Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA215222015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision and Reasons Promulgated**
On 23rd June 2017	**On 29th June 2017**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MACHAYA TERRENCE MUPAYAH

Respondent

Representation:

For the Appellant: Ms R Petterson, Senior Home Office Presenting Officer
For the Respondent: Mr C Lane, instructed by Genesis Law Associates Ltd

DETERMINATION AND REASONS

1. The appellant, who had arrived in the UK on 26th August 2005 had been granted leave to enter as a student which was extended until 15th November 2011, sought asylum on 1th November 2011. His application was refused. It does not appear he appealed that decision. On 21st November 2014, he was served with a notice declaring he had sought leave to enter through deception based on false declarations as to his nationality. During 2014, further submissions made by him for asylum were refused.

2. On 8 December 2014, he made an application for leave to remain based on his family and private life in the UK. That application was refused by the respondent on 21st April 2015; his appeal against that decision was allowed by First-tier Tribunal Judge Frankish in a decision promulgated on 1st November 2016. The SSHD was granted permission to appeal that decision on 28th March 2017.

3. The grounds relied upon by the SSHD are as follows:

> "1. The Judge gives no reasons for his decision to allow the appeal. It is unclear whether he allows the appeal under the immigration rules or under Article 8 of the ECHR. If his decision is under the Rules (he makes reference to EX.1) then his self-direction [23] that human rights appeals are decided on the facts at the date of hearing is misconceived. There is in any event no reasoning in respect of EX.1; merely an underlining of those parts of the rule that the judge finds appropriate and no explanation of how and why the circumstances of this appellant come within those requirements. Although there is a statement [22] that the Judge has found it was not reasonable to expect the child to leave, a careful reading of the determination fails to reveal such a reasoned conclusion.
> 2. If the intention of the judge was to allow the appeal under Article 8 outside the rules, there is no reasoning, no balancing act and no proportionality assessment.
> 3. For these reasons the Judge has materially erred in law. Permission is sought to appeal to the Upper Tier(sic) Tribunal with a view to having the determination set aside.

4. The First-tier Tribunal judge sets out the relevant case law. There was considerable argument before the First-tier Tribunal about the nationality of the appellant. The judge, having considered the evidence before him reached the uncontested finding that Mr Mupayah was a Zambian national. He is married to a Zimbabwean citizen, who is recognised as a refugee and has indefinite leave to remain, with whom he has been in a relationship since 2010. They have a child, born on 7th July 2015, who also has indefinite leave to remain. The judge also finds, again uncontested, that it is open to Mr Mupayah's wife and child to go to Zambia but that it was abundantly clear from the wife's evidence that she would not consider doing so.

5. The relevant paragraphs of the First-tier Tribunal judge's decision are as follows:

> "20. [The child] has a future here and I have accepted his mother's evidence that she will emphatically not abandon her right to remain here in favour of returning to her home country of which she is a refugee or Zambia of which I have found her husband to be a citizen. [the child] could only accompany [Mr Mupayah] to Zambia if a UK family court so ordered. My conclusion is that, based on the child's best interests, including remaining with the mother, they would not.
> …..
> 22. Obviously 6(a) and 6(b) [of s117B(6) Nationality, Immigration and Asylum Act 2002] greatly favour [Mr Mupayah]. He has the requisite relationship with the child. I have concluded, as above, that it is not reasonable to expect the child to leave and, indeed, that I t would be impossible to bring this about. With regard to financial considerations, [Mr Mupayah] is dental nurse. His wife works at two jobs plus her studies in order to convert her foreign dental qualification into one recognised here…….financial considerations, at the moment, are not greatly against [Mr Mupayah].
> 23. In the refusal letter, the application is refused under EX.1 on the grounds that [the wife] was merely pregnant…..That is no longer the case, human rights appeals being decided on the facts as at the date of hearing….
> 24. It is apparent from the findings of this determination that the appellant falls within EX.1, the outcome of this case being, essentially, the consequence of the [SSHD] leaving

> [Mr Mupayah] to police the expiry of his visa on 15 November 2011 and her decision dated 13 May 2013 against himself. In the light of finding for [Mr Mupayah], I emphasis [Mr Mupayah's] evidence at §11 in connection with any subsequent dependant relative claims."

Error of law

6. The SSHD is incorrect in her assertion that if the appeal were under the Immigration Rules then the relevant time would be the date of the decision the subject of appeal. Irrespective of whether the First-tier Tribunal decision is under the Rules or an appeal on human rights grounds, the relevant date for an in-country appeal assessment of evidence, is the date of hearing.

7. The scheme of the legislation under which this appeal is heard is a human rights scheme. At the time, Mr Mupayah made his application for leave to remain in the UK, he was an overstayer. His application was made on the basis of his family and private life as engaged by Article 8. The refusal of that application is appealable only on human rights grounds – under the pre-Immigration Act 2014 scheme he would not have had a right of appeal unless it was against a s10 Immigration and Nationality Act 1999 decision taken pre-amendment by the 2014 Act. In either case the success or otherwise of Mr Mupayah's appeal would, given the basis upon which he made his application, be dependent on whether he could show that his removal from the UK was a disproportionate interference in his Article 8 rights namely the right to respect for his private and family life. Part of the assessment of that is the issue of whether Mr Mupayah meets the requirements of the Rules. If he does, it would be very unlikely that his removal could be found to be anything other than disproportionate. If he does not meet the requirements of the Immigration Rules all factors, including those that may not be referred to in the legislative scheme, are taken into account.

8. Mr Lane submitted that the grounds as set out in the application for permission to appeal and upon which permission had been granted did not seek to challenge the finding of the First-tier Tribunal judge that the child fell within the provisions of s117B of the 2002 Act or EX.1. He submitted that the grounds were a disagreement with the findings of the judge, which were not perverse and should thus be upheld. He submitted the grounds simply asserted that the judge had failed to undertake a proportionality assessment whereas he had.

9. Ms Petterson submitted that the First-tier Tribunal decision was unclear. There had been no proportionality assessment, there were factual errors in the judge's findings and the grounds do challenge the findings by reference to the lack of any findings by the judge of how Mr Mupayah falls within EX.1 which had been simply underlined rather than an exercise undertaken to explain how Mr Mupayah met the criteria.

10. There is no proportionality assessment. Although the judge sets out s117B of the 2002 Act, the judge does not consider that section in the context of an assessment overall. There is no reasoning at all why it is not reasonable for the child to go to Zambia other than an assertion that it is in the best interest of the

child to be with his mother and his mother refuses to go there. That is not reasoning but a statement of an assertion.

11. The judge has underlined the subsection in EX.1 that it would be unreasonable for the child to leave the UK and underlined that there are insurmountable obstacles to his partner going to Zambia or why it would be unreasonable for the child to leave the UK. But he has not said what they are. §17 of the decision refers to the wife's ability to go to Zambia (which has not been challenged) so it does not appear that there are, in, fact any obstacles other than her refusal.

12. In §24 the judge states that from the findings, the child falls within EX.1. But there are no findings to that effect. The grounds for appeal refer to the lack of findings. Mr Lane is incorrect in his submission that the grounds do not challenge the findings made in connection with EX.1 and s117B.

13. There are two matters that are incorrect on the face of the decision: the child is not a qualifying child under EX.1 and nor is a court order required for the child to be taken to Zambia with its parents or with the consent of each parent. The failure by the First-tier Tribunal judge to explain how he came to his findings is one of the challenges by the SSHD.

14. Nowhere in the decision is there any attempt to consider the proportionality of the removal of Mr Mupayah. No account is taken of his immigration history in any proportionality assessment even though it is set out in the decision. That he speaks English and is therefore less of a burden on taxpayers and better able to integrate are not factors that weigh greatly in his favour – they are factors that do not militate against him.

15. §24 of the First-tier Tribunal decision is rather incomprehensible. The fact that the appellant chose not to leave the UK after his failed asylum claim is not solely down to the SSHD's failure to enforce immigration control. That it appears she may have chosen not to enforce his departure may be a matter to weigh in the balance but it is not a matter upon which he can achieve leave to remain as some sort of reward. The reference to other dependant relative applications and §11 must be some sort of gremlin. §11 sets out some history and there is not, so far as I can see, any dependant relative application made.

16. In short, the judge has left out of account material considerations and has placed impermissible weight upon others. I am not satisfied that, had these matters been considered as they should have been, the outcome would have been the same. It follows the errors of law made by the judge were material ones. I set aside the decision in its entirety, to be remade, no findings of fact preserved.

17. It is not the function of the Upper Tribunal to make primary findings of fact. As indicated at the hearing (if I were to find material errors of law), and to which there was no dissension, I remit this appeal to be heard afresh by a First-tier Tribunal judge.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

The appeal is remitted to the First-tier Tribunal to be remade, no findings of fact preserved.

Date 28th June 2017

Upper Tribunal Judge Coker