



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/05447/2013

IA/05543/2013

IA/03684/2013

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 9 April 2014

Before

**UPPER TRIBUNAL JUDGE MOULDEN
JUDGE OF THE FIRST-TIER TRIBUNAL CHANA
SITTING AS DEPUTY JUDGE OF THE UPPER TRIBUNAL**

Between

**MR RONALD CHAWATAMA
MS CODRA MASIWA
MASTER DARREL EDRIC PANASHE CHAWATAMA
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Wortley, Legal Representative
For the Respondent: Mr E Tufan, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellants, who are husband, wife and their 6 year old child, appealed to the First-tier Tribunal against the decision of the respondent dated 8 January

2013 to refuse their applications for further leave to remain as a Tier 1 (General) Student and his dependent wife and child. As the second and third appellants' appeals stand or fall with that of the first appellant, we shall first consider the appeal of the first appellant and for the sake of convenience refer to him as "the appellant".

2. The First-tier Tribunal dismissed the appellant's appeal in a determination dated 10 October 2013. First-tier Tribunal Judge Sullivan in a decision dated 7 January 2014 refused to grant the appellant permission to appeal to the Upper Tribunal. A renewed application to the Upper Tribunal was successful and the appellant was granted permission to appeal. Thus the appeal came before us.

The findings of the First-tier Tribunal

3. The First-tier Tribunal dismissed the appellant's appeal, concluding that :

[6] "the appellant does not meet the requirements of paragraph 245CA(f) of the Immigration Rules as he was not granted entry clearance under any of the categories permitted under these rules as set out in the refusal. The appellant did not seek to argue that he met the requirements of the rules at the hearing. In the circumstances it is not necessary for me to consider paragraph 245CA(c)."

[9] "There is no evidence before me that the appellants meet the requirements of paragraph 276ADE or appendix FM of the Immigration Rules." "Where the claimant does not meet the requirements of the rules it will be necessary to go on to make an assessment of article 8 applying the criteria established by law.

[16] "I have considered whether the appellants have a private and family life in the UK which would be interfered with if they are not granted further leave to remain which engages Article 8 of the ECHR ." "When considering proportionality, the family unit as a whole must be considered and the impact upon those sharing family life with the appellant".

[11] "I also take into account pursuant to section 55 of the UKBA, the respondent has a duty regarding the welfare of children. I give specific regard to the case of EA (Article 8- best interests of child) Nigeria [2011] UKUT 00315 (IAC)". "The best interests of the child is to live and to be brought up by his or her parents and subject to any strong contra indications that, if this is the case, that the child removal with his parents does not involve any separation of family life. The parents came to the United Kingdom for temporary purposes of study, neither they nor their child could have had any legitimate expectation that they would be allowed to make their future home here. The Tribunal found in EA Nigeria that the fact that the children had lived in the United Kingdom all or of most of their lives did not make a move to Nigeria disproportionate. In the particular circumstances of this case requiring the appellants to leave the UK and to go to Nigeria was justified by the public interest as a proportionate measure and the fair balance between the competing interests."

[12] “I am not satisfied that the adult appellants’ (aged 34 and 29 respectively) who have been in this country for exactly seven years and were given leave to enter for a temporary reason cannot return to their country of origin where they have spent all of their formative years and continue their private lives there.

[13] “With respect to the third appellant I take into account that the best interests of this child is a primary consideration including her (sic) wider family and the impact of any decision on her (sic) welfare. The third appellant is six years of age. He was born and has lived all his short life to date in the UK. He is not a British National and has links with Zimbabwe by way of nationality and given that both of his parents are Zimbabwean Nationals. I am satisfied that at the age of six, the third appellant is at an age where he is primarily focused on self and his parents. Although I did not hear any evidence, I take into account that he would only have recently commenced his primary school education. English is widely spoken in Zimbabwe. At such an early age he can readily adapt to life in school in Zimbabwe. I am satisfied that the third appellant’s parents who are well educated and resourceful will be able to look after him and will be able to use the education, skills and resources they have from the UK to establish themselves and make a living to support the third appellant. I do not find that such a move would place him at any risk of harm or prejudice to his or her welfare. In conclusion I find that the best interests of the third appellant is to remain within the family unit with his parents. Taking into account all the circumstances of this case and performing the balancing exercise that any interference with the appellant’s private lives (taking into account family life) by not granted him further leave to remain would be in accordance with the law for the legitimate purpose of immigration control and proportionate. They are no compelling or compassionate or other reasons why the public interest in the maintenance of a firm immigration control should not prevail.

4. This appeal involves two steps, the first being to determine whether there is an error of law in the determination of First-tier Tribunal Judge Hanes and the second, if we find there was an error of law, to hear evidence or submissions to enable us to remake the decision.

The grounds of appeal

5. The appellant’s grounds of appeal are in summary as follows. The First-tier Tribunal Judge erred in number of respects in the assessment under Article 8 of the ECHR, and specifically in respect to the issue of proportionality. The First-tier Tribunal Judge failed to take into consideration all the relevant facts pertaining to the appellants’ family and private lives to reach a just conclusion. It is accepted that the appellant was unable to meet the requirements of the Immigration Rules and this case centred on Article 8. The appellant’s appeal was unfairly prejudiced and he was denied a fair trial by the failure of his legal representative to make submissions on Article 8. The First-tier Tribunal Judge adopted a restrictive interpretation of the appellants’ family and private lives, and failed to have regard to difficulties which the appellant would experience in his country of origin on his return due to his political activities in the UK.

The First-tier Tribunal Judge also failed to have proper regard for the interests of others affected by the expulsion and failed to assess the consequences of the appellant being prejudiced by his representative's failure to raise human rights issues in a human rights appeal. The Asylum and Immigration Tribunal (Procedure) Rules 2005 ensure that the proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible. Fairness must include a First-tier Tribunal Judge assisting an appellant in his appeal. The appellant through his legal representation was denied a fair trial and his appeal was prejudiced. The First-tier Tribunal Judge failed to raise with the appellant's representative the question why he did not raise human rights issues given that the appeal could only succeed on human rights grounds. The First-tier Tribunal Judge also failed to enquire why the appellant was not giving oral evidence. The First-tier Tribunal Judge failed to address the risk and the injustice in the presentation of the appellant's case through inadvertence. The appellant by placing his case in the hands of solicitors has done what could justly be required of him. He did not envisage the need to supervise his solicitors. The appellant has a legitimate expectation that his human rights would be properly considered and that he would receive proper representation by his counsel and the First-tier Tribunal Judge would properly consider his human rights in light of all the circumstances. The appellant's social ties in this country given his duration of stay in the UK amount to private life even though he is not a settled migrant. The Secretary of State and the Tribunal must protect the appellant's rights under Article 8 notwithstanding the Immigration Rules. The appellant did not give oral evidence and no submissions were made on human rights grounds leading to devastating consequences for the appellant, his family, his future career, community ties and the safety and wellbeing of him and his family.

The Rule 24 Response by the Respondent

6. The respondent made a Rule 24 response to the appellant's appeal which submitted in summary as follows. The First-tier Tribunal Judge directed himself appropriately. He correctly found that the appellant did not meet the requirements of the Immigration Rules. The appellant's legal representative at the hearing also took the view that the appellant could not succeed under the Immigration Rules, as is evident from paragraph 2 of the determination. The grounds of appeal did not take issue with this point and the appellant has not sought permission to appeal on this point. The First-tier Tribunal Judge considered private and family life pursuant to the Immigration Rules and gave adequate consideration to Article 8 of the ECHR.

The hearing

7. At the hearing and we heard submissions from both parties. Ms Wortley on behalf of the appellant submitted that the First-tier Tribunal Judge did not consider the appellant's circumstances at all. There was no inquiry and no analysis of the appellant's human rights. There was no evidence that the

First-tier Tribunal Judge looked at the Immigration Rules. The appellant's previous representative did not put the arguments for the appellant at the hearing. The First-tier Tribunal Judge erred in law by not taking into account the documents and not enquiring from the appellant what points he wished to argue in respect of Immigration Rules and Article 8. The appellant's previous representative Mr Fripp conceded that the appellant could not win the appeal. The First-tier Tribunal Judge failed to make enquiries from the appellant at the hearing. The First-tier Tribunal Judge should have sought more information from the appellant about his rights under Article 8. The appellant was not informed by his legal representative that he was not going to rely on Article 8. He told the appellant that if he went against his advice he would not be responsible for the outcome. He had no other option but to follow his legal representative's advice.

8. Mr Tufan adopted his Rule 24 Response and stated that Mr Fripp conceded at the hearing that the appellant could not rely on the Immigration Rules which was a proper concession because the appellant had not demonstrated that he could come within the Immigration Rules. He submitted that the First-tier Tribunal Judge came to the right conclusion in respect of Article 8.

Decision on Error of Law

9. Having considered the determination as a whole, we find that the First-tier Tribunal Judge's consideration of the appellant's appeal in respect of the Immigration Rules is not materially flawed. Mr Fripp conceded at the hearing that the appellant could not satisfy the Immigration Rules which was a proper concession because the appellant had not provided evidence to show that he came within the Immigration Rules as set out in the Rule 24 Response by the respondent. The appeal was not put on the basis that the First-tier Tribunal Judge erred in respect of his findings under the Immigration Rules. There can be no serious suggestion that the First-tier Tribunal Judge fell into material error in his findings about the Immigration Rules.
10. The crux of the appellant's complaint is that the First-tier Tribunal Judge did not advise the appellant at the hearing when it must have become obvious that the appellant was not being properly represented. The appellant claims that Mr Fripp advised him not to give evidence at the hearing and that Mr Fripp did not make any submissions in respect of his rights pursuant to Article 8 of the ECHR. He claims that he relied on Mr Fripp's advice not to give evidence and that this led to an unfair trial and that he has been prejudiced by Mr Fripp's lack of proper representation. He claims that the First-tier Tribunal Judge should have intervened and asked the appellant to give evidence about his circumstances in this country and why he cannot return to Zimbabwe with his family.

11. The burden of proof is upon the appellant to prove his claim on a balance of probabilities. It is not for the First-tier Tribunal Judge to assist the appellant to put forward his case especially when the appellant is represented by competent Counsel. The appellant chose not to give evidence at the hearing and now complains that he was advised by his representative not to give evidence and that it was not up to him to supervise his representative. We disagree. The appellant was at the hearing when he heard Mr Fripp say that he did not rely on the Immigration Rules. It was open to the appellant to address the First-tier Tribunal Judge at the hearing and explain his difficulties with his representative. In any event, from our reading of the determination, the First-tier Tribunal Judge was aware that the appellant's case rested entirely on Article 8 given his finding that the appellant could not satisfy the Immigration Rules for leave to remain in respect of his private and family life.
12. Almost the entirety of the First-tier Tribunal Judge's determination focuses on a discussion about the appellant's rights pursuant to Article 8. The First-tier Tribunal Judge considered the appellant's and his wife's rights pursuant to Article 8 and gave careful consideration to the minor child's human rights. He referred to the relevant case law in his analysis.
13. The First-tier Tribunal Judge reached legally sustainable conclusions that the appellant, his wife and child could return to Zimbabwe as a family unit. He considered that the appellant and his wife have only been in this country for six and seven years respectively and were only given leave for temporary purposes in the United Kingdom. He concluded that the appellants can continue their private life in Zimbabwe. He noted that the appellant and his wife lived in Zimbabwe during their formative years and it is evident from that finding that he found that they continued to have social and emotional ties to Zimbabwe, their country of birth.
14. There is nothing perverse in these findings and the First-tier Tribunal Judge was entitled to reach this conclusion taking into account the appellant's circumstances. The First-tier Tribunal Judge properly took into account that the appellants' leave to enter the United Kingdom was for a limited purpose and time frame, and that the appellants knew that they would have to return to their country of origin if they could not satisfy the Immigration Rules for further leave to remain in this country, which they could not. The First-tier Tribunal Judge also considered whether there were any exceptional and compelling circumstances in the appellant's case, and he concluded that there were not. He was entitled to reach this conclusion. There could have been no reasonable expectation on the appellant's part that he and his family could live here permanently..
15. The First-tier Tribunal at paragraph 13 took into account the best interests of the appellant's child as a primary consideration, as he was bound to do. He took into account that the child is six years old and has lived here all his life.

However, he stated that the child is not a British national and has links to Zimbabwe by way of nationality, and that both his parents are Zimbabwe nationals and that they would all be removed as a family unit. The First-tier Tribunal Judge considered that the child's best interests were best served by being with his family which would be returned to Zimbabwe. This was a finding clearly open to him.

16. The First-tier Tribunal Judge also considered that the appellant's child had recently started primary school education. He noted that English is widely spoken in Zimbabwe and that the child can easily adapt to life in school in Zimbabwe given his young age. There is nothing perverse and this finding and the First-tier Tribunal Judge was entitled to reach this conclusion.
17. The First-tier Tribunal Judge further noted that the child's parents are educated and resourceful and will be able to look after him in Zimbabwe. From the determination it is clear that the First-tier Tribunal Judge took into account the appellant's child's best interests and came to the conclusion that his best interests will be safeguarded and not be prejudiced by his return to Zimbabwe with his parents. On the evidence this is a sustainable conclusion and we can see nothing perverse in it.
18. In the balancing exercise the First-tier Tribunal Judge found that the appellants' private lives can continue in Zimbabwe and that the family's removal is in accordance with the law for the legitimate purpose of immigration control and is proportionate. He further found that there are no compelling compassionate or other reasons why the public interest in maintenance of firm and fair immigration control should not prevail. The First-tier Tribunal Judge was bound to take into account the respondent's interests in a firm and fair immigration control in the balancing exercise. There is nothing in the First-tier Tribunal Judge's reasoning which gives us cause for concern. Having considered the determination as a whole we conclude that the First-tier Tribunal Judge took all the relevant circumstances into account.
19. We also consider that the appellant had a fair hearing notwithstanding his complaint about his legal representative. The First-tier Tribunal Judge did not conclude that the appellants do not have a private life in the United Kingdom but found that they did. Notwithstanding this finding, he found that their removal was proportionate and that the appellant's and his family's family and private life can continue in Zimbabwe, their country of nationality, the country where the appellant and his wife lived all their lives before they came to the United Kingdom.
20. We find that the First-tier Tribunal Judge gave full consideration to the appellant's circumstances in the United Kingdom even though the appellant complains that he did not have an opportunity to give evidence before the First-tier Tribunal Judge. The appellant was present at the hearing and there is

no indication from him that he did not understand what was happening at his hearing. It was for him to inform the First-tier Tribunal Judge if he wanted to give oral evidence, and not for the First-tier Tribunal Judge to advise him that it was in his interests to give oral evidence. The procedure of the Tribunal is adversarial, especially when an appellant is legally represented. We reject the suggestion that the First-tier Tribunal Judge should be faulted for not suggesting to the appellant that the appellant was not being well advised.

21. Having read the appellant's statement provided, we find there is nothing in it which would lead any Judge of the Upper Tribunal to come to a different conclusion. We find that there is no material error of law in the determination of Judge Hanes and we uphold his decision.

DECISION

For the reasons given above, the determination of the First-tier Tribunal is upheld.

Appeals dismissed for all three appellants.

Signed by

First-tier Tribunal Judge Chana
Sitting as deputy Judge of the Upper Tribunal

This 20th day of April 2014