Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03939/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 January 2019	**On 27 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR CJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Singer, of Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the USA. He was born on 1 February 1979.

2. The appellant appealed against the respondent's refusal to grant him leave to remain.

3. The appeal was allowed by Judge G Wilson in a decision promulgated on 3 August 2018. The judge dismissed the appeal under the Immigration Rules but allowed the appeal under Article 8.

4. The grounds claim the judge materially erred in giving weight to immaterial factors and/or giving inadequate reasoning in the balancing exercise. At [17]–[22] the judge found the Rules could not be met. At [3] the judge found the appellant did not have a parental relationship with his stepdaughter, and at [38] that S.117B(6) did not apply with regard to his relationship with his son or his stepdaughter. The judge further found at [38] that the Family Court proceedings were not material to the outcome of the appeal.

5. The only reasons the judge gave for finding that the balance should be struck in the appellant's favour is that his application for entry clearance would succeed and that it would not be in the stepdaughter's best interests for him to be removed because he provided childcare. See [47]–[48. The grounds claim the judge had not considered the Reasons for Refusal Letter or his findings when striking a balance. The fact that the appellant could not meet the Rules weighed heavily against leave being granted. His partner earned a significant amount of money to be able to singularly support the family and the grounds contended that there had been no consideration of whether or not she could pay for childcare or whether anyone else would be able to assist her during a period of temporary separation whilst the appellant made an entry clearance application from abroad. Given that the Rules could not be met and there was no guarantee that the application from abroad would be successful, the judge did not consider whether family life could continue in the USA. In that sense, the balancing exercise was entirely one-sided. Further, there had been no consideration of the mandatory public interest considerations in S.117B and the maintenance of immigration control.

6. Permission was refused by Judge Simpson on 17 September 2018. She said:

> *"2. Permission to appeal is refused because:*
>
> *(i) contrary to the assertions made on behalf of the respondent the decision arguably disclosed the judge having carefully weighed all material matters in the proportionality assessment, including weight to be given where an appellant has not met the Immigration Rules and the importance of effective immigration controls, and nevertheless concluded on findings reasonably open to them on the evidence combined with an adequacy of reasoning, that the respondent's decision had constituted a disproportionate interference with his family life with his British citizen family members, his wife and stepdaughter, there appearing having had material regard to* ***Chikwamba [2008] UKHL 40*** *and* ***Agyarko [2017] UKSC 10****;*
>
> *(ii) notwithstanding in the concluding paragraphs dealing with proportionality (46-48), that there was not express reference to S.117B of the NI and A Act 2002, earlier*

> *discussion in the decision arguably disclosed an adequacy of cognisance of the provisions of the statutory considerations in that provision along with the respondent's reasons when refusing his human rights application".*

7. The grounds were renewed to the Upper Tribunal arguing that there had been an inadequate balancing exercise which included all of the relevant public interest considerations. The refusal of permission to appeal stated that the judge had regard to S.117B elsewhere in the decision but did not point to where that had taken place. As such, apart from the consideration of S.117B(6), which was found not to apply in the appeal because there was no genuine and subsisting parental relationship with the children, there was a lack of consideration of the other factors. The judge had failed to consider and factor in the balancing exercise that the Rules could not be met and even though the refusal for permission to appeal stated that the judge had regard to **Chikwamba** and **Agyarko**, the grounds claim that there was no guarantee that any application from abroad would succeed and as such, that could not be determinative of the outcome.

8. Upper Tribunal Judge Kekic granted permission to appeal on 22 November 2018. She said inter alia:

> *"The grounds take issue with the judge's Article 8 findings and argue that the determination does not contain any assessment of the public interest issues encompassed in S.117B other than 117B(6) which was found not to apply. Given that the appellant does not meet the eligibility requirements or any other part of the Immigration Rules, it is arguable that the judge's reasons for allowing the appeal outside the Rules are inadequate and insufficiently reasoned".*

9. There was no Rule 24 response.

Submissions on Error of Law

10. Mr Walker relied upon the grounds.

11. Mr Singer submitted that the only issue was that the appellant had come here as a visitor. Leaving that aside, there was an acknowledgement in the Reasons for Refusal Letter that he met all the other eligibility requirements. The judge was entitled to reach the decision he did.

Conclusion on Error of Law

12. The judge erred because he did not fully engage with S.117B. He did find that S.117B(6) did not apply in relation to the appellant's relationship with his stepdaughter and son. Nevertheless, considering the anticipated family court proceedings and the evidence with regard to the children, the judge was entitled to come to the conclusion that it was in their best

interests that the appellant remain in the United Kingdom. It is true that the judge erred because he failed to engage with the whole of S.117B although there was no issue that all provisions were satisfied with the exception of S.117B(5) and (6). As regards (5) *"little weight should be given to a private life established by a person at a time when the person's immigration status is precarious"* the judge did not materially err in failing to engage with this provision given that it was accepted that the appellant was claiming not only interference with private life but also family life. The appellant's relationship with Mrs Willis-Jones had been formed when the appellant was here lawfully in terms of S.117B(4). S.117B(5) relates to private life only although admittedly, the appellant's life here had always been precarious.

13. The judge carried out a careful and comprehensive analysis taking into account the relevant case law such as **Chikwamba [2008] UKHL 40** and **Agyarko [2017] UKSC 10**.

14. The judge clearly considered the Reasons for Refusal Letter and had in mind the appropriate case law in reaching his decision. There was no issue that the appellant would meet the requirements of the Rules save for the fact that he was here as a visitor. That being the case, the judge was entitled to come to the decision that there was no public interest in his removal to the USA.

15. The judge made no material error of law. His decision shall stand.

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 his 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 Date 21 March 2019

Deputy Upper Tribunal Judge Peart