**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/26927/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22 September 2015** | **On 25 September 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**MR KWESI ARHIN**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Waithe of Counsel
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Ghana, born on 1 July 1973. He applied for leave to remain on 4 July 2013 as the parent of a child currently in the United Kingdom. That application was refused by the respondent on 3 December 2013.

2. The appellant's appeal against the respondent's refusal was allowed by a panel comprising Judge R J Tiffen and Judge N Bridgman Baker (the panel) promulgated on 11 March 2014.

3. The panel found the appellant and his witnesses to be credible. They found the application did not meet the requirements of the Immigration Rules but went on to allow the appeal on Article 8 grounds on the basis that the respondent's refusal was disproportionate.

4. The grounds claim the panel made a material error of law in finding that the appellant's removal would be disproportionate bearing in mind the finding that he enjoyed family life with his child whom he saw at weekends. See [23] of the decision.

5. The panel did not set out the appellant's immigration history or the detail of the refusal which the respondent considered to be significant and which was set out in [2] and [3] of the grounds. The respondent claimed that the appellant's immigration history and custodial sentence made it undesirable that he remain in the United Kingdom. He did not meet S-LTR.1.6. Further, bearing in mind his child was not British nor settled here, nor had he lived in the United Kingdom for seven years, E-LTRPT.2.2. was not satisfied. The appellant could not benefit from the criteria set out at EX.1.

6. Further, the appellant did not meet the requirements of 276ADE(vi).

7. The grounds set out the relevant case law in terms of the appellant's failure to meet the Immigration Rules and the consequent compelling circumstances which had to be shown outside the Rules:

   **Haleemudeen [2014] EWCA Civ 558**;

   **PG (USA) [2015] EWCA Civ 118** at [28];

   **Singh [2015] EWCA Civ 74.**

8. The grounds submitted that how a person failed to succeed under the Rules would always be materially important when assessing the public interest outside the Rules and what the consequences of the individual remaining in the UK was, for instance, where the party had failed to show that they could maintain themselves. In this particular case, the Appellant could not meet the suitability requirements of Appendix FM because he had committed a criminal offence for which he had received a six month sentence. That was a clear material expression of the public interest – the effect of that failure was that the appellant should not be entitled to the benefit of EX.1/EX.2 of the Immigration Rules. In purporting to find that there were exceptional circumstances, the panel ignored the appellant's criminal history in the United Kingdom and indeed, did not even acknowledge the same.

9. Further, the panel failed to take into account the mandatory requirements of S.117B even though the statute explicitly required them to do so. See **Dube (SS.117A-117D) [2015] UKUT 90 (IAC)**. The panel erred because the public interest had not been considered nor had there been any consideration of the fact that the appellant had been an overstayer since 2005 and the child did not have settled status here.

10. Judge Mark Davies granted permission to appeal on 1 May 2015 on the grounds that the panel had failed to have any regard to S.117B. All grounds were allowed.

11. Mr Waithe made a Rule 24 response dated 2 June 2015.

**Submissions on Error of Law**

12. Mr Waithe conceded that the appellant was not able to satisfy the requirements of the Immigration Rules but that there was no error in the panel's approach, taking into account the evidence that was before them. There was no necessity to set everything out in detail.

13. Mr Waithe submitted that the panel gave full reasons for allowing the appeal. Their reasons largely turned on their acceptance of the appellant's account of historical facts as being credible. Further, the panel properly directed themselves with regard to Article 8 in terms of **Huang [2007] UKHL 11** and **ZH Tanzania [2011].**

14. As regards S.117, Mr Waithe submitted that the panel's statutory duty to consider the same was satisfied if the Tribunal's decision showed that it had regard to such parts of it as were relevant and that the panel had given consideration as per the statute. **Dube (SS.117A–117D) [2015] UKUT 00090 (IAC)** assisted the appellant. See head note (2). It was not an error of law to fail to refer to SS.117A–117D considerations if the panel had applied the test they were supposed to apply, according to its terms. What mattered was substance, not form.

15. Mr Kandola submitted that there was no analysis of the appellant's immigration history. The Immigration Rules could not be met but there was no explanation by the panel of the appellant's failure to meet the Rules with reference to his criminal background and immigration history. At [23] the panel said that there was "*undisputed evidence*" before them that the appellant enjoyed family and private life in the United Kingdom but that was to disregard what the respondent had to say and which the panel set out at [17] of their decision. There clearly was disputed evidence which the panel failed to analyse.

**Conclusion on Error of Law**

16. Section 19 of the 2014 Immigration Act introduced into the Nationality, Immigration and Asylum Act 2002 a new part 5A containing new Sections 117A-117D. It is headed "*Article 8 of the ECHR: Public interest considerations*". The new Sections 117A-117D set out statutory guidelines that must be applied. S.117B refers to public interest considerations applicable **in all cases** (my emphasis).

17. There is no reference to S.117 in the panel's decision. I accept that at [30] they say "*Having considered all of the evidence in case law and carried out the necessary balancing exercise ……"* but there is no evidence in their decision that the public interest considerations were taken into account notwithstanding that it is apparent the Presenting Officer raised

the same. There was no consideration of the appellant's poor immigration history, criminal offending and failure to satisfy the Immigration Rules which the panel were obliged to take into account.

18. I conclude that the decision contains material errors of law such that it should be set aside, and re-heard in the First-tier Tribunal de novo. None of the findings are to stand.

**Notice of Decision**

19. The decision of the First-tier Tribunal contains errors of law, is set aside and shall be remitted to the First-tier to be heard again de novo by a panel or a judge sitting alone, not Judges R J Tiffen or N Bridgman Baker.

No anonymity direction is made.

Signed Date 22 September 2015

Deputy Upper Tribunal Judge Peart