Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/10486/2015
HU/10497/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 21st July 2017	**On 3rd August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NANURAI JEFFREY ZINAREI
MACDONALD MUCHINERIPI ZINAREI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Vokes of Counsel instructed by Dipak Acharya & Co Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against the decision of Judge P J M Hollingworth of the First-tier Tribunal (the FFT) promulgated on 10th November 2016.

2. The Appellants are brothers, and are citizens of Zimbabwe born 4th December 1988 and 3rd August 1990 respectively. The first Appellant was aged 28 and the second Appellant aged 26 at the date of the Upper Tribunal Hearing.

3. The father of the Appellants is Clive Zinarei who has been granted refugee status in the UK. The Appellants together with their stepmother and half-sister applied for entry clearance on 19th September 2011 in order to join their father in the UK. The second Appellant together with the stepmother and half-sister was granted entry clearance on 31st October 2011. The second Appellant arrived in the UK on 21st December 2011. His visa was valid until 28th January 2015.

4. The first Appellant appealed against refusal of entry clearance and his appeal was heard on 12th April 2012 by Judge Bell of the FTT and allowed. It was found that he satisfied the requirements of paragraph 319V of the Immigration rules which sets out the requirements to be met in order to be granted leave to enter the UK as the relative of a refugee.

5. The decision of Judge Bell was not appealed. However the Entry Clearance Officer did not grant entry clearance following the appeal but issued a further refusal dated 27th June 2012, not accepting that the requirements of paragraph 319V were satisfied.

6. However, for reasons that have not been explained, the Entry Clearance Officer then issued the first Appellant with an entry clearance visa on 22nd April 2014 enabling him to join his refugee father and other family members in the UK. The first Appellant arrived in the UK on 6th August 2014. His visa was valid until 28th January 2015 in line with the other family members.

7. On 10th January 2015 the Appellants, together with their half-sister and stepmother applied for indefinite leave to remain. The stepmother and half-sister were granted indefinite leave to remain, as was the Appellant's father. The applications of the Appellants were refused. The reasons for refusal are set out below;

> "You have applied for indefinite leave to remain in the United Kingdom as the dependant of Clive Zinarei, however as you have not been granted asylum or humanitarian protection either in your own right or in line with Clive Zinarei nor have you been granted a family reunion visa. It is noted that your passport has been endorsed with 'ODR-LLE to join/acc parent(s) C Zinarei.' Your aspect of the application has been rejected as you (sic) there are no provisions under the Settlement Protection route to be granted leave.
>
> If you wish to remain in the United Kingdom you should make the appropriate application and pay the correct fee. For further advice on which application is relevant to you, you should visit the Home Office website at www.homeoffice.gsi.gov.uk.

I should remind you that as the application was made in time you have 28 days to make a valid application, if you fail to regularise your stay you may be liable for removal action."

8. The Appellants thereafter made applications on 1st June 2015 for further leave to remain on human rights grounds, using form FLR(O). They relied upon their family and private lives.

9. These applications were refused on 26th October 2015. The Respondent found that the Appellants could not rely upon Appendix FM in relation to family life. It was not accepted that their applications should be granted pursuant to paragraph 276ADE(1) because they had not resided continuously in the UK for at least twenty years, and there would be no very significant obstacles to their integration into Zimbabwe.

10. The Respondent considered Article 8 outside the Immigration rules, not finding that any exceptional circumstances existed which would warrant granting leave to remain pursuant to Article 8 outside the rules. It was acknowledged that the Appellants had established family life with their parents and sibling, but it was not accepted that this was strong enough to engage Article 8.

11. The appeals were heard together by the FTT on 31st October 2016. The FTT found that the Appellants had established a family life that would engage Article 8, notwithstanding that they were adults. The FTT went on to consider proportionality, and concluded that the public interest in the removal of the Appellants from the UK, outweighed their Article 8 rights. The appeals were therefore dismissed.

12. The Appellants applied for permission to appeal to the Upper Tribunal and permission to appeal was granted by Judge Hodgkinson in the following terms;

"2. The grounds appear to adopt a 'scattergun' approach in terms of criticising the judge's consideration of Article 8, the appeal being limited to consideration of Article 8 outside the rules. However, a reading of the judge's findings presents a confusing picture. The judge indicates that he considers there to be 'very compelling circumstances' applicable to the Appellants (paras 33-34 of the decision). At paragraph 47, he concludes that the second Appellant is financially dependent upon his father in the UK and that both Appellants are emotionally dependent. He concludes that there is an extant family life between the Appellants and their immediate family in the UK. His findings present as arguably inconsistent in terms of whether the Appellants were admitted to the UK in the first place for the purposes of family reunion, or not, which is a potentially highly material factor in terms of proportionality (see para 42, 44, 47-48 and 51). There is a lack of clarity in the judge's findings as to whether the second Appellant is capable of employment. The net result is that the judge's reasoning is arguably unclear and/or the overall decision arguably perverse. The decision reveals arguable errors of law and permission is granted on all grounds."

13. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FTT directed itself appropriately and if an holistic approach was taken to the findings of the FTT, they were not contradictory or perverse. It was contended that the grounds amounted to a disagreement with the findings made by the FTT but did not disclose a material error of law.

14. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

15. I heard oral submissions from both representatives. Mr Mills helpfully supplied a document clarifying the list of endorsements for entry clearance. This indicates that the endorsement upon the Appellants' passports did relate to paragraph 319V of the Immigration rules.

16. Both representatives made oral submissions at some length. I will summarise those submissions in brief terms.

17. Mr Vokes relied upon his skeleton argument. I was asked to find that the FTT decision was unclear and confused. The FTT erred by failing to make any reference to the decision of Judge Bell, which should have been a starting point under the Devaseelan principles.

18. It was contended that the FTT had adopted the wrong approach at paragraphs 33-34 to consideration of Article 8 as it was not necessary to find very compelling circumstances before deciding whether to consider Article 8 outside the rules.

19. I was asked to find that the FTT had made contradictory findings at paragraphs 42, 44, 47 and 50. I was asked to find that because the FTT decision was unclear and confused, it should be set aside and remade.

20. Mr Mills accepted that there appeared to have been some confusion before the FTT. It was accepted that the Appellants together with their stepmother and half-sister had applied for family reunion. The passports of the stepmother and half-sister (contained at pages 120 and 129 of the Appellants' bundle prepared for the Upper Tribunal hearing) were endorsed with the words "visa family reunion-Sponsor C Zinarei 25/01/1951.". That was different to the endorsement made on the Appellants' passports, which endorsement was set out in the refusal decision dated 30th April 2015, referred to above.

21. Mr Mills submitted that the FTT had been correct to find that the Appellants did not have a legitimate expectation of settlement. Although the incorrect test may have been applied at paragraphs 33-34, Mr Mills submitted that this was not material, because the FTT had gone on to consider Article 8.

22. Overall Mr Mills submitted that the FTT decision was rational and adequately reasoned and should therefore stand.

23. In response Mr Vokes noted that Mr Mills had not addressed the Devaseelan point.

24. At the conclusion of oral submissions I reserved my decision as to error of law. Both representatives indicated that if an error of law was found, the decision could be remade by the Upper Tribunal without a further hearing, based upon the evidence that had been before the FTT. My attention was drawn to paragraph 47 of the FTT decision in which the FTT specifically accepted the evidence that had been given by the Appellants and their father.

My Conclusions and Reasons

Error of Law

25. I find the FTT materially erred in law. The decision is unclear.

26. I find that there should have been a reference to the previous appeal by the first Appellant in April 2012 which resulted in his appeal being allowed. The principles in Devaseelan [2002] UKIAT 00702, indicate that the conclusions made in this earlier appeal should have been regarded as a starting point. The conclusions reached in the earlier appeal were that the first Appellant satisfied the requirements of paragraph 319V of the Immigration rules.

27. I find that the FTT made some conflicting and contradictory findings. The findings made by the FTT commence at paragraph 33. The FTT found that very compelling circumstances existed which enabled Article 8 to be considered outside the Immigration rules. Supreme Court case law now makes it clear that this is not the appropriate test. Although this is an error, I do not find it to be material, as the FTT went on to consider Article 8 outside the rules.

28. However at paragraph 38 the FTT found that the Appellants were able to join their father “as the Immigration rules were fulfilled.” There is no specific reference to paragraph 319V, but that is the paragraph setting out the requirements to be satisfied in order to be granted entry clearance as the relative of a refugee, and therefore it is presumed that the FTT found this paragraph to be satisfied although it is not absolutely clear.

29. If the FTT accepted that paragraph 319V was satisfied, it is not clear why at paragraph 42 the FTT finds “on the basis of the nature of the leave granted to the Appellants that they could not in fact have had the expectation of being able to remain in the United Kingdom.”

30. At paragraph 44 the FTT makes a finding which appears to contradict paragraph 42 stating that when the Appellants came to the UK “I accept

that their expectation was that they were coming to settle with their father and other family members on the footing of what they regarded as family reunion." The FTT does in fact go on to say that this was not in fact the reality of the position. It would appear that this was an error and the Appellants had been granted entry clearance to rejoin their family members.

31. The basis upon which the Appellants were granted entry clearance is an important factor, and the FTT is not clear in setting out this basis. This is relevant when proportionality is considered under Article 8.

32. The FTT found at paragraphs 40 and 47 that the Appellants, even though they were adults, had established family life with their family members which engaged Article 8.

33. As the FTT appears to have accepted that the Appellants satisfied the Immigration rules in order to be granted entry clearance, and they had established family life which engaged Article 8 with their family members, the FTT has not adequately explained why the Appellants could not have an expectation of being able to remain in the UK.

34. I do not find that clear findings have been made, and adequate reasons for the findings have not been supplied.

35. The above amounts to a material error of law and I therefore set aside the decision of the FTT.

Remaking the Decision

36. I have taken into account by way of documentary evidence the Respondent's bundles that were before the FTT in relation to both Appellants. The Respondent's bundle in relation to the first Appellant has Annexes A-D, the bundle in relation to the second Appellant has Annexes A-C. I have also taken into account the bundle prepared on behalf of the Appellants for the Upper Tribunal hearing comprising 173 pages.

37. In considering Article 8 I have adopted the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 60, and in so doing have regard to the guidance given by Lord Reed at paragraphs 39 to 53.

38. The burden of proof lies on the Appellants to establish their personal circumstances in this country, and to establish why the decision to refuse their human rights claim will interfere disproportionately in their private and family life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellants. The standard of proof is a balance of probabilities throughout.

39. I find that the Appellants have established private lives since their arrival in the UK. I find that the findings made by the FTT to the effect that they

have established family life which engages Article 8 have not been challenged and therefore stand.

40. I find that the Appellants were granted entry clearance because it was accepted that the requirements of paragraph 319V of the Immigration rules were satisfied. I find that the Appellants have lived with their family members since their arrival in this country. Their family members have been granted indefinite leave to remain.

41. In my view the different endorsements upon their passports when compared to the passports of their stepmother and half-sister have not been satisfactorily explained, and the refusal of their applications for indefinite leave to remain on 30th April 2015, have not been satisfactorily explained, considering that the applications of their other family members were granted.

42. As Article 8 is engaged I must have regard to section 117B of the Nationality, Immigration and Asylum Act 2002. This confirms that the maintenance of immigration control is in the public interest.

43. Both Appellants can speak English but this must be regarded as a neutral factor in the balancing exercise. The first Appellant has employment and is financially independent but again this is a neutral factor. The second Appellant does not have employment because he has not been given permission to work and therefore he is not financially independent.

44. I find that little weight must be given to the private lives established by the Appellants, because their private lives have been established initially when the Appellants had a precarious immigration status, in that they only had limited leave to remain, and thereafter when they have been in the UK unlawfully.

45. With reference to their unlawful status, I do accept that when their application was refused on 30th April 2015, they were notified of this on 5th May 2015 and submitted a further application within 28 days of being notified, on 1st June 2015.

46. I do not find that the Appellants have what could be described as a poor immigration history. They were granted entry clearance as it was accepted that they satisfied paragraph 319V, and thereafter they have lived with their family members. There is no evidence to indicate that they have obtained or attempted to obtain public funds to which they were not entitled, and there is no evidence of criminality, although these considerations must again be regarded as neutral factors in the balancing exercise.

47. As the Appellants were granted entry clearance to enable them to rejoin family members even though they were adults, and they have rejoined and lived with those family members, and the FTT finding that they have family life which engages Article 8 has not been challenged, I do not find

that evidence of public interest factors which would mean that it would be proportionate for the Appellants to be removed has been provided.

48. My overall conclusion is that I do not find that the public interest requires the removal of the Appellants, and I therefore conclude that their removal would be disproportionate, and their appeals are allowed under Article 8 of the 1950 European Convention on Human Rights.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeals are allowed pursuant to Article 8 of the 1950 Convention.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed Date 28th July 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeals have been allowed but I do not make fee awards. The appeals have been allowed because of evidence submitted to the Tribunal that was not before the original decision maker.

Signed Date 28th July 2017

Deputy Upper Tribunal Judge M A Hall