the fourteen day time limit prescribed by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The Secretary of State’s application for permission contained no explanation for the delay.

25.
Mr Jacobs cited r ule 20 of the 2014 Rules:-

“ **Late notice of appeal**

20.—(1) Where a notice of appeal is provided outside the time limit in rule 19, including any extension of time directed under rule 4(3)(a) (power to extend time), the notice of appeal must include an

application for such an extension of time and the reason why the notice of appeal was not provided in time.

(2) If, upon receipt of a notice of appeal, the notice appears to the Tribunal to have been provided outside the time limit but does not include an application for an extension of time, the Tribunal must (unless it extends time of its own initiative) notify the person in writing that it proposes to treat the notice of appeal as being out of time.

(3) Where the Tribunal gives notification under paragraph (2), the person may by written notice to the Tribunal contend that—

(a) the notice of appeal was given in time; or

(b) time for providing the notice of appeal should be extended,

and, if so, that person may provide the Tribunal with written evidence in support of that contention.

…

(4) The Tribunal must decide any issue under this rule as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary issue, and may do so without a hearing.

(5) Where the Tribunal makes a decision under this rule it must provide to the parties written notice of its decision, including its reasons. ”

26.
Mr Jacobs relied upon the Upper Tribunal decision in Samir (FtT permission to appeal: time) [2013] UKUT 00003 (IAC) , in which permission to appeal to the Upper Tribunal was granted by a judge of the First-tier Tribunal , where the application was out of time, but the judge did not extend time. Applying the decision in Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442, the Upper Tribunal held that the grant of permission by the First-tier Tribunal had been conditional upon time being extended by that T ribunal. Such an extension could be granted at the hearing in the Upper Tribunal, if the judge or judges of the Upper Tribunal re-constituted themselves as First-tier Tribunal judges and decided, in all the circumstances, that it was appropriate to extend time.

27.
In Samir , a Deputy Judge of the Upper Tribunal had decided (it is assumed, as a Judge of the First-tier Tribunal) not to extend time and he therefore declined to admit the application. This meant that the Secretary of State, as the disappointed party, had the opportunity of making an application for permission to the Upper Tribunal, which he duly did. The Upper Tribunal considered the application, pursuant to r ule 21 of the Upper Tribunal Rules, paragraph (7) (b) of which provides that, in the circumstances with which the case was concerned, the Upper Tribunal “must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so”. The Upper Tribunal considered that it was not in the interest s of justice; and so there was no appeal pending before it.

28.
The following passages from the decision in Samir contain the essence of the reasoning of the Upper Tribunal:-

“18. We see no reason to depart from either the reasoning or the decision of Judge Allen in Boktor and Wanis . The present rules both of the First-tier Tribunal and of the Upper Tribunal made clear the importance attached to making applications in time; and the separate notion of the admission of applications on the grant of permission makes it clear that an out of time application has to go separately through the process of being admitted before it is eligible for a grant of permission. The only doubt we have as to the decision in Boktor and Wanis is whether it is correctly described as a decision of the Upper Tribunal.

19. In our judgement it is clear from the Rules, and to a limited extent also from the 2007 Act, that it is intended that a party whose application to the First-tier Tribunal is unsuccessful should have the opportunity of making an application to the Upper Tribunal for permission to appeal to it. That that process applies even if the First-tier Tribunal refuse to admit the application because it was late is confirmed by Upper Tribunal rule 21(7), which we have set out in paragraph 15 above. It follows that the process set out by Judge Allen, in which a grant on the merits is treated as conditional, subject to time being extended when the matter is brought to the Tribunal’s attention, must be seen as part of the First-tier Tribunal process of considering the application for permission to appeal. If the outcome of that process is a decision that the application should not be admitted, because it was out of time and time should not be extended, the applicant must have an opportunity to put his case again to the Upper Tribunal.

20. After all, if the judge considering the application to the First-tier Tribunal had dealt with the issue of time and had refused to admit the application, there would be no doubt that the applicant could apply again to the Upper Tribunal. It cannot be that the applicant is deprived of a level of application simply by the judge’s mistake in failing to appreciate or deal with matters of time.

21. For these reasons, when a judge of the Upper Tribunal is faced with these issues, he will need to sit as a judge of the First-tier Tribunal to determine them. Properly interpreted, that is clearly what Judge Allen was doing (or should have been doing) in Boktor and Wanis , and it must be what Judge Lever is to be interpreted as having done in the present case. Despite the trappings of the Upper Tribunal, the decision he made was the completion of the task begun by Judge Waumsley, which was the consideration of the application for permission to appeal, made to the First-tier Tribunal.”

29.
The effect of Boktor and Wanis and Samir is that s omething that , on its face, purports to be a grant of permission, which is the jurisdictional prerequisite for being able to bring an appeal before the Upper Tribunal, is merely “conditional”, in the sense that – as i s apparent from paragraph 19 of Samir – the First-tier Tribunal ’s permission process is incomplete. If “when the matter is brought to the Tribunal’s attention” , the First-tier Tribunal does not grant permission, then the Upper Tribunal lacks jurisdiction to consider the appeal, by reference to the purported grant of permission by the First-tier Tribunal ; and the only course open to the party concerned is to make a renewed application for permission , direct to the Upper Tribunal.

30.
The pragmatic approach adopted by Boktor and Wanis and Samir , in which the Upper Tribunal reconstitutes itself as the First-tier Tribunal to complete the process begun but not finished by the First-tier Tribunal judge, may be a satisfactory approach, where the Tribunal’s attention is drawn to the timeliness issue at an early stage in the Upper Tribunal proceedings . However , it raises questions where the timeliness point is not raised until much later. The logic of these cases might suggest that, even if the point is raised after the Upper Tribunal has made a substantive decision,

which may have been appealed to the appropriate appellate court, its raising at any stage means the issue will need to be adjudicated upon by the First-tier Tribunal, if the purported grant of permission is to be treated as valid.

31.
Since Samir was decided, the P rocedur e R ules of the Immigration and Asylum Chamber of the First-tier Tribunal had been replaced by the 2014 Rules. Mr Jacobs drew attention to r ule 20 (late notice of appeal) , quoted above .

32.
At the hearing, the Upper Tribunal drew attention to r ule 6(1) of the 2014 Rules, which has no counterpart in the earlier Rules:-

“6.—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.”

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

…” [1]

33.
With the benefit of rule 6, it is possible to avoid the potential problem described in paragraph 30 above. The fact that permission to appeal has been granted by the First-tier Tribunal without extending time will not, of itself, affect the validity of the grant. It will, however, be possible for the timeliness point to be taken before the Upper Tribunal has reached a substantive decision on the appeal. If it is, then the First-tier Tribunal (including , if necessary, the Upper Tribunal reconstituting itself) will decide under rule 6(2) whether to waive the requirement to extend time and, if not, whether time should be extended. Much will depend upon the procedural history and the knowledge and conduct of the parties. If t he requirement is not waived and time is not extended, then the outcome will be as it was in Samir.

34.
Where the timeliness point is not taken before the Upper Tribunal reaches a substantive decision in the appeal, rule 6 means that the proceedings in the First-tier Tribunal, including the grant of permission, are to be treated as valid, with the result that the ensuing decision of the Upper Tribunal is, likewise, valid. It cannot be compatible with the overriding objective of both Chambers’ Procedure Rules for the party who did not secure the permission to raise the timeliness point only a fter the substantive decision has been given . In order to argue his or her case in the Upper Tribunal, that party will have had access to the other party’s application and grounds, from which the timeliness point should have been apparent. Accordingly, the Upper Tribunal’s substantive decision is the point at which Boktor and Wanis and Samir cease to have any application.

35.
Returning to the present case, although the formal position is that the Upper Tribunal has yet to make a substantive decision (its earlier one having been set aside by the Court of Appeal), in all the

circumstances it would be wholly unconscionable now to prevent the Secretary of State's appeal from being substantively determined by the Upper Tribunal. The claimant's present stance is at odds with his stance before this T ribunal hitherto, in which, as we have seen, he accepted that there was an appeal before the Upper Tribunal . I n particular, it is wholly incompatible with his decision to appeal the Upper T ribunal's earlier decision to the Court of Appeal. The claimant has long been in a position to take the timeliness point but has not done so.

36.
A s a result , even though the breach of the time limit by the Secretary of State in 2015 was significant and we have not been given an explanation for it, we have no hesitation in concluding that the claimant has waived any entitlement he may have to raise the timeliness point.

37.
In order to avoid the procedural disadvantages of reconstituting o urselves as the First-tier Tribunal, we treat the Secretary of State's application for permission to appeal as one made directly to the Upper Tribunal . We waive the relevant requirements of r ule 21 of the Upper Tribunal Rules, so as to enable that application to be made ; and we give permission to appeal, with this decision standing as written notice for the purposes of r ule 22(2)(a).

F. DECIDING THE APPEAL

38.
We are now able to turn to the question of whether there is an error of law in the decision of First-tier Tribunal Judge O'Rourke, such that her decision should be set aside.

39.
The judge clearly had an obligation to decide whether it was more likely than not that the appellant had engaged in deception in relation to his TOEIC test, the burden being on the Secretary of State to prove that. The judge, accordingly, could not validly decline to decide whether or not the claimant had acted in that manner or there had otherwise been deception of the kind envisaged by the Immigration Rules. As matters stand, this issue remains unresolved.

40.
However, as Mr Clarke fairly acknowledged, the Secretary of State needs to show that that error on the part of the judge is one that properly requires her decision to be set aside. It is, accordingly, necessary to examine paragraph 17 of her decision.

41.
T he Upper Tribunal held in Sabir (Appendix FM - EX.1. not free-standing) [2014] UKUT 00063 (IAC) that EX.1. is not a free-standing mechanism for granting leave, in the sense that, where leave is sought as a partner and the applicant fail s to meet the "suitability" requirements of S-LTR, the applicant will not succeed , even if he or she falls within the scope of EX.1.

42.
Since it was the ETS issue which caused the Secretary of State to take the view that the suitability requirements were not met by the claimant , the judge's failure to make a finding on that issue infected her conclusions in paragraph 17. Nevertheless, as Mr Clarke pointed out, the First-tier Tribunal Judge was required, when looking at the claimant's Article 8 ground o f appeal, to have regard to "the public interest question" as defined in section 117A of the Nationality, Immigration and Asylum Act 2002, as regards the considerations listed in section 117B.

43.
Section 117B(6) provides that:-

“ 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. ”

44.
As we now know from K O (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 , section 117B(6) is of particular significance. Where paragraphs (a) and (b) are satisfied, the Secretary of State cannot point to the public interest as requiring the removal of the person concerned. In determining whether those paragraphs are satisfied – in particular, whether it would “be reasonable to expect the child to leave” - th e individual conduct of the person concerned does not play a part. Nor is it relevant whether the child would, in practice, leave the United Kingdom in the event of the person’s removal : AB (Jamaica) v Secretary of State for the Home Department [2019] EWCA Civ 661.

45.
In the light of her findings in paragraph 17, regarding the largely analogous provisions of EX.1., it is manifest that the judge’s decision to allow the appeal would have been the same , if she had gone on specifically to look at section 117B(6) . We say this because t here is no ch allenge by the Secretary of State in the grounds to the findings of fact that underpinned the judge’s conclusions in paragraph 17.

G. DISCLOSURE OF MATERIAL GENERATED IN FAMILY PROCEEDINGS

46.
Finally, we must deal with an important matter which needs to be firmly borne in mind by practitioners and others in the immigration jurisdiction. Upon receipt of the claimant’s bundle for the Upper Tribunal hearing, it became evident that material in it emanated from proceedings involving the claimant in the Family Court in Bristol. It appeared to us that at least some of the relevant documentation fell within the ambit of section 12 of the Administration of Justice Act 1960 and r ule 12.73 of the Family Procedure Rules 2010; in which case, its disclosure would be a contempt of court unless the F amily C ourt had given permission.

47.
The Upper Tribunal took immediate steps to ascertain whether such permission had been obtained. Regrettably, Mr Jacobs informed us at the hearing that it had not. We wrote to the Designated Family Judge in Bristol, in order to bring the matter to his attention. Although Mr Jacobs addressed us on the circumstances surrounding the disclosure, we do not consider that it would be appropriate to re cord them in this decision.

48.
It is very important that judges in this jurisdiction are alert to th e matter and t hat they take all necessary steps when it arises.

DECISION

The decision of the First-tier Tribunal does not contain an error of law, such as to require the decision to be set aside. The Secretary of State’s appeal is, accordingly, dismissed.

No anonymity direction is made.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

---

[1] The corresponding provisions in the Tribunal Procedure (Upper Tribunal) Rules 2008 are rule 7(1) and (2).