Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number:
AA/10411/2013

AA/10412/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 8th April 2014	**On 25th April 2013**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS PATRICIA NYAMUTAMBA – FIRST RESPONDENT
MASTER KUPAKWASHE BRAYDEN MTENGWA – SECOND RESPONDENT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Respondent: Mrs R Pettersen, Home Office Presenting Officer
For the Appellant: No representation

DETERMINATION AND REASONS

1. The Respondents are citizens of Zimbabwe. The first Respondent is the mother of the second Respondent, a minor (date of birth 20th September 2010) and a dependant of the first Respondent. The Appellant is the Secretary of State for the Home Department. For ease of reference I will refer to the Appellant as"the Respondent" as she was before the First-tier

Tribunal and I will refer to the first Respondent as "the Appellant" and the second Respondent by his name, Brayden.

2. On 7th November 2013 the Respondent made a decision refusing to the grant the Appellant asylum and on 27th March 2013 made a second decision to remove the Appellant and Brayden from the UK by way of directions under Section 10 of the Immigration and Asylum Act 2009.

3. The Appellant appealed those decisions to the First-tier Tribunal (Judge Birkby) which, in a determination dated 6th January 2014 dismissed the appeal on asylum and Humanitarian Protection grounds but allowed the appeals of both the Appellant and Brayden on Article 8 ECHR grounds.

4. The Secretary of State now appeals with permission to the Upper Tribunal. The dismissal of the asylum/Humanitarian Protection appeals have not been challenged by the Appellants.

Background

5. The following background is relevant.

   (i) The Appellant entered the United Kingdom in 2000 in possession of a visit visa. She subsequently obtained leave to remain as a student until 2003. When entering in 2000 she left her husband and their 9 year old daughter Bevy Lyn, remaining in Zimbabwe.

   (ii) In 2001 having obtained leave as a student the Appellant brought Bevy Lyn over to the United Kingdom to join her. Her husband then entered the United Kingdom in 2002, but was removed in March 2002, returning again in September 2002. At this time he made a fresh claim to asylum. However the appellant and her husband subsequently separated. He formed a new relationship elsewhere and on the basis of this new relationship was given a period of discretionary leave to remain in 2012. There are two children born of that relationship.

   (iii) Despite the Appellant's husband forming another relationship she gave birth to a second child by her husband. That child is Brayden who was born on 20th September 2010. According to the Appellant, she and her husband only separated in June 2012, although it is of note that he had apparently formed the new relationship prior to that date. It is recorded that the Appellant's husband has two sons from the new relationship, Malcolm born on 26th March 2007 and Ethan born on 13th December 2011.

   (iv) The Appellant's daughter Bevy Lyn has also been granted indefinite leave to remain. The Appellant therefore claims that to return her to Zimbabwe would breach her Article 8 ECHR family and private rights and those of Brayden. The basis of her claim is her family life with her daughter Bevy Lyn, family life between Bevy Lyn and Brayden and Brayden's relationship with his father and half-siblings.

The UT Hearing

6. Mrs Pettersen appeared for the Respondent. The Appellant attended in person. She informed me that she was no longer represented by Bake and & Co Solicitors of Birmingham. This was confirmed by a letter on the court record from that firm dated 4th April 2014. In the letter they request that I take into account a skeleton argument which they had prepared on behalf of the Appellant. I confirm that I did so. I also ensured that the Appellant understood the proceedings and informed her that she would have the opportunity to address me fully.

7. Mrs Pettersen essentially relied on the grounds seeking permission and submitted that the Judge had erred in his approach to the Article 8 assessment. None of the facts found by the Judge amounted to exceptional circumstances in the sense that the requirements of the Rules not having been met, refusal to vary leave would result in an unjustifiably harsh outcome. This is particularly so in the light of paragraph 48 of the Judge's determination which stands unchallenged. She asked that I find an error of law; set the decision aside and remake it dismissing the Appellant's appeal.

8. Miss Nyamutamba told me that she did not want to return to Zimbabwe with Brayden. She said that she has medical problems including schizophrenia which is controlled by medication. She accepted that medication is available in Zimbabwe, but said that she would have to pay for it, whereas it is free here. In addition, people in Zimbabwe look down on those with her condition. Her parents remain in Zimbabwe and live in a house, but they are old people who are now retired. She said she would not get employment and that any qualifications which she had gained in the UK (remaining on a student visa) would not be taken seriously there. Finally she said she did not want to leave her daughter and she wanted her son to grow up knowing his sister and his father and his half-siblings.

Has the Judge Erred?

9. At paragraph 40 of his determination Judge Birkby wrote:

> "I do not believe that the Appellant left Zimbabwe fearing any kind of persecution or ill treatment. I believe that she has fabricated her assertions with regard to fears in Zimbabwe in order to sustain a claim for asylum. I am not satisfied that on return to Zimbabwe now either she or her son, Brayden, would face any form of ill treatment".

He then wrote at paragraph 42 and 44:

> "The Appellant claimed at the hearing that her husband had regular contact with Brayden, visiting the Appellant and Brayden in Rotherham on average around every fortnight. When Ms Mtengwa (Bevy Lyn) gave oral evidence, she stated that she herself had regular contact with her father, but also that

she visited her mother and Brayden in Rotherham on a regular basis. Ms Mtengwa now lives in the Midlands. There was an inconsistency when the Appellant stated that her husband and Ms Mtengwa would meet at times at their house in Rotherham when the husband came to visit, but Ms Mtengwa, although she stated that her father did visit Rotherham, stated that she never saw him there.

Much of the evidence about family life and private life in the United Kingdom has indeed been consistent. I accept that Ms Mtengwa has been educated in the United Kingdom and she has recently completed her BTEC National Diploma in Sport Science. At one time she wished to study Physiotherapy at University in 2014 but she told me in oral evidence she now wishes to go into nursing. I accept that that is the case. I also accept that Ms Mtengwa lived with the Appellant and her brother, Brayden, prior to the Appellant's application for asylum in 2013. I accept that since then the family have been separated since the Appellant has taken NAS accommodation in Rotherham. Nevertheless, I believe that the relationship between Ms Mtengwa and the Appellant and Brayden is a particularly close one. I also accept that the Appellant herself has had medical problems. There was no full medical report, but there was a full medical history of the Appellant provided to the Tribunal. The Appellant claimed that she suffered from schizophrenia although that was not clear from the documentation. What was clear from the documentation is that the Appellant has consistency suffered from depression and indeed a form of psychosis. It is clear to me that the Appellant and her daughter have had a close relationship over the thirteen years that the daughter has been in the United Kingdom. Although Ms Mtengwa has not been promised indefinite leave, it may be that she is granted indefinite leave to remain in the United Kingdom in due course. I accept that she and her mother have lived in a close and loving relationship during the time that they have been in the United Kingdom. I accept that that relationship is just as close with Brayden. I also accept that both Ms Mtengwa and Brayden do have contact with their natural father, although I do not believe that such contact is a regular as described. I have taken careful note of the corroborative documentation submitted in support of the Appellant from her church and also from individuals. One of such letters confirms that the Appellant has been involved in visiting people who have been the subject of violence and mental health problems".

The Judge then concluded at paragraph 49 that the Respondent's decisions are not proportionate.

10. I consider that paragraphs 42, 44 and 49 reveal some difficulty in the Judge's approach to the facts of this appeal. The Judge factors into the proportionality assessment the following findings in paragraph 49,

> "I am also satisfied that her family life and that of the second Appellant, her son, extends to family life with Ms Bevy Mtengwa, who has lived for most of her life with the Appellant and for most of Brayden's life with Brayden. I believe that they will have endured a particularly close attachment bearing in mind the illegal nature of their being so long together in the United Kingdom. There is a strong emotional dependency as regards each to the others in my judgement....

> I also believe that it would be in his (Brayden) best interests that contact between Bevy Mtengwa and her father is maintained…
>
> I therefore conclude that the decision of the Respondent interferes with the rights to a private and family life of both Appellants in this appeal…
>
> I have also concluded that the Respondent's decisions are not proportionate in all the circumstances. Those circumstances are exceptional and unusual…
>
> If the Appellants were to have to return to Zimbabwe I believe that the contact between Bevy Mtengwa and the Appellants would be severely restricted or indeed largely severed. That would not be in the interests of anyone, including in the best interests of Brayden. Furthermore, Brayden's father has discretionary leave to remain in the United Kingdom as does his current partner and his current partner's two children. It is not clear whether they will be granted further leave, but that remains a serious possibility. In those circumstances if Brayden and the Appellant were to return to Zimbabwe their contact with Brayden's father would again be severely restricted or it would cease. That would not in my judgement be in Brayden's best interests".

11. I find no evidence to support such findings. Further, I would agree with the Respondent those findings sit ill with the Judge's finding at paragraph 43 where he says as follows:

> "As a consequence I found that the Appellant's evidence with regard to the visits by Brayden's father was exaggerated, but I was impressed by the evidence of Ms Mtengwa who I found to be a credible witness with regard to the situation in the United Kingdom".

There also appears to be an inconsistency with the conclusions in paragraph 48 where he says as follows:

> "I have considered the assertions of the Respondent with regard to Appendix FM of the Immigration Rules. The Appellant has been in the United Kingdom for less than twenty years, as has her son. She is separated from her husband. He is a failed asylum seeker with limited leave to remain in the United Kingdom. There are no insurmountable obstacles preventing the Appellant, her son and her ex husband however and indeed the ex husbands children, who are all citizens of Zimbabwe and failed asylum seekers from returning to Zimbabwe. There is nothing to prevent the Appellant's daughter, Bevy, from returning also. The Appellant's case under Appendix FM cannot be sustained".

12. I find for the foregoing reasons the Judge has adopted the wrong approach when assessing proportionality and that his reasoning is flawed to the extent that the determination should be set aside and the decision remade.

Remaking the Decision

13. I did not find it necessary to receive further evidence in order to remake the decision. The facts are not challenged by the Respondent. I find that the family life of the Appellant and Brayden will not suffer because they would be removed together to Zimbabwe. Brayden's best interests are served by being with his mother.

14. So far as his relationship with his sister Bevy Lyn is concerned, Judge Birkby found that she now lives in the Midlands and is hoping to train as a nurse. To all intents she is living an independent life. She is 22 years of age and although the Appellant hopes that she and Brayden will live with Bevy Lyn in the future, that remains an aspiration rather than a reality. In any event, Bevy Lyn at present is a citizen of Zimbabwe, as Judge Birkby found. There is nothing put forward in the evidence adduced to show that she would be prevented from travelling to Zimbabwe and seeing her brother and mother there.

15. The relationship between Brayden and his father is doubtless an important one but equally, there is nothing in the evidence to show that contact would be severely restricted or cease altogether between them. Brayden's father is also a citizen of Zimbabwe and nothing in the evidence shows that he would have any problem returning to or travelling there.

16. The Appellant when she appeared before me made much of her medical condition but I keep in mind that Judge Birkby found that he accepted that the Appellant suffers from depression and is subject to psychotic episodes and is on medication. Nevertheless he was not satisfied that the Appellant would not have access to medication in Zimbabwe. He also found that pursuant to the case of **N**, the Appellant did not qualify to remain in the United Kingdom under Article 3 or Article 8 ECHR because of her medical condition. Those findings remains unchallenged.

17. Therefore for the foregoing reasons I am satisfied that Judge Birkby erred in law.

DECISION

18. Judge Birkby's determination is set aside because of an error of law. I remake the decision. These appeals are dismissed under Article 8 ECHR. Appeals dismissed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

I have dismissed the appeal and therefore there can be no fee award.

Signature **Dated**