



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

Appeal Number: HU/07218/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 25 April 2019**

**Decision & Reasons Promulgated
On 17 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**M M S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Smith, Counsel

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Hosie dismissing his appeal against the decision of the respondent made on 9 March 2018 to refuse his application for leave to remain in the UK on human rights grounds. The appellant is a citizen of Zimbabwe born on 6 July 1969. He entered the UK as a visitor in

December 2000. He made an unsuccessful application to remain in the UK and then overstayed. He made subsequent attempts to regularise his leave.

2. The appellant's claim is made on the basis of his long residence in the UK, his medical problems, and his relationship with the two daughters of his cousin with whom he is closely involved following the death of their mother in June 2018. I was told that the two girls are aged 8 and 13 and not 8 and 18 as stated by the judge. It was claimed that the appellant has assumed a parental role for the two daughters of his late cousin and that it would not be in their best interests if he were to be removed from the United Kingdom.
3. The two daughters of his late cousin are currently residing with Dee Cummings who the judge found was their primary carer. The judge found that the girls remain in contact with their biological father who supports them financially, albeit any other input is minimal as he has remarried. As a result, the role played by the appellant in their lives is said to be an important one at this particular time in their lives having lost their mother.
4. I find that Ms Smith identified errors made by the judge which were supported by Mr Diwnycz.
5. At paragraph 58 the judge held that "Notwithstanding the submissions made on the appellant's behalf he is no (sic) assuming a parental role towards the girls." It was difficult to deduce whether the "no" meant "now" or "not". I find that whilst the rest of the paragraph identified the appellant's involvement in the girls' lives, there was no consideration or finding by the judge as to whether there was family life between the appellant and the girls.
6. Dee Cummings had given evidence that the appellant was an integral part of the lives of the girls and that if the appellant were to leave, the girls would suffer a loss. There was further information about the length of time of their mother's illness during which the appellant and Dee Cummings were involved with the care of the girls. The argument before the judge was the type of parental care and/or relationship the appellant has had with the girls since their mother's illness and after her death. I find that the judge failed to make a finding as to whether the appellant was exercising parental care over the two girls.
7. I accept Ms Smith's argument that in a case where the appellant has daily contact with the children, where he is a family member and is in a caring role, it was critical for the judge to engage with this aspect of the case. Furthermore, any finding family life would have intrinsically affected the balancing exercise on account of the considerations in Section 117B and the case law in this area.

8. I find that the judge took into account irrelevant factors when considering the role the appellant plays in the children's lives. For instance, the fact that their deceased mother was a single mother and the fact that their biological father who has little contact with his daughters supports them financially. These factors should not supplant the consideration of the appellant's role in the lives of the children over the two-year period when their mother was dying and the role he has played in their lives since her death.
9. I also accept Ms Smith's argument that in considering Section 117B and the balancing exercise, the judge restricted her approach by saying that she had to follow a particular course because sub-paragraph (5) states that little weight should be given to a private life that is established by a person at a time when the person's immigration status is precarious and sub-paragraph (4) which states that little weight should be given to a private life that is established by a person at a time when the person's immigration status is unlawful.
10. Ms Smith submitted that since the judge's decision, the Supreme Court in **Rhuppiah v SSHD [2018] UKSC 58** paragraph 49 makes clear that factors in Section 117B must be taken into account but are not determinative. The Supreme Court held that inbuilt into the concept of "little weight" itself is a small degree of flexibility.
11. For the above reasons I find that the judge's decision cannot stand. It is set aside in order to be remade.
12. The appellant's appeal is remitted to Hatton Cross for rehearing by a FtTJ other than First-tier Tribunal Judge Hosie.

Signed

Date: 15 May 2019

Deputy Upper Tribunal Judge Eshun