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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00830/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 11 July 2014	**On 22 August 2014**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

GULULIKAYISE NCUBE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Caskie, instructed by Latta & Co Solicitors
For the Respondent: Mr G Jack, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a South African national, appeals the decision of First-tier Tribunal Judge Burns who dismissed her appeal against the decision dated 28 January 2014 to remove her as an illegal entrant. This was for reasons given by the respondent in an accompanying letter of the same date.

2. The judge heard evidence from the appellant and Dumisani Ndlovu, her husband.

3. It is the appellant's case that she is not South African but a national of Zimbabwe. She had been in the United Kingdom previously in 2002. She returned to South Africa with her daughter later that year but came back to the UK in May 2003 on a South African passport. She was refused entry. In June 2003 she applied for a visa in Pretoria which was refused in July. It is the appellant's case that she nevertheless returned that month. She was encountered in August 2004 when trying to open a bank account using a passport with a forged stamp. In September 2004 the appellant claimed asylum but then withdrew her claim after appealing on the basis that she would be reapplying as a national of Zimbabwe.

4. Between 2008 and 2011 a number of representations were made to the SSHD which were considered and rejected resulting in removal directions as an illegal entrant on 28 January 2014.

5. The appellant and her husband separated in 2009. He is currently in the United Kingdom but has no lawful immigration status. The couple had met in Zimbabwe in 1993 where they had married in December 2000. The couple had a daughter who accompanied the appellant on her visit to the United Kingdom in 2002. She has since died. The couple also have a son who was born on 24 October 2007 in the United Kingdom.

6. In her reasons letter the Secretary of State explained why she did not consider the appellant would be at risk in Zimbabwe. It was unclear what had happened to the appellant's daughter who had returned with her to South Africa in 2003. Furthermore, the appellant would not be at risk in South Africa.

7. The respondent accepted the appellant had established family life in the United Kingdom with her son Khaya and she considered the case under the Rules for leave to remain as a parent. She considered the appellant failed under S-LTR.1.6 on the basis that the applicant's presence was not conducive to the public good in the light of her dishonest and deceptive behaviour. It was also refused under S-LTR.1.7 on the basis of a failure to provide the Secretary of State with accurate information. Paragraph 276ADE was also considered but rejected because the appellant could not meet the criterion as to length of time in this country.

8. Returning to EX.1(a), this was found not to apply as the appellant's son and daughter had lived in the United Kingdom for three years and four months and one year and six months respectively. It was considered that the appellant's son, Khaya, was young enough to adapt to life in either South Africa or Zimbabwe.

9. The judge found the appellant and her husband to be unreliable witnesses and not credible. Furthermore, he considered the evidence from an expert, Susan Baird, inconsistent and poorly argued. He concluded the evidence did not establish a good arguable case with reference to *MS v SSHD* [2013] CSIH 52 or *Gulshan v SSHD* [2013] UKUT 00640.

10. Although not reaching a definitive conclusion on nationality, the judge expressed a view that a better case was made out for the appellant being South African or having some form of status there.

11. The challenge to this decision accepts that the negative findings were open to the judge but it is argued that he had failed to carry out a full and proper assessment of what was in the best interests of Khaya. The fact that parents have a precarious immigration history must not be used against the children.

12. Permission to appeal was granted on the basis that the judge did not appear adequately to engage with the relevant issues relating to the son's interests nor give an indication as to what was in those best interests.

13. It was clarified by Mr Caskie that the appellant had not reapplied for asylum but this aspect was addressed in the further representations made between 2008 and 2011. He argued that the effect of the grant of permission to appeal was to widen the grounds of application to include a challenge to the adequacy of reasons by the judge.

14. After hearing submissions on the point, I explained that I did not accept this argument. The grounds of challenge in the application, after an introduction to the history of the matter, is in these terms:

> "The Immigration Judge made significant negative credibility findings at paragraph 26 of his determination. It is accepted that these findings were open to him. It is, however, that as a result of the negative credibility of the appellant, the Immigration Judge has failed to carry out a full and proper assessment of what is in the best interests of the appellant's son, Khaya Oliver Ndlovu, who was a dependent on the appeal.
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> It is submitted that in line with *ZH (Tanzania)* (SC) SSHD [2011] UKSC 4 at paragraph 44, the fact that the parents have a precarious immigration history must not be used against the children and it would be wrong in principle to devaluate what is in the best interests of the child by something for which the child could in no way be held responsible. It is submitted that the Immigration Judge has found the appellant to be an incredible and unreliable witness and as a result of this has failed to carry out an assessment of the child's best interests. It is submitted that this amounts to an error of law.
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> Permission to appeal is respectively sought in respect of the above grounds."

15. Even if I were persuaded that when granting permission it is open to the decision maker to extend the grounds of appeal, the additional basis of challenge sought by Mr Caskie is simply not available on the text of the decision by First-tier Tribunal Judge Hodgkinson.

16. By way of substantive submissions Mr Caskie made the following points:

(i) The judge had taken his "eye off the ball" in taking a negative view as to the report of Miss Burnes. It was clear from that report that the child regarded his home as a place of safety;

(ii) The judge had failed to carry out any assessment as to what was in the child's best interests. The decision in *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874 makes it clear in its assessment in [36] that once it is established that it is in the interests to stay it does not operate as a light switch. The judge needed to consider how emphatic the assessment of best interests were. Mr Caskie contrasted the position to where it was marginally in the best interests of the child to stay with those when it was clearly in such interests that he should do so. The judge in the case before the First-tier Tribunal had not explained the outcome of the first question and therefore had failed to emphasise the second point which was how emphatic those interests were stated;

(iii) In reaching his conclusion that there was no evidence that the father could not follow the appellant and child to their own country, the judge had asked the wrong question. It was not whether the father could go but whether he would go.

17. By way of response Mr Jack observed that the grounds of application did not challenge the findings in the report by Susan Baird. He considered that the judge had given adequate reasons for findings and referred me to specific passages from the determination which I consider in more detail below. The judge was clearly aware of all the facts and issues. It was not necessary for the judge to make a decision on the best interests outside the Rules as those interests were catered for in the Rules. Even if it could be argued that the best interests had not been taken into account the error was not material if the determination was read as a whole.

18. Before hearing Mr Caskie's reply, and particularly in light of his correct submission that the decisions of the Court of Appeal in England and Wales were not binding in Scotland, I drew his attention to the decision in *Zoumbas v SSHD* [2013] UKSC 74 in particular the judgment of Lord Hodge at [12].

19. Mr Caskie argued that Lord Hodge had "pulled back" from what Lord Kerr has said in *ZH (Tanzania)*. He concluded his submissions in terms that if the determination were allowed to stand it would be without adequate consideration of the point on which there was error in that it was appropriate to have regard to the immigration history of the appellant when deciding the child's best interests.

20. I reach the following conclusions. This is a case where the circumstances of the appellant when considered in isolation or combined with those of her son do not enable them to benefit from the provision in FM including EX.1. Whilst the negative credibility findings are not challenged in the grounds of appeal it is argued that the impact of those findings resulted in

a failure to carry out a full and proper assessment of the best interests of Khaya. I cannot accept this argument.

21. Although it is correct that the judge did not specifically refer to the "best interests", I am sastified that in substance this is precisely what he did. It is clear that the best interests were uppermost in his mind having regard to his record of the evidence from the appellant at [12] to [14] and the evidence from her husband at [15] to [17]. The judge also set out relevant extracts from Susan Baird's report at [19] to [21]. Likewise the judge also recorded in detail the submissions on the appellant's behalf including a number of specific references to the child's circumstances at [24].

22. The judge turned to his assessment of Susan Baird's report at [27]. It is significant that the grounds of challenge do not seek to disturb those conclusions which to my mind were unlawfully open to the judge having regard to the report.

23. The extract from the judgment of Lord Hodge in *Zoumbas* to which I drew the parties' attention is at [24] in these terms:

> "There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that other things being equal, it was in the best interests of the children that they and their partners stayed in the United Kingdom so they could obtain such benefits as health care and education which the decision maker recognised mighty be of a higher standard than would be available in Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were parent of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into the United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to tier wellbeing. We agree with Lady Dorian's succinct summary of the position in paragraph 18 of the Inner House's opinion."

24. I readily accept that in embarking on a comparison with skilled workers moving between EU countries the judge turned his focus from the facts before him but any concerns about that are corrected in [28] as follows:

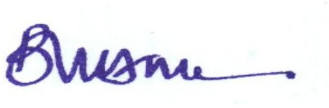
> "Insofar as the facts of the case were concerned, it is commonplace that Article 8 us a qualified right, and that countries and [sic] entitle to select which immigrants they wish to have, as proposed to having that choice thrust upon them. All that can be said here is that the young child in question is happy, well adjusted, and, like all children of his age, is reluctant to move from his present settled

circumstances. He has some form of contact with his father, but it is haphazard and uncertain. The future of the parents' relationship is speculative. There was no evidence advanced before me that the father could not follow the mother and child to their own country, although obviously he does to want to. All that in my view did not constitute "a good arguable case" in terms of *MS v SSHD* [2013] CSIH 52 or *Gulshan v Secretary of State for the Home Department* [2013] UKUT 00640. The case admittedly fails under the Rules which otherwise are determinative of the parties' Article 8 rights."

25. I am satisfied that the judge took proper account of the child's best interests and reached a permissible conclusion on article 8 grounds based on factual findings open to him on the evidence after a correct direction as to the law. His reasoning is succinct but clear and I am not persuaded that he erred in law.

26. This appeal is dismissed.

Signed Date 20 August 2014



Upper Tribunal Judge Dawson