IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000689
UI-2024-000690

First-tier Tribunal No: HU/60506/2023
HU/60276/2023
LH/06715/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued
On 31 December 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RUVARAHE KUDZAI JENA
NOKUTENDA JENA
(NO ANONYMITY ORDER MADE)

Appellants

and

AN ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: Ms Lucy Jena, Sponsor.
For the Respondent: Ms Rushforth, a Senior Home Office Presenting Officer.

Heard at Cardiff Civil Justice Centre on 19 December 2024

DECISION AND REASONS

1. The appellant's, both citizens of Zimbabwe born on 2 November 1999 and 12 February 2006, appeal with permission a decision of First-tier Tribunal Judge Buckwell ('the Judge'), promulgated following a hearing at Newport on 2 January 2024, in which the Judge dismissed their appeals on human rights grounds against the decision of an Entry Clearance Officer ('ECO') who refused their applications for leave to enter the United Kingdom made on 3 April 2023.
2. The appellants maintained they are dependent upon their sponsor, Lucy Jena ('the Sponsor'), born on 29 August 1976, who is resident in the UK.
3. The Judge records the Sponsor and another attending who gave oral evidence. The Sponsor stated she is the aunt of both appellants. The Sponsor stated her brother Andrew, who has passed away, was their father.

4. At [10] the Judge refers to the evidence of the situation in Zimbabwe. The Sponsor stated the second appellant remains a minor, the first appellant was "mentally challenged" as she has been epileptic since the age of three, has brain damage, and is unable to live independently as she requires care on a "24/7" basis. She is on medication and has challenging behaviour. It was stated there is a care plan in place for the first appellant. The Judge records this and other aspects of the evidence provided in the determination.
5. The Judge's findings are set out from [49] of the decision under challenge. The Judge finds it is clear the Sponsor has a sound grasp of the issues relevant to the appeals and was able to convey strongly the basis of the claims made [49].
6. The Judge finds it does not appear to be an issue that neither appellant can meet the requirements of the Immigration Rules [51].
7. The Judge notes the first appellant is an adult and accepts the evidence she has a mental age which is much lower, which the Sponsor stated is that of a nine-year-old. The Judge notes that was not contested on behalf of the ECO [52].
8. The Judge was satisfied from the evidence of the Sponsor that in terms of emotional support, visits and personal and financial support, she has a strong relationship with both appellants which justifies a positive finding as to engagement of Article 8(1) ECHR as between each appellant and the Sponsor on family life grounds, and that the matter turned upon the question of proportionality [52].
9. In undertaking the proportionality exercise the Judge finds it is significant that the Immigration Rules are not met [53].
10. Having undertaken the necessary balancing exercise the Judge concludes at [58 -59]:

> 58. Consequently, in assessing proportionality with respect to both appellants I do not find that either of them has established that the consequences of the decision resulting unjustifiably harsh consequences. In effect the status quo will continue. The sponsor, at her choice, can continue to visit Zimbabwe she is also in a position to continue to give financial support to both appellants. Specifically, a lower quality of medical provision in Zimbabwe for the first appellant is not found to constitute exceptional circumstances. I take note of the CPIN in that it is possible for medical supplies to be obtained from neighbouring South Africa.
>
> 59. Taking into account my findings above, whilst Article 8 (1) ECHR is found to be engaged in respect of each appellant, the Immigration Rules are not met. The public interest lies in the maintaining of effective immigration controls. In assessing proportionality, I have adopted a 'balance sheet' approach and I have set out above those factors to which I have given weight in favour of either party.

11. The appellants sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

> 2. I take in account that the Appellants are unrepresented. The grounds on page 1 take issue with the Respondent's finding that the Appellants did not satisfy the requirements of the Rules. The Judge at [51] states that it did not appear to be in issue that neither Appellant could satisfy the requirements of the Rules and proceeds on that basis. The Judge emphasises the significance of the fact that the Appellants cannot meet the requirements of the Rules at [53]. At [55] the Judge attaches very significant weight to this. However, nowhere in the decision does the Judge explain why it is that the Second Appellant who is under 18 cannot satisfy the requirements of the Rules. There are arguably no clear reasons given for this matter upon which the Judge

placed very significant weight. It is thus arguable that the Judge erred in law in finding that the Second Appellant could not satisfy the requirements of the Rules and gave inadequate reasons for this finding.

3. Given that the Judge appears to accept that the two Appellants are half-sisters with no other close family in Zimbabwe, and that while she is an adult she has a mental age of a 9 year old, it is arguable that an error in relation to the Second Appellant's appeal would also render the decision in the First Appellant's appeal unsustainable.

12. In a document entitled "main points for appeal" submitted by the sponsor by email on 13 December 2024 it is submitted:

It is apparent that first tribunal made a mistake because:

- Both Appellants no longer have family in Zimbabwe, and they have a right to a family.
- Ruvarashe Kudzai Jena has the brain of a nine year old, so despite her age, she needs family care, love and protection against abuse owing to her vulnerabilities. There is enough evidence even within UK to show that vulnerable people are at high risk of abuse. Please see below:

  (There are than a number of links to articles in the Guardian newspaper, BBC News, and other sources, in relation to abuse within a care homes, Baby P, etc.)

- HO asked for evidence of relationship in terms of my brother's birth certificate, and this was provided so there was no reason for them to deny these girls the right to a family.
- Nokutendra Jena, was a minor at the time of application too!

Discussion and analysis

13. In considering the merits of this appeal I have had regard to the guidance provided by the Court of Appeal in Volpi v Volpi [2022] EWCA Civ 462 at [2], Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 at [26] and Hamilton v Barrow and Others [2024] EWCA Civ 888 at [30 – 31].
14. The Tribunal is grateful for the contribution made by both the Sponsor and Miss Rushforth. It is fair to say that during the course of the hearing the Sponsor became emotionally distressed when speaking about her belief that the appellants should be able to join her in the UK as she is their only family and her fear that they will suffer abuse in Zimbabwe without family to care for them. She stated she is their only surviving family and they hers.
15. I have no reason to doubt that the Sponsor's feelings and sentiments that she expressed are genuinely held. Indeed, the strength of those feelings conveyed the impression that so far as the Sponsor was concerned the Judge had erred in not accepting that family are everything. She specifically submitted that the Judge's decision had nothing to do with family care, nothing to do the situation in Zimbabwe, and was highly critical of any reference to the NHS in the determination, stating that as a qualified nurse of some years standing she will provide any care that is required in the UK.
16. The submission the Judge had not considered the evidence or the situation in Zimbabwe, further points raised by the Sponsor, is not made out when the determination is read as a whole. The Judge clearly considered the evidence made available with the required degree of anxious scrutiny.
17. Contrary to the grant of permission to appeal it is clear why the Judge found the appellants could not satisfy the Immigration Rules as there is clear reference to

the terms of the refusal at [49] of the determination, and it was not established that they could on the evidence available to the ECO.

18. The refusal letter dated 13th February 2023 in respect of Ruvarashe shows she made an application for entry clearance to the UK under Appendix Adult Dependent Relative ('Appendix ADR') to the Immigration Rules on the basis of her family life with her relative.
19. It was accepted by the ECO that the application did not fall for refusal on grounds of suitability under Section S-EC of Appendix ADR, but it was found that the applicant could not meet all the eligibility requirements of Appendix ADR as it was not accepted on the evidence that the Sponsor was the applicant's aunt, as it was not accepted they are related as claimed. It was stated, in addition, that even if the relationship had been shown, Aunties are not eligible to sponsor under Appendix ADR, leading to refusal under ADR 4.1 of Appendix ADR.
20. The ECO noted Ruvarashe is stated to have epilepsy which was accepted as being a serious condition, but refers to the lack of medical evidence being uploaded preventing it being assessed whether she requires long-term personal care to perform everyday tasks as a result of age, illness or disability, leading to refusal under paragraph ADR 5.1 of Appendix ADR.
21. It was also stated that due to lack of medical evidence the ECO could not be sure any care that she needed is not available and there is no person in Zimbabwe who can reasonably provide it, leading to refusal pursuant to paragraph ADR 5.3 of Appendix ADR.
22. It was accepted the eligibility financial requirements of ADR 6.1 - 6.4 are met.
23. The ECO considered exceptional circumstances under paragraph ADR.7.1 which would render refused a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for each of the applicants, a relevant child, or another family member, but did not find that information or evidence had been provided to establish that there were any exceptional circumstances in this case, leading to refusal. It was also found the applicant did not fall for a grant of entry clearance outside the Immigration Rules on the basis of compassionate factors.
24. In relation to Nakutenda, in the refusal of 2 August 2023, the ECO notes that the application for entry clearance had been considered under the Immigration Rules by reference to Appendix Child staying with or joining a Non-Parent Relative (Protection) for a child joining a non-parent relative with protection status in the UK ('Appendix CNP').
25. CNP.3.1 of the Rules sets out a number of mandatory requirements, one of which is that the applicant has an existing, genuine family relationship with a UK based relative which the ECO did not accept had been proven as no birth certificate had been provided for their father which would have provided a link between him and the sponsor. As a result, the application was refused by reference to paragraph CNP.3.1(d).
26. CNP 3.2 of the Rules refers to accommodation, maintenance, or the existence of serious and compelling family or other circumstances which make exclusion of the applicant undesirable. As it was said the relationship with the sponsor had not been proven the ECO did not consider this provision leading to refusal under CNP.3.2 (c).
27. It was not accepted this applicant met the eligibility requirements or that there were exceptional circumstances such that the application should be granted, or that there were compassionate circumstances of a compelling nature sufficient to warrant a grant of entry clearance outside the Rules. It was not found to be in the best interests of the applicant to join the sponsor in the UK as it had not been shown that they were related.

Discussion and analysis

28. Having found the Rules could not be satisfied, which has not been shown not to be a sustainable finding, the Judge went on to consider the question of the existence of compassionate circumstances and/or whether there was anything on the evidence that would make interference with the family life found between the Sponsor and the appellant's disproportionate.
29. The Judge was entitled to find at [53] that it was significant that the immigration rules are not met as they set out the criteria an individual needs to show they can satisfy to warrant a grant of leave to enter the United Kingdom, to which they would otherwise not be entitled.
30. The Judge sets out the correct legal self-direction of the need to adopt a "balance sheet" approach when assessing proportionality. At [54] the Judge sets out the points raised by the sponsor in favour of finding that the decision is disproportionate which the Judge states is understood. That clearly demonstrates the Judge had considered the evidence with the required degree of anxious scrutiny and understood that evidence in the context in which it was being placed.
31. The Judge at [56] sets out the correct legal self-direction that Article 8 did not allow a person to choose where they wish to live. That is correct as the purpose of Article 8 is to prevent any unwarranted interference with a protected right.
32. Having weighed up the evidence in relation to the second appellant the Judge concludes on the evidence that the decision is proportionate.
33. In relation to the first appellant the Judge considers her circumstances from [57]. It is in this paragraph that there is reference to the NHS. The Judge accepts the first appellant is under a disability that notes the sponsor has provided finance over a significant period of time when a carer has been in place, and that there is a care plan. The Judge finds adequate provision is made by the arrangements which is a finding within the range of those reasonably open to the Judge on the evidence. The reference to the NHS is a reference to the comparator between the treatment that will be available in Zimbabwe and that in the UK. It was found, however, that contrasting health provisions is not a factor which constituted exceptional circumstances.
34. At [58] the Judge finds that neither appellant had established that the consequences of decision would resulting unjustifiably harsh consequences.
35. It has not been shown those findings did not factor into the equation the points raised by the Sponsor, clearly, they did. When discussing this element with the Sponsor it was abundantly clear that her belief in the need for family and the strength of the family, in her mind overrode all other considerations. Whilst that may be her personal feeling it is not one that properly represents the legal exercise the Judge was required to undertake.
36. This is an experienced judge who has dealt with a significant number of such cases and was well aware of the process that needed to be followed. Have been done so the Judge concluded that the public interest lies in the maintenance of effective immigration control. Whilst the Sponsor took a very dim view of that statement in her submissions at the error of law hearing, she must appreciate that the weight to be given to the public interest is relevant as it relates to the public as a whole, not just any one individual, and that the obligation is upon the Secretary of State to establish where the bar should be set in that respect. As the Judge notes in the determination, it is not sufficient for a person just to make a statement and expect them to be admitted to the UK. There is a need to show that person can either satisfy the provision of the immigration rules all that the decision to refuse is disproportionate. Having undertaken a necessary assessment the Judge concluded that neither appellant could succeed on either basis.

37. Whilst I am aware this decision will cause a Sponsor further distress it was explained to her that the role of the Upper Tribunal at this stage is not to remake the decision but to rule upon whether the First-tier Tribunal judge has made an error of law material to the decision to dismiss the appeal. Having very carefully considered matters following the hearing I conclude that it has not been established that there is anything rationally objectionable in the Judge's finding that the Respondent has established that the decision is proportionate when weighing the points relied upon by the appellants against the public interest, which was found to be the determinative factor. On that basis I must dismiss the appeal.

Notice of Decision

38. The decision of the First-tier Tribunal has not shown to be infected by material legal error. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 December 2024