



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11241/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17th October 2013

Determination Promulgated
On 31st October 2013
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Before

UPPER TRIBUNAL JUDGE RENTON
UPPER TRIBUNAL JUDGE MCGEACHY

Between

EDWARD MULENGA MWANSA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of Zambia born on 3rd January 1976. He first arrived in the UK on 23rd January 2000 when he was given leave to enter as a student until 31st December 2000. He was subsequently granted further leave to remain in the

same capacity until 28th February 2003. Nothing more was heard from the Appellant until he applied for leave to remain on human rights grounds on 9th February 2012. That application was refused for the reasons given in the Respondent's letter of 27th March 2013. At the same time a decision was made to remove the Appellant to Zambia under the provisions of Section 10 Immigration and Asylum Act 1999. The Appellant appealed, and his appeal was heard by First-tier Tribunal Judge O'Garro (the Judge) sitting at Hatton Cross on 23rd July 2013. He decided to allow the appeal for the reasons given in his Determination dated 29th July 2013. The Respondent sought leave to appeal that decision, and on 21st August 2013 such permission was granted.

Error of Law

2. We must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.
3. The bare facts of this case which are not in dispute are that the Appellant has been resident in the UK since January 2000, but without leave from February 2003. Some time in 2009 he was diagnosed as HIV positive and started antiretroviral treatment. The Appellant has a partner named Kangwa Laura Mubanga who is a Zambian national. She has no leave to be in the UK. They have a child named Kailani Mulenga Mwansa born on 5th May 2010. The Appellant's partner has made an application for leave to remain in the UK on human rights grounds which is undecided.
4. The Appellant's appeal was originally heard by First-tier Tribunal Judge Monro on 7th November 2012. He decided that there would be no breach of the Appellant's Article 3 ECHR rights by his removal to Zambia, and that the Appellant did not meet the requirements of paragraph 276ADE of HC 395 in relation to the Appellant's private life for Article 8 purposes. However, he also found that the decision of the Respondent was not in accordance with the law in relation to the Appellant's family life as the Respondent had not given any consideration to the interests of the Appellant's child as required by Section 55, Borders, Citizenship and Immigration Act 2009, hence the Respondent's later decision of 27th March 2013.
5. The Judge allowed the appeal because he found that the Appellant had a family life with his partner and child which would be interfered with by his removal. That interference would be of such a degree of gravity as to engage the Appellant's Article 8 rights. The Judge also found that the interference was in accordance with the law, and pursued the legitimate public aim of maintaining the economic well-being of the country through immigration control. Finally, the Judge found the Respondent's decision to be not proportionate as it was not in the best interests of the child to remove the Appellant until a decision had been made in respect of the application of the Appellant's partner for leave to remain.
6. At the hearing, there was no appearance by or on behalf of the Appellant. Instead, there was a letter from him dated 9th October 2013 stating that he would not be attending the hearing. In those circumstances we decided to hear the appeal in the

absence of the Appellant in accordance with the provisions of Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

7. We did not hear a submission from Ms Horsley as we indicated to her that we were minded to find an error of law in the decision of the Judge and set it aside.
8. We do find such an error of law. In deciding the appeal, the Judge failed to carry out the balancing exercise necessary for any assessment of proportionality, and in particular attributed no weight to the public interest and failed to explain why. The Judge should have decided the issues in the appeal according to the circumstances at the date of the hearing at which time the Appellant's partner had no leave to be in the UK. Instead the Judge speculated as to the possible outcomes of the application for leave to remain made by the Appellant's partner. These errors amount to errors of law and hence we set aside the decision of the Judge. We decided to proceed to remake the decision of the Judge on the basis of the evidence before him. We have also taken into account the contents of the Appellant's letter dated 9th October 2013.

Remade Decision

9. At the hearing Ms Horsley made a brief submission to the effect that the Respondent's decision was proportionate. The Appellant did not meet the requirements of the Immigration Rules as regards Article 8, and there were no exceptional circumstances. The best interests of the child had now been considered by the Respondent. Those best interests were for the child to return to Zambia with her parents.
10. Although we have found an error of law in the decision of the Judge, we are able to adopt some of his findings. We agree with the decision of the Judge given at paragraph 34 of his Determination that the Appellant cannot succeed under Appendix FM of HC 395. Likewise, we agree with the findings of the Judge given at paragraphs 38 to 40 inclusive of his Determination that the Appellant has a family life with his partner and child; that that family life will be interfered with by the Respondent's decision to such a degree of gravity as to engage the Appellant's Article 8 rights; and that the decision of the Respondent is in accordance with the law and pursues a legitimate public aim being the economic well-being of the country achieved through immigration control.
11. We are left to decide the issue of proportionality. In this case, the public interest must weigh heavily. None of the members of this family are British citizens, and they do not have any right to be in the UK. On the other side of the balance, the best interests of the child are a primary consideration. She has lived all of her life in the UK, and apparently has recently started at a nursery school. However, she is not yet 4 years of age, and her best interests must be to continue her life with her parents wherever that may be. Otherwise, we accept that the Appellant has been resident in the UK for over thirteen years, although the majority of that time has been without any sort of leave. The Appellant is HIV positive but there has been no evidence that the appropriate medical treatment is not available to him in Zambia. The Appellant's partner and his child have no right to be in the UK and therefore can return to

Zambia with him. The Appellant's partner is a citizen of Zambia. There was no evidence that it would be unreasonable for her to return with the Appellant. In those circumstances, we find that the public interest carries the most weight and that therefore the decision of the Respondent is proportionate.

Decision

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

We set aside the decision.

We remake the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and we find no reason to do so.

Signed

Date

Upper Tribunal Judge Renton