Upper Tribunal
(Immigration and Asylum Chamber)

MM (section 117B(6) – EU citizen child) Iran [2020] UKUT 00224 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2020	.....

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MM

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr T Bahja, Counsel, instructed by Solomon Solicitors

For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

1. The definition of “qualifying child” contained in section 117D(1) of the Nationality, Immigration and Asylum Act 2002 does not include an EU citizen child resident in the United Kingdom for less than seven years.

2. The non-inclusion of EU citizen children resident for less than seven years in the definition of “qualifying child” does not breach the EU law prohibition against discrimination on grounds of nationality.

DECISION AND REASONS

1.
This appeal concerns whether EU law requires the definition of “qualifying child” in section 117D(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) to be applied as though it extends to children who are EU citizens, even if the child has not lived in the United Kingdom for a continuous period of seven years or more.

2.
The appellant is a citizen of Iran, born in March 1998. He appeals against a decision of First-tier Tribunal Judge Fox promulgated on 30 October 2019 dismissing his appeal against a decision of the respondent dated 18 July 2019 to refuse his asylum and human rights claim. Judge Fox dismissed the protection element of the appeal, finding that the claim had been fabricated. T here is no challenge to that finding . The focus of this appeal is the Article 8 limb of the judge's decision.

3.
The appellant has a three year old Polish daughter with whom he is in a genuine and subsisting relationship. He submits that the judge's assessment of her best interests was flawed. He also contends that if his EU citizen daughter were British, she would engage section 117B(6) of the 2002 Act. The public interest would not require the appellant's removal if it would not be reasonable to expect the child to leave the United Kingdom. However, as the child is Polish and does not otherwise satisfy the "qualifying child" criteria, section 117B(6) is of no application to the appellant. The central issue is whether that is nationality discrimination contrary to EU law.

Factual background

4.
The judge accepted that the appellant enjoyed family life for the purposes of Article 8 of the European Convention on Human Rights ("ECHR") with his Polish partner and their daughter. The appellant and his partner 's relationship began in 2015. They are not married but live together. Their daughter was born in October 2016 .

5.
The judge addressed the best interests of the daughter in these terms, at [116]:

"I now consider Article 8 in conjunction with section 55 [of the Borders, Citizenship and Immigration Act 1999]; Zoumbas [[2013] UKSC 74] applied. There is no dispute that family life exist [sic] between the appellant, partner and child. However, for the reasons stated above it is reasonable to conclude that the partner has conspired with the appellant to pursue an unmeritorious and opportunistic asylum claim."

6.
The judge found that the appellant and his partner had always known that the appellant's immigration status was precarious, and that separation was a possibility [117]. Pursuant to section 117B of the 2002 Act, their family life attracted little weight , the judge said . There was no suggestion that the child would be required to leave the United Kingdom if the appellant were removed : see [118] .

7.
The judge found that the appellant "cannot satisfy the respondent's definition of Article 8 ECHR". There would be no "insurmountable obstacles" [sic] to the appellant's removal to Iran [121]. There were no exceptional circumstances such that the appellant's removal would be unjustifiably harsh.

8.
T he judge considered that he did not enjoy the jurisdiction to consider whether the appellant could succeed on any other basis under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") . That would have been a "new matter" for which the respondent had not provided her consent ([125]) . The judge made findings on the point in any event. There was no "reliable"

evidence to demonstrate whether the appellant's partner's claimed part-time employment at Pizza Hut was genuine and effective or marginal and ancillary: see [126].

9.
Permission to appeal was granted by Upper Tribunal Judge Mandalia on the basis that the judge erred in assessing Article 8 in the context of the best interests of the partner's child .

Submissions

10.
First, the grounds contend that the judge erred by holding against the child the misconduct of the appellant and his partner, the child's mother .

11.
Secondly, the grounds contend that the judge was wrong not to treat the child as a "qualifying child" for the purposes of section 117D(1) of the 2002 Act . This is because Parliament's exclusion of the appellant's daughter from the definition of "qualifying child" was nationality-based discrimination in breach of Article 18 of the Treaty on the Functioning of the European Union ("TFEU") . Further, it would not be reasonable to expect the child to leave the United Kingdom.

12.
Mr Bajha focused primarily on his second ground of appeal, relying upon Nouazli v Secretary of State for the Home Department [2016] UKSC 16 at [51]. He submits that nationality-based discrimination is only permitted where it can be justified objectively, on public policy grounds, relying on Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française Case C-73/08 . T here is no legitimate public interest to justify the difference in treatment between British citizen children under section 117D(1) and EU citizen children, he submits. Accordingly , the judge failed properly to deal with the application and import of section 117B(6) , as he was required by EU law to do . Mr Bajha accepts that this was not a point raised before the judge below, but submits that it was " Robinson obvious", and should have been considered by the judge of his own motion .

13.
Mr Bramble submitted that the appellant had not applied to have his position as the father of an EEA national child determined under the 2016 Regulations . In any event, he submitted, the child had not started education, was under three at the time; there was no suggestion that her best interests were such as to override the cumulative force of the reasons in favour of removing the appellant.

The law

14.
Article 18 of TFEU provides, where relevant:

"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

15.
Article 24(1) of Directive 2004/38/EC of the European Parliament and of the Council dated 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States provides:

“ Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. ”

16.
Section 117B(6) of the 2002 Act provides:

“(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.”

17.
The term “qualifying child” is defined in section 117D(1) in these terms:

“‘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…”

Discussion

Best interests of the child

18. A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent: see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge. There must be a full consideration of all relevant factors.

19. The Court of Appeal developed the context for any assessment of the best interests of a child in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 in these terms, at [58]:

“…the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

The “real world” context test was endorsed by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [19].

20. I find that the judge failed to apply the above principles when addressing the best interests of the appellant’s daughter. The only operative analysis the judge engaged in concerning the best interests of the appellant’s daughter was to highlight his findings that the appellant and his partner had “conspired” to bring an unmeritorious asylum claim: see [116], quoted at paragraph 5, above. The adverse findings made by the judge against the appellant and his partner were of no relevance to his assessment of the best interests of the appellant’s daughter. Yet he appeared to hold the parents’

misconduct against the daughter. Nor did he address the “real world” context. These were errors of law.

21. I must address the second ground of appeal to determine the materiality of the above errors.

The definition of “qualifying child” and EU citizen children

22. Mr Bahja is correct to highlight the fact that section 117B(6) of the 2002 Act is not engaged by an EU citizen child in the same way as it is by a British citizen child. A British citizen child is a “qualifying child” automatically. By contrast, an EU citizen child (like any other non-British child) will only be a “qualifying child” if they have resided here for a continuous period of seven years or more.

23. I should note that Mr Bahja did not submit that the distinction between EU and British children contravenes other international legal obligations of the United Kingdom (for example, Article 14 ECHR) or domestic anti-discrimination law, such as the Equality Act 2010. The sole focus of his case was that section 117B(6) contravenes Article 18 TFEU.

24. Mr Bahja contends that section 117B(6) must be “read down” to include EU citizen children, to avoid direct, nationality-based discrimination in contravention of EU law.

25. Two preliminary observations are necessary.

26. First, the submission was not raised before the First-tier Tribunal. It will not usually be an error of law for the First-tier Tribunal not to address a submission it was not invited to consider. See Hickey v Secretary of State for Work and Pensions [2018] EWCA Civ 851 at [52], per Coulson LJ.

27. The submission is not, as Mr Bahja contends, “ Robinson obvious”. If it had been, it would have been an error of the judge not to consider the point, even though the parties had not raised it. “ Robin son obvious” has its origins in R v Secretary of State for The Home Department, Ex parte Robinson [1998] Q.B. 929, referring to the obligation on a tribunal to consider an “obvious” point of refugee law not raised by an appellant. At 946, Lord Woolf MR said, “[w]hen we refer to an obvious point we mean a point which has a strong prospect of success if it is argued.”

28. The high threshold for a Robinson - obvious point was underlined recently in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) at [61] to [74], and in Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC).

29. The appellant’s submissions in the present matter are in different territory. It is not “obvious” that the definition of “qualifying child” should be read so as to encompass an EU citizen child resident for fewer than seven years. For the reasons set out below, that submission is without merit.

30. Secondly, the jurisdiction of the First-tier Tribunal was, in relation to the Article 8 limb of the case, to consider whether the decision would be unlawful under section 6 of the Human Rights Act 1998: see the ground of appeal contained in section 84(1)(c) of the 2002 Act. By contrast, the primary thrust of Mr Bahja’s submission is that the approach taken by Parliament in section 117D(1) of the 2002 Act was such that the EU law rights of the appellant’s daughter were breached. That is an entirely different argument, advanced pursuant to a separate legal framework that sits within a different international legal order (the EU Treaties, rather than the European Convention on Human Rights), relating primarily to the EU law rights enjoyed not by the appellant, but by his daughter.

31. While it is possible to raise, within the confines of an appeal before the First-tier Tribunal under the 2002 Act, a point of law concerning the EU Treaties, that process was not followed before the

judge below. An appellant may raise an EU law point in response to a notice served under section 120 of the 2002 Act, or as a “new matter”, with the consent of the Secretary of State: see Schedule 2(2) to the 2016 Regulations and Oksuzoglu (EEA appeal - "new matter") [2018] UKUT 385 (IAC).

32. Given the appellant did not seek to raise the novel EU law point on which he now relies previously, either in response to the Secretary of State’s notice issued to him under section 120 of the 2002 Act on 15 January 2015, or as a “new matter” before the First-tier Tribunal, it follows that the First-tier Tribunal lacked the jurisdiction to consider whether the EU ground of appeal now relied upon by the appellant was made out. The prospect of the appellant enjoying a right to reside on an unspecified EU law basis was canvassed before the judge, but he lacked the jurisdiction to consider it. The same restriction is not engaged in the Upper Tribunal, as a superior court of record: see Birch (Precariousness and mistake; new matters) [2020] UKUT 86 (IAC).

33. It follows that the judge’s purported findings concerning the appellant’s partner’s work and whether she was a “qualified person” under regulation 6 of the 2016 Regulations were reached without jurisdiction. That was an error of law.

Nationality discrimination under EU law

34. Turning to the substantive submission under the second ground, it is necessary to recall that the appellant is not an EU citizen. He is Iranian. The rights conferred by the EU Treaties on EU citizens, including the protection against nationality-based discrimination enjoyed by EU citizens under Article 18 TFEU and Article 24(1) of Directive 2004/38/EC are not conferred upon, or enjoyed by, third country nationals who are outside the scope of EU law.

35. Although the appellant relies on Nouazli in order to substantiate his claim of discrimination, it is of no assistance. The issue in Nouazli was whether Mr Nouazli, an Algerian citizen with EU free movement rights in the United Kingdom acquired by marriage to his French wife, suffered discrimination contrary to Article 18 TFEU on account of his detention under the Immigration (European Economic Area Regulations) 2006 in circumstances where no equivalent power of detention would have been available had he been a person subject to immigration control under the Immigration Act 1971. The power in question was to detain on an anticipatory basis, pending a full deportation decision being taken. There was no power of so-called “anticipatory detention” under the 1971 Act for third country nationals subject to immigration control. Mr Nouazli argued that he was subject to a more draconian detention regime as a result of his EU law rights than other third country nationals subject to immigration control would face, contrary to Article 18 TFEU.

36. The Supreme Court held that Article 18 TFEU was only concerned with discrimination between EU citizens and citizens of the host Member State. The EU law prohibition against nationality-based discrimination did not apply in relation to rights enjoyed by EU citizens (and, by extension under Article 24(1) of Directive 2004/38/EC, their third country family members residing under the directive) when compared with those wholly outside the EU regime. At [43], Lord Clarke noted that in Vatsouras v Arbeitsgemeinschaft (AGRE) Nürnberg 900 (Joined Cases C-22/08 and C-23/08) [2009] All ER (EC) 747, the Court of Justice of the European Union (“the CJEU”) held at [52] that what is now Article 18 TFEU:

“concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.”

Vatsouras concerned whether it was discriminatory for a Member State to confer social benefits on certain third country nationals but not on EU citizens residing there. The case was not confined to its facts, held Lord Clarke. It was setting out general principles: see [43]. It remains good EU law; see, for example, Opinion 1/15 Re CETA Investment Court System (Belgium and others) at [169], handed down by the CJEU on 30 April 2019.

37. Against that background, at [51], Lord Clarke highlighted the limited scope of Article 24(1) of Directive 2004/38/EC. Lord Clarke said that Article 24(1):

"…makes clear that the relevant comparators for the purposes of the Directive are the nationals of the host member state but [it] does not include and is not concerned with discrimination as regards third country nationals who fall entirely outside the scope of EU law. "

38. Thus, it was not open to Mr Nouazli to seek to compare his liability to anticipatory detention with the absence of a corresponding power of detention for those subject to immigration control under the 1971 Act. Such persons were not relevant comparators for the purposes of EU anti-discrimination law; they were wholly outside the scope of EU law. Pursuant to the way the Advocate General summarised the position in Vatsouras at [AG66]:

"[Article 18] TFEU seeks to eliminate discrimination between Community citizens and nationals of the host member state but does not offer guidelines for eliminating the discrimination complained of by the referring court."

39. It follows that the issue at the heart of Nouazli's anti-discrimination claim is of no assistance to the appellant; it concerns a different form of alleged discrimination which, in the event, was held not to be discrimination contrary to the EU Treaties at all.

40. The appellant's complaint must therefore be analysed on the basis that he contends that it is his Polish daughter who suffers nationality discrimination when compared to the hypothetical British qualifying child. Put this way, submits Mr Bahja, the daughter is potentially at risk of her father being removed, even if it would not be reasonable for her to leave the country, in circumstances in which the removal of a person in a genuine and subsisting parental relationship with a British citizen child would be regarded as not being in the public interest, if it were not reasonable to expect the child to leave.

41. For the reasons set out below, this submission is without merit.

Discrimination on grounds of nationality: scope of EU law?

42. The EU law prohibition against nationality discrimination arises only in relation to situations that are within the scope of EU law. So much is clear from Article 18 TFEU itself: " **Within the scope of application of the Treaties…** any discrimination on grounds of nationality shall be prohibited" (emphasis added).

43. Article 24(1) of Directive 2004/38/EC gives expression to the EU prohibition against nationality-based discrimination in the specific context of the free movement of persons. It provides that Union citizens and their "family members" residing in the host Member State pursuant to the residence rights it confers, "shall enjoy equal treatment with the nationals of that Member State **within the scope of the Treaty** ". The emphasis added demonstrates the scope of the principle, which is limited to those areas covered by the EU Treaties, reflecting the delineation of competences between EU

Member States and the EU. The context for the above provision is provided by Recital (20) to the Directive, again with emphasis added:

“In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with **nationals in areas covered by the Treaty** , subject to such specific provisions as are expressly provided for in the Treaty and secondary law.”

44. In the free movement of persons context, the CJEU has underlined the limitation of EU rules in this area to situations within the scope of EU law. The court noted in McCarthy v Secretary of State for the Home Department Case C-434/09 at [45] that:

“…it is settled case law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State (see, to that effect, Government of the French Community v Flemish Government (C-216/06) [2008] E.C.R. I-1683; [2008] 2 C.M.L.R. 31 at [33], and Metock [2008] 3 C.M.L.R. 39 at [77]).”

45. The primary question for consideration, therefore, is whether the appellant’s daughter’s relationship with him is a situation that is “within the scope” of the EU Treaties? Or, by contrast, is there “no factor” linking the appellant’s relationship with his daughter “to any of the situations governed by EU law” meaning that it is “confined [from the EU law perspective] in all relevant respects within a single Member State”? The term the CJEU often uses to describe such a scenario is a “wholly internal situation” (see, for example, KA v Belgium Case C-82/16 and the authorities cited at [30]).

46. The appellant’s daughter’s residence will, at all material times, have been governed by Directive 2004/38/EC and the EU Treaties. Directive 2004/38/EC does not classify the appellant as a “family member” of his daughter. Although ordinarily a broad term, “family member” has a limited scope as defined by the directive. Article 2(2) defines the term “family member” to include spouses, registered partners, direct descendants under the age of 21, and dependent direct relatives in the ascending line. The appellant is not, under that definition, a “family member” of his daughter, and his relationship with her is not “within the scope of the Treaties” on that basis.

47. The appellant has not been recognised by the Secretary of State as a “durable partner” of his Polish partner, under Article 3(2)(b). Nor was he married to his partner or in a registered partnership, meaning he cannot be a “family member” on that account. Accordingly, the appellant’s family life situation is not within the scope of Directive 2004/38/EC, and cannot be within the scope of the Treaties on that basis.

48. There are, of course, situations when a third country national may enjoy a right to reside conferred directly by the EU Treaties, in order to ensure an EU citizen is not deprived of the benefits of Union citizenship: see the doctrine established by Zambrano Case C-34/09. The underlying rationale was described as the “effective citizenship principle” by Lady Justice Arden (as she then was) in Sanneh v Secretary of State for Work and Pensions [2015] EWCA Civ 49 at [4]. At [5], she said:

“The effective citizenship principle means that member states may not indirectly remove the benefits of a person's status as an EU citizen.”

49. Chavez-Vilchez and others v Raad van bestuur van de Sociale verzekeringsbank and others Case C-133/15 was a continuation of the Zambrano line of authority. The CJEU confirmed that the residence of third country nationals falls within the competence of the Member States, save for those situations where a third country national's continued presence is necessary to secure the continued enjoyment of Union citizenship rights of an EU citizen. The court held, with emphasis added:

"63. In this connection, the court has already held that there are very specific situations in which… a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status: Ruiz Zambrano's case, paras 43-44; Dereci's case, paras 66-67; Rendón Marín's case, para 74 and S v Secretary of State for the Home Department , para 29.

64. The situations referred to in the preceding paragraph have the common feature that, although they are governed by legislation which falls, a priori, **within the competence of the member states, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of EU secondary legislation** , which provide for the grant of such a right under certain conditions, **those situations none the less have an intrinsic connection with the freedom of movement** and residence of a Union citizen, which precludes the right of entry and residence from being refused to those nationals in the member state of residence of that citizen, in order to avoid interference with that freedom: Rendón Marín's case, para 75 and S v Secretary of State for the Home Department , para 30 and the case law cited."

50. Two propositions are clear from the above extract.

51. First, residence rights of third country nationals outside the scope of EU secondary legislation (for example, Directive 2004/38/EC) ordinarily fall within the competence of the Member States and therefore will not be within the scope of the Treaties. As a consequence, Member States are free to enact domestic legislation in such areas, provided in doing so they have regard to situations covered by EU law upon which there may be an impact (see Rottman v Freistaat Bayern Case C-135/08 at [41]).

52. Secondly, it is only where a national measure would have the effect of depriving a Union citizen of the genuine enjoyment of the substance of the rights concerned by the virtue of their status that a right to reside must be conferred on the third country national. The third country national's continued presence in the host Member State must be required to avoid an interference with the substance of the Union citizenship rights of the EU citizen in question. Rights to reside on this basis are often termed "derivative" rights, as the third country national's right to reside derives from that of a Union citizen. In the case of minors, the assessment of the required presence of dependency must be based on an assessment of the best interests of the child, including the child's age, physical and emotional development, the emotional ties to each parent, and the risks which separation from the third country national parent might entail for that child's equilibrium. See the third unnumbered bullet point of paragraph [2] of the operative part of the judgment of the CJEU in KA v Belgium , as applied by the Supreme Court in Patel v Secretary of State for the Home Department [2019] UKSC 59 at [28] to [30], drawing on Chavez-Vilchez at [71].

53. Applying the above considerations to the present matter, I recall that the appellant is a third country national with no leave to remain in the United Kingdom. He is not a "family member" under Directive 2004/38/EC. The mere fact that the appellant's daughter is an EU citizen who may be

residing in the United Kingdom on the basis of EU law is not a sufficient nexus with EU law to extend to bring the family life situation of the appellant within the scope of the Treaties, given the non-inclusion of the appellant as a "family member" of his daughter in Directive 2004/38/EC, and the fact that his continued residence has not been recognised on a derivative rights basis. Mr Bahja did not take me to any EU legislation concerning family unification or third country residence rights in relation to which the United Kingdom has exercised its ability to opt-in, or that otherwise applies to the United Kingdom, which is engaged in relation to the appellant. The appellant's family life with his daughter is a wholly internal situation.

54. The fact that (an entirely separate) EU avenue is potentially open to the appellant highlights the futility of his nationality discrimination submissions and underlines the difficulties inherent in comparing the EU residence regime to the domestic immigration control equivalent.

55. If the appellant is successful in gaining recognition of any claimed EU law-based derivative right to reside, that will of course bring his situation "within the scope of the Treaties", potentially removing the barrier he currently faces to relying on his daughter's claimed discrimination contrary to Article 18 TFEU. However, by definition, if such a derivative (or other) right to reside is recognised, his daughter will not face a discriminatory situation when compared with a hypothetical British qualifying child. The discrimination the appellant complains that his daughter currently faces will have vanished. The appellant would enjoy a right to reside, and his daughter would be able to enjoy his continued presence in this country.

56. In those circumstances, far from experiencing less favourable treatment than the hypothetical British qualifying child, the appellant's daughter would enjoy more favourable treatment. The engagement of section 117B(6) only arises where a person faces possible removal, which would not be a risk for her father, who would have secured a right to reside. The hypothetical British child who enjoys the benefit of section 117B(6) merely enjoys the ability for their parent not to be removed if it would not be reasonable to expect the child to leave the United Kingdom. By contrast, no such reasonableness considerations would arise under EU law once the appellant had secured recognition of a derivative right to reside.

57. By contrast, if the appellant is unsuccessful in securing recognition of a derivative or other EU-based right to reside, it would confirm that his situation is not "within the scope of the Treaties", preventing him from relying on his daughter's putative nationality discrimination by proxy. The position as at the date of the hearing below, of course, was that the appellant had not even attempted to secure recognition of any form of derivative right to reside through his daughter, and jurisdictionally it was not the role of the judge to consider the issue.

58. Accordingly, whether the appellant is successful or unsuccessful in gaining recognition of any claimed derivative right to reside, the fact that EU law makes provision for him to attempt to do so demonstrates that the discrimination he claims his daughter faces in breach of EU law is incapable of being established within the confines of this human rights appeal.

59. It follows that the difference in the application of section 117B(6) to the appellant's Polish daughter and a hypothetical British qualifying child is not within the scope of the Treaties, and, therefore, incapable of amounting to nationality discrimination contrary to EU law. This is fatal to Mr Bahja's submission. Accordingly, the judge did not fall into error through his non-application of section 117B(6) to the Article 8 ECHR proportionality assessment.

Postscript: Bressol

60. Mr Bahja's reliance on Bressol is misplaced. Bressol concerned indirect discrimination on grounds of nationality, and the need for an objective justification for that form of discrimination. By contrast, the appellant submits that his daughter is a victim of direct discrimination, which can never be justified. Although Mr Bahja did not pursue a fall-back indirect discrimination argument, the prohibition is only engaged in relation to comparator situations that are within the scope of the Treaties. There can be no indirect discrimination within the scope of the Treaties here, for the reasons set out above.

Application to the present matter

61. The decision of Judge Fox involved the making of an error of law in assessing the appellant's daughter's best interests and reaching findings beyond the Tribunal's jurisdiction on whether his partner was a "qualified person". I set aside his decision, preserving his unchallenged asylum and related findings of fact, and the findings of fact which went to the Article 8 analysis. I will remake the decision insofar as it relates to the best interests of the appellant's daughter and the proportionality of the appellant's removal under Article 8.

62. The central issue is whether it would be proportionate, for the purposes of Article 8(2) ECHR, for the appellant to be removed, treating the best interests of his daughter as a primary consideration.

63. The "real world" context of the appellant's family unit is that his partner and daughter are Polish. Mother and daughter do not require leave to remain and claim to enjoy a right to reside under the relatively favourable regime established by the 2016 Regulations. Both will be eligible to apply for pre-settled or settled status under the EU Settlement Scheme, subject to a detailed assessment of their circumstances. The appellant is Iranian; relocation of the family unit to Iran is likely to present considerable difficulties; the judge did not countenance the possibility of the family unit relocating to Iran, and there is nothing to suggest that it would be possible. Mr Bramble did not suggest relocation to Iran would be reasonable. The judge did find that the couple were free to explore relocation to Poland, pursuant to the domestic arrangements there for the appellant's partner to sponsor his residence. The appellant's daughter is now three years old. The judge found that she speaks English and Polish, and is involved in the Catholic faith, albeit in a limited manner (see [118]). No safeguarding concerns have been presented. The "ultimate question" of whether it is reasonable to expect the child to relocate to the "country of origin" (EV (Philippines) at [58])), in the current context, is whether it is reasonable to expect the child to follow the appellant to Iran. Plainly it would not be. The child's best interests are to remain living with the family unit, whether in the United Kingdom or Poland.

64. Factors in favour of the removal of the appellant include:

a. The public interest in the maintenance of effective immigration controls (section 117B(1));

b. The appellant does not meet any requirements of the Immigration Rules;

c. The appellant's English is limited; he gave evidence before the First-tier Tribunal in Kurdish Sorani (section 117B(2));

d. The appellant entered the United Kingdom unlawfully and has never held leave to remain;

e. Little weight should be given to the appellant's private life and his relationship with his partner, as it was established at a time when the appellant's immigration status was unlawful.

65. Factors mitigating against removal include:

a. The appellant's removal would not be consistent with the best interests of the appellant's daughter, which are to remain here or to move to Poland, her country of nationality. This is a primary consideration;

b. The appellant enjoys family life with his Polish partner and daughter;

c. The appellant has worked as a barber in the past and there is no evidence that he has claimed any benefits and is not otherwise financially independent (the judge noted that the appellant did not know whether his partner claimed housing benefit but made no positive findings on the point). He wants to continue to work in the future;

d. The appellant has established a private life in this country, since his clandestine arrival in January 2015.

66. I consider the factors in favour of the removal of the appellant to outweigh those mitigating against his removal. While the best interests of his daughter are for the family unit to remain intact and are not consistent with her returning to Iran with him, or remaining here in the absence of the appellant, the cumulative weight of the factors in favour of the appellant's removal are capable of outweighing her best interests. Even treating his daughter's best interests as a primary consideration does not have the effect of outweighing the combined force of the factors in favour of the appellant's removal. The daughter falls within a category of children resident in this country in relation to which Parliament has legitimately drawn a distinction from British citizens, and she does not enjoy the benefit of section 117B(6). The public interest in the maintenance of immigration control is a weighty factor. This appellant entered the United Kingdom unlawfully, sought to pursue a fabricated asylum claim, and has resided here unlawfully ever since. This decision does not necessarily lead to permanent separation of the family unit; there is no evidence that the appellant and his partner would not be able to relocate to Poland. The removal of the appellant would not be disproportionate for the purposes of Article 8(2) ECHR.

67. This appeal is dismissed.

Notice of Decision

The decision of Judge Fox involved the making of an error of law and is set aside. His findings concerning the appellant's asylum claim are preserved.

I have remade the decision, dismissing it on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 2 June 2020

Upper Tribunal Judge Stephen Smith