IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05605/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 11th March 2016	**On 13th April 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

[S N]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T Murshad (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Grimshaw, hereinafter "the judge") dismissing his appeal against a decision of an Entry Clearance Officer made on 26th March 2014, refusing to grant him entry clearance to come to the UK for the purposes of settlement as the infant child of his mother and Sponsor.

2. The Appellant is a national of Zimbabwe and was born on [ ] 2000. He is, therefore, a minor. His mother and Sponsor (hereinafter "the Sponsor"), [SaN] is now a naturalised British citizen. She came to the UK as long ago as 5th December 2002 and claimed asylum in 2003. Her application was initially refused but, in due course, in fact on 20th February 2009, she was granted indefinite leave to remain in the UK. She subsequently naturalised on 15th March 2011. She says that the Appellant's father has never had any involvement with him, that she had lived with the Appellant prior to leaving Zimbabwe and that after she left he stayed with her mother (his grandmother) but that she unfortunately passed away in October of 2013. Hence, the application for entry clearance. The Sponsor explains that she was worried about the Appellant because he had been staying with a nephew who "has now turned 18" but who had appeared to be disinterested in taking responsibility for him.

3. By way of further background, the Sponsor explained that she had not previously been in a position to adequately maintain the Appellant but had, nevertheless, sent him some money at various times since she had come to the UK. She said that, since arriving here, she has had two further children, a son born on [ ] 2007 and a daughter born on [ ] 2010, both of whom are British citizens. Her daughter has neurological problems and the Sponsor is her carer.

4. As indicated, the Entry Clearance Officer refused the application. By the time the Appellant's appeal came before the judge, there was no dispute about the fact that he is the son of the Sponsor and there was no dispute that the maintenance and accommodation requirements of the Immigration Rules were satisfied. The substantive Immigration Rule in these circumstances is paragraph 297. However, paragraph 320(7A) was also highly relevant because the Respondent had concluded, and such was not in dispute before the judge, that a birth certificate filed in support of the entry clearance application was a false document.

5. The judge heard the appeal on 14th May 2015. The Sponsor attended and gave oral evidence. Both parties were represented.

6. As indicated, the judge dismissed the appeal. She considered the position under the Immigration Rules first of all and said she was satisfied a false document had been filed in support of the application such that refusal, following paragraph 320(7A) under the Rules, was mandatory. She explained her reasoning as to that in this way;

> "26. It may very well be the case that the Appellant, together with his mother and grandmother are innocent victims in the matter and did not know that the birth certificate issued had not come from the Registrar. However, that is not the end of the matter. The refusal notice also alleges the falsification of the document that purports to be the Appellant's birth certificate.
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> 27. I am satisfied that the Respondent has proved to the requisite standard that the birth certificate submitted with the application is a false document. The case of **AA (Nigeria)** defined a false document as one

that tells a lie about itself. In the present case, the Respondent was asked to rely on a document which purported to be the Appellant's birth certificate showing that he was related to the Sponsor as claimed. I find as fact that the document submitted by the Appellant was not a genuine birth certificate. Indeed the Appellant does not seek to persuade me otherwise.

28. Unfortunately for the Appellant the law is strict in relation to the submission of a false document. The Immigration Rules provide for a mandatory refusal in these circumstances. In other words refusal under paragraph 320(7A) is mandatory and draconian, notwithstanding the Appellant, his mother and grandmother were innocent of the fact that the document that purported to be a birth certificate, and had been obtained for the purposes of the application and a passport, was false."

7. The judge went on to say that, given that she had found the mandatory refusal ground to apply, there was little point in her going on to make any decision in relation to the disputed aspects of paragraph 297 (the substantive Rule) which would, of course, have necessitated findings concerning, in particular, whether the Appellant's Sponsor had had sole responsibility for his upbringing and/or whether there were serious or compelling family or other considerations making exclusion of him from the UK undesirable.

8. The judge then turned to the possible applicability of Article 8 of the European Convention on Human Rights (ECHR) outside of the Immigration Rules. She noted that the intention behind the Rules was to strike a fair balance of interests between an individual and society as a whole and said that if the requirements of the Rules were not met then compelling circumstances must exist to justify a grant of entry clearance outside those Rules. She then reasoned matters as follows;

"32. Accordingly, the factors that are pertinent to the Appellant to support the grant of entry clearance outside the Rules relate to the issue of proportionality. I have gone on to consider if the refusal of entry clearance is proportionate and thus justified under Article 8.

33. I bear in mind that the maintenance of immigration control and a fair and effective immigration policy is in the public interest.

34. I have gone on to consider the factors that weigh in favour of the Appellant.

35. I accept that the Appellant is a child who is now aged 14. Clearly his interests are an important matter although not the primary factor when I conduct the proportionality assessment and weigh the interests of the individual and those of the general community.

36. On the totality of the evidence before me I make the following findings. The Sponsor is in a position to financially support the Appellant and pay for his education. The Appellant can continue to live in the house that the Sponsor owns in Zimbabwe. I am aware that the Sponsor has concerns about the attitude of her nephew who shares the house. She describes him as "*distant and disinterested in taking responsibility for being guardian to my son*". However, against that I note the Sponsor

has sensibly put in hand arrangements with a family friend, Florence, so she can keep an eye on the Appellant and ensure his needs for basic necessities are met. Despite the concerns on the part of the Sponsor as to the Appellant's welfare I note from the medical evidence that the Appellant is in good health. The letter from Dr Kuzanga dated 6th January 2014 confirms that the Appellant was examined *"... and found to be physically and mentally healthy all round"*.

37. I am satisfied that contact between the Appellant and Sponsor can be maintained by telephone or by utilising other tools of communication. Furthermore, the Sponsor can visit and spend time with the Appellant in Zimbabwe as she has done so on three occasions in the past. There appears to be no pressing need that would underpin a claim for entry clearance outside the Rules.

38. In short I find no evidence to justify a conclusion that there are compelling or compassionate features to this application.

39. I am mindful that my decision will be a disappointment to the Sponsor. However, when I stand back and look at the evidence as a whole, the end result does not make the position of the Appellant or the Sponsor rare or compelling, warranting entry outside the Rules. The maintenance of family life may be difficult but I cannot find that it is lost notwithstanding the Appellant and Sponsor live apart and in different countries.

40. I am satisfied that the decision to refuse entry clearance in this case is one that can be justified by the Respondent as a proportionate and fair balance between competing considerations."

9. So, the judge dismissed the Appellant's appeal.

10. That was not the end of the matter because the Appellant sought permission to appeal to the Upper Tribunal. In summary, it was contended in the grounds that the judge had erred in;

(a) failing to weigh in the balance, when considering Article 8 outside the Rules, her view that the Appellant, the Sponsor and the Sponsor's mother might be "innocent victims" with respect to the false birth certificate;

(b) failing to refer to the interests of wider family members including the UK based children of the Sponsor one of whom is disabled;

(c) failing to consider Article 8 outside the Rules in line with the five fold test set out in **Razgar [2004] UKHL 27**;

(d) failing to adequately consider particular family and other circumstances;

(e) failing to apply the judgment in **Chikwamba [2008] UKHL 40**;

(f) wrongly concluding that contact between the Appellant and Sponsor by way of "modern forms of communication" could be an adequate substitute for normal family life.

11. Permission to appeal was granted by a Judge of the First-tier Tribunal and the salient part of the grant reads as follows;

> "The Grounds of Appeal disclosed an arguable error of law on the part of the judge. The judge made an arguable error of law in not carrying out a structured approach to a resolution of the Article 8 appeal and the judge did not carry out the sequential five step consideration suggested by Lord Bingham of Cornhill at paragraph 17 of judgment in **R (Razgar v The Secretary of State for the Home Department) [2004] INLR 349 (HL)**. In failing to do so the judge made a further arguable error of law in failing to accord due weight to the family life which the Appellant had established before the date when the Respondent made the decision to refuse to grant entry clearance. All the suggested grounds are arguable".

12. The matter was then listed for a hearing before the Upper Tribunal (before me) so that the question of whether the judge had materially erred in law such that her decision ought to be set aside could be considered. Representation at that hearing was as stated above.

13. Ms Murshad, for the Appellant, maintained the various points which had been made in the Grounds of Appeal and did not limit herself to those points which had directly led to permission being granted. Of course, she was not required to do so. She suggested that the judge had failed to adequately consider the best interest of the child Appellant. She argued the judge had failed to consider the best interests of his siblings. Given that it had been accepted that the Appellant and Sponsor were "innocent victims" with respect to the documentation fraud there was nothing weighing in favour of the public interest in refusing entry clearance. The judge had failed to appreciate that. She ought to have undertaken a full consideration of the requirements in paragraph 297 of the Rules because the extent to which the Rules were not satisfied was a highly relevant factor when considering Article 8 outside of those Rules. The judge had, it was said, taken a "very cursory approach" to matters, in particular, those involving the Appellant's best interests as a child.

14. Mr Diwnycz submitted that, in fact, the judge had not clearly found that the Appellant and/or the Sponsor were innocent with respect to the documentation fraud. There had been no requirement for the judge to undertake an exhaustive consideration of the paragraph 297 requirements given her finding that the appeal failed under the Rules in any event because of the application of paragraph 320(7A).

15. Finally, Ms Murshad invited me to set aside the judge's decision and to remit to the First-tier Tribunal for the decision to be remade.

16. I have concluded, after careful consideration and not without some hesitation that the judge did err in law in a material manner though I would wish to stress that I reject many of the criticisms of the determination which have been advanced.

17. I will deal, albeit briefly, with some of the criticisms which I think lack merit. It does not seem to me that the judge materially erred by moving

straight to proportionality rather than working her way through the classic **Razgar** steps on the facts of this case. There was never any serious doubt that Article 8 was engaged and, similarly, there was never any serious doubt that any interference with Article 8 rights brought about by the refusal of entry clearance was lawful and was in pursuance of a legitimate aim. Accordingly, nothing would have been served by the judge simply reciting all of that. I do not really understand the point about **Chikwamba**. **Chikwamba** was a removal case involving the proposed return of one member of a couple in circumstances where it appeared inevitable that if that member of the couple did return to the home country entry clearance would be granted thus enabling a return. There just does not seem to me to be any similarity at all with this case nor does it seem to me that there is anything in the judgment of **Chikwamba** which could realistically assist this Appellant. Nor do I think the judge, in saying what she did about the likely ability of the Appellant and Sponsor to maintain contact with each other, was suggesting that such would be an adequate substitute for full family life. She was simply making the point, as far as it went, that contact was not shut down by the refusal of entry clearance.

18. Having said the above, though, the judge did decide not to consider the substantive requirements of paragraph 297 because it was, in her view, irrelevant to the outcome of the appeal bearing in mind the decision she had made, and which it was inevitable she would make, with respect to paragraph 320(7A). So, she did not make findings about whether, as at the date of decision, the Sponsor was exercising sole responsibility for the Appellant's upbringing and did not make findings as to whether there were serious and compelling family or other considerations which made exclusion of the Appellant undesirable. Those were, it seems to me, matters of relevance as to the Article 8 consideration outside the Rules. I do not say, as Ms Murshad seemed to suggest, that there necessarily had to be a consideration of the Rules and a decision as to the extent to which the requirements of the Rules were met or not prior to there being a consideration of Article 8 outside the Rules but I do say that those sorts of matters had to be considered somewhere in the determination because they were directly relevant to the Article 8 position outwith the Rules.

19. As it turns out, it is readily apparent from what the judge said at paragraph 36 of the determination, that had she asked herself the specific question she would have concluded that there were not serious and compelling family or other considerations. I cannot, though, find anything in the determination which indicates that the judge undertook a consideration of or reached findings about the question of sole responsibility. Nor did she undertake any assessment as to the nature of and strength of the relationship between the Sponsor and the Appellant. Had she asked herself about the sole responsibility question, though, she would have had to do so. In any event, sole responsibility fed into a consideration of what was in his best interests. I would agree that, in this regard, the judge's findings and the judge's consideration of the evidence

were not sufficiently holistic. I am, therefore, albeit quite narrowly, persuaded that the decision has to be set aside.

20. Having set aside the decision I have decided to remit to the First-tier Tribunal. That is because it seems to me that there is scope for further fact-finding regarding the nature, substance and strength of the relationship between the Sponsor and the Appellant. There is scope for further findings as to his situation in Zimbabwe and what his best interests are though, of course, it must be remembered he is not a British citizen. Those are all relevant to the position outside of the Rules. I will not preserve anything from the first decision so as to give the new First-tier Tribunal a blank canvass but it does not seem that there is any basis upon which to argue that paragraph 320(7A) is not applicable to this case. I have set out some directions for the First-tier Tribunal below.

Directions to the First-tier Tribunal

(1) I have set aside the decision of 3rd June 2015. All matters are to be considered entirely afresh by the new First-tier Tribunal.

(2) The time estimate for the appeal shall be two hours. The services of a Ndebele speaking interpreter shall be required.

(3) The hearing shall take place, subject to any variation of these directions, in the Bradford Hearing Centre.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The case is remitted to a new and differently constituted First-tier Tribunal.

Anonymity

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway