



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

Appeal Number: HU/20819/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 April 2018**

**Decision & Reasons  
Promulgated  
On 10 May 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**SIKHANYISO [M]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Rhind, Counsel

For the Respondent: Ms Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Zimbabwe. He was born on [ ] 1983.
2. The appellant appealed against the respondent's decision dated 15 August 2016 to refuse his application for leave to remain.
3. In a decision promulgated on 12 September 2017, Judge Hussain (the judge) dismissed the appellant's appeal against the respondent's refusal. The judge found the public interest outweighed the appellant's private and family life.

4. The grounds claim the judge erred in dismissing the appeal because:
  - (a) he accepted that the appellant enjoyed a genuine and subsisting relationship with his son. See [15];
  - (b) he misdirected himself on the application of EX1(a) and s.117B(6);
  - (c) at [13] the judge referred to Article 8 being infringed where s.117B(6) criteria was met and referred to the Home Office's own guidance which "... expressly states that once a child reaches seven years' residence in the UK there need to be strong reasons for refusing leave".
5. The grounds claim that the judge's decision "... contains at least one material error of law ...".
6. Judge Maller granted leave on 26 February 2018. It reads inter alia as follows:

" ... There are pages missing from the respondent's refusal letter in the bundle produced in the file. The appellant's appeal was based on his parental relationship with his son, born in the UK on [ ] 2010 and who had been in the UK for seven years at the date of the hearing. He was not a British citizen. His application had been refused under EX.1. The judge noted that this is in like terms with s.117B(6) of the 2002 Act. See [10].

2. The judge found that the appellant exercises parental responsibilities towards his son and is a loving father [12]. He found under s.117B(6) that the child did not live with the appellant and is not dependent on him. He lives with his mother permanently save for spending time with the appellant every second weekend. If the appellant were removed the child would be continued to be cared by his mother (sic). He thus did not meet the requirements under Section 117B(6) or under EX.1 [15].
3. The grounds contend that at no stage did the SSHD attempt to invite the judge to find that he could not benefit from EX.1(a) or Article 8 if it was found that he had a parental relationship. The judge erred in dismissing the appeal having found that a genuine and subsisting relationship exists. It had been submitted to the judge that the alternative for family life continuing was that his son, as an EU national, would be required to relocate with him. However, it had been submitted that the child's mother would not consent.
4. It is arguable that the issue was not whether the son would be required to relocate to Zimbabwe but whether it was reasonable in the circumstances to expect him to."

7. There was no Rule 24 response.

### **Submissions on Error of Law**

8. Ms Rhind relied upon the grounds. The judge did not engage with the evidence.

9. Ms Everett submitted that there was no error. The judge did not err with regard to s.117B(6) because there was never any possibility of the child leaving the United Kingdom.

### **Conclusion on Error of Law**

10. The judge did not err in what he had to say regarding s.117B(6) in terms of **Treebhawon (Section 117B(6)) [2015] UKUT 674 (IAC)**. In the particular circumstances of the appellant's family life with his son, there was no issue that the child would ever leave the United Kingdom because he lives with his mother. The appellant only sees him every other weekend. See **Treebhawon** at [17], the issues in s.117B must be relevant.
11. The judge did not err in finding that the appellant did not meet the Immigration Rules or the requirements of s.117B. Nevertheless, he was then obliged to continue, as he did, to carry out an analysis under Article 8 as to whether the decision was proportionate. He found the appellant enjoys a genuine and subsisting relationship with his son. He found that separating the child from his father would affect the child's emotional wellbeing and was contrary to his best interests. There was considerable evidence before the judge from the child's mother. See [12] of the decision. She spoke of the appellant's "*..... close involvement with their son*". There had been no family court proceedings. The appellant and his former partner had come to an amicable arrangement regarding visiting contact. There was evidence that the appellant attended parent's evenings, his son's birthdays and generally helped out as and when needed. The judge accepted the former partner's evidence as credible "*..... to show that the appellant exercises his parental responsibilities towards his son and is a loving father*".
12. The judge erred materially because in his Article 8 analysis, having recorded the evidence he had heard which I have set out above, he failed to take these matters into account. It is true that the appellant had flouted immigration law and had remained here unlawfully for many years. It also appears true that he had been working unlawfully. Clearly the appellant did not satisfy the Immigration Rules or the requirements of s.117B but the judge's analysis should not have ended there in a finding that the public interest demanded his removal. Having recorded the evidence of the appellant's relationship with the child, it was incumbent upon him to take that evidence into account in his Article 8 proportionality exercise.
13. The decision of the First-tier Tribunal is set aside and will be remade following a de novo hearing.

No anonymity direction is made.

Signed

Date 27 April 2018

Deputy Upper Tribunal Judge Peart