Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01507/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 4th March 2019	**On 15th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR JAYDE MUNYARADZI MUZWURU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kumar
For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Moan, promulgated on 14th December 2017, following a hearing at Birmingham on 6th December 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Zimbabwe, and was born on 10th September 1998. He applied to join his sponsoring parents, Mr Stheven Muzwuru and Mrs Getrude Muzwuru, both of whom had discretionary leave to remain in the UK, when he was 17 years of age, but just five days short of reaching the age of 18 years. The application appears to have been made on the basis of paragraph 297 HC 395. However, by the time of the hearing before the judge, it was recognised that the Appellant's sponsoring parents did not have "settled" status in the UK, and therefore the Appellant could not satisfy the Immigration Rules on that basis. This being so, "the appeal proceeded on the basis of Article 8 only, namely, that the decision of the Respondent was a disproportionate interference with the Article 8 right to respect for family life of the Appellant and Sponsors" (paragraph 4).

The Appellant's Claim

3. The Appellant's claim is that, after he was born in 1998, his parents left Zimbabwe to come to the UK in 2002 and they acquired discretionary leave to remain in 2012. The Appellant was living with his paternal grandmother, Ms Mandoe during this time. The Appellant had two siblings. Both of these were born in the UK. They were 7 years and 11 years of age. The Sponsors maintained that they could not relocate to Zimbabwe to join the Appellant because these children have settled status in the UK and have always lived in this country. At the hearing, the judge accepted that although neither child was British, "they are qualifying children" having spent over seven years in this country (paragraph 7).

The Judge's Findings

4. The judge observed how, after the sponsoring parents were granted discretionary leave in 2012, they started to send money to their son thereafter, and "there were numerous money transfers", and there were separate letters which confirmed "that the Sponsors paid the Appellant's educational fees and medical costs". The judge concluded that, "I am satisfied that they have contributed financially for their son albeit there is little evidence of regular maintenance for their son since 2002 or 2012" (paragraph 13).

5. In the end, however, the judge concluded that,

> "Whilst I am satisfied that family life continues to exist between the Sponsors and Appellant, and noting the compassion that I feel for this family in their wish to be together, when I look at all the factors objectively, I am unable to conclude that the decision of the Respondent is disproportionate".

6. The reason for this was that the decision of the Respondent did strike a fair balance between Article 8 rights with respect to this family and the public interest, according to the judge. This is because

> "That relationship can continue in the same format as it does now, and the desire for the family to have a direct relationship with the Appellant by the Appellant being allowed to join them in the UK, cannot counterbalance the public interest in maintaining firm immigration control in denying access to an adult child who is not financially independent and does not meet the Immigration Rules" (paragraph 27).

7. The appeal was dismissed.

The Grounds of Application

8. The grounds of application state that the judge's conclusions with respect to whether the Appellant, in an Article 8 appeal before the Tribunal, was "dependent" or "independent" of his parents, was inconsistent. The judge had made findings of dependency on the sponsoring parents at no less than four different places in the determination (see paragraphs 13, 15, 22 and 26). Yet, the judge had then gone on to conclude that the Appellant was independent (see paragraphs 8 and 27).

9. On 7th March 2018, permission to appeal was granted.

10. On 23rd March 2018, a Rule 24 response was entered. It was asserted that, insofar as there was a discrepancy in the judge's findings as to whether or not the Appellant was dependent on his parents, or was actually "independent", "this is not material, and indeed may be a 'slip of the pen'". The fact was that the Appellant could not qualify as a dependent under the Immigration Rules. His Sponsors were not settled in the UK. Between 2002 and 2013 they had not even visited. The judge was correct to conclude that the current situation could continue and would not be a disproportionate breach of the Appellant's Article 8 rights.

Submissions

11. At the hearing before me on 4th March 2019, Mr Kumar submitted that the judge had earlier accepted that the appeal could not succeed under paragraph 297 of HC 395, and that the only basis upon which it could be determined was on "Article 8 only" (paragraph 4). Despite this, the judge felt constrained to apply paragraph 297, to such an extent that she concluded (at paragraph 27) that the Appellant's appeal fell to be refused because it "does not meet the Immigration Rules" (paragraph 27). It was also not correct that the parents had not visited the Appellant in Zimbabwe. They were not able to do so during the time that their immigration status was precarious between 2002 and 2013, but subsequent to that there had been flight itineraries produced before the judge and the judge accepted that "in time having visited in July 2014" paragraph 12 which was the earliest opportunity after 2013. Furthermore, there were numerous money transfers that the judge referred to as well as separate letters, and confirmation of the payment of medical costs and educational fees by the parents for the Appellant (paragraph 13).

12. Second, and more importantly, given that the appeal was under Article 8, freestanding Article 8 jurisprudence should have been applied, and on this basis, once the judge had accepted that, "I am satisfied that family life continues to exist between the Sponsors and the Appellant" (paragraph 27), that they did not fall to be the case that there was a public interest militating against such an appeal, because the Appellant was applying on the basis of existing family life, without there having been the commission of any immigration offence by either side.

13. Finally, the judge had in the end failed to do justice to the claim because of references also to the fact that the Appellant was independent, whereas it had in fact been found that he was dependent on his parents.

14. For her part, Ms Aboni accepted that the Appellant was dependent upon his parents. However, the position that the Secretary of State would take is that the financial support, which the Appellant had been receiving, can continue. She relied upon the Rule 24 response. The judge had found that the Appellant, who was staying with his grandmother, did not now need the same level of care from his grandmother that he previously had. The judge had observed that, "as a healthy 19 year old male, it is unlikely that he needs any physical support" (paragraph 56).

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.

16. First and most importantly, this is a case where the judge did make findings of fact on several occasions that the Appellant was dependent on his sponsoring parents and that family life existed. This culminated in the final paragraph that, "I am satisfied that family life continues to exist between the Sponsors and Appellant" (paragraph 27). In the circumstances, the suggestion that family life did not actually exist, plainly corrupted the application of Article 8 ECHR and the determination of proportionality in that context. The judge's conclusion, "I have no doubt that all of the family wish there to be such a relationship. However, the public interest does not require the authorities to adapt the Rules to allow a relationship to develop, where it does not currently exist" (paragraph 25), is one which, is open to question.

17. Second, this is because, if the judge did find that, "I am satisfied that family life continues to exist" (paragraph 27), then it is highly arguable that the public interest does require the authorities to allow a relationship to develop, in circumstances where that relationship could not earlier develop because the parents were in the UK with precarious leave, and the Appellant son had to remain in Zimbabwe with his grandmother. Although the Appellant is an adult now, he was not an adult at the time that he

made his application. The application deserved to be considered in that context.

18. Third, it is unclear to what extent the Appellant's grandmother, who the judge finds has mobility which is deteriorating (paragraph 26) and uses an aid to walk, was looking after the Appellant, and to what extent it was the Appellant who has been supporting the grandmother as of late. Be that as it may, this is a case where Lord Bingham's tabulation in **Razgar** (at paragraph 17) was most pertinent.

19. First, it is plain that the continued exclusion of the Appellant is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellant's right to respect for his family life. This family life is qualitatively different with the one that the Appellant is enjoying in his country of origin, where his grandmother is not able to any longer look after the Appellant, given her age and disability, and to provide him with the kind of care that he would need as a teenager. On the other hand, he does have the care and support of his own father and his mother in this country, both of whom are keen and able to look after the Appellant.

20. Second, the interference here does have consequences of such gravity as to potentially engage the operation of Article 8 (bearing in mind that this is a low threshold).

21. Third, the interference here is one where the judge had accepted that family life existed between the sponsoring parents and the Appellant, to such an extent that there was considerable financial support after 2012 in the payment of the Appellant's medical costs and school fees (paragraph 13), which was not possible at a time when their immigration status was precarious (paragraph 12), a matter that was confirmed by Ms Aboni already before this Tribunal at this hearing. There is also extensive evidence in the form of WhatsApp chat logs from June 2017 (paragraph 14). The evidence before the judge was that they had not transferred their responsibility for decision making to anyone else (paragraph 15). A letter from the paternal grandmother dated 5th September 2016 confirmed that the Sponsors had made all the important decisions in the Appellant's life (paragraph 16). The grandmother's condition has since 2017 been deteriorating with severe hypertension and arthritis and she has degenerative disease of her hip and knee and the doctor's opinion was that "she was no longer capable of effectively continuing to take care of the Appellant" (paragraph 17).

22. Fourth, the interference is not necessary in a democratic society because it is not necessary for the economic wellbeing of the country or for the protection of the rights and freedoms of others. There is no hint whatsoever of any wrongdoing or illegalities by any of the parties concerned. In fact, all of the evidence is that the sponsoring father and mother have continuing legal custody of the Appellant. Fifth, all in all, the decision here is not proportionate to the legitimate public end that is sought to be achieved.

23. It is well established that the relevant question engaging proportionality of an administrative decision that threatens to break a family is whether it is reasonable to expect the Appellant to remain separately from his natural parents, which in this case means his natural father and mother, who are the persons with a legitimate legal status. On the facts of this case it is not reasonable.

Re-making the Decision

24. I have re-made the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. For the reasons I have given above, this appeal is allowed.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision stands to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

26. No anonymity direction is made.

27. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019