



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

Appeal Numbers: OA/08514/2014  
OA/09061/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester**

**Decision & Reasons**

**On 17<sup>th</sup> November 2015**

**Promulgated**

**On 12<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MR THULANI DIGNITY MAPHOSA (FIRST APPELLANT)  
MR EFFORT NDABEZINHLE MAPHOSA (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No attendance

For the Respondent: Miss C Johnstone, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Zimbabwe they were born respectively on 8<sup>th</sup> July 2000 and 13<sup>th</sup> April 1996. They originally applied for entry clearance as the dependent children of their Sponsor Mr D Maphosa. Those applications were refused by the Secretary of State on 12<sup>th</sup> June 2014 and the decisions were upheld by the Entry Clearance Manager's review on 10<sup>th</sup> November 2014.

2. The Appellant's appealed and the appeals came before First-tier Tribunal Judge Ennals sitting at Manchester on 10<sup>th</sup> April 2015. In a decision promulgated on 13<sup>th</sup> April 2015 the Appellants' appeals were allowed under the Immigration Rules. On 17<sup>th</sup> April 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended that it was arguable firstly that the judge should have treated the previous determination in respect of the Appellants as the starting point and secondly that the judge failed to adequately resolve the points made in the Notice of Refusal. On 8<sup>th</sup> June 2015 First-tier Tribunal Judge Grimmett granted permission to appeal. Judge Grimmett noted that the original decision of the Secretary of State to refuse the Appellant's leave to enter as the children of the Sponsor on the grounds of sole responsibility and that the grounds asserted that the judge had failed to apply the principles of *Devaseelan [2002] UKIAT 00702* in the decision. Judge Grimmett in granting permission was satisfied that it was arguable that there was no reference to the various credibility issues raised when the Appellants had previously sought leave to enter.
3. It is on that basis the appeal comes before me to determine whether or not there is a material error of law in the First-tier Tribunal's decision. For the purpose of continuity throughout the appeal process the Secretary of State is referred to herein as the Respondent and Mr Thulani Maphosa and Mr Effort Maphosa as the Appellants. The Secretary of State appears by her Home Office Presenting Officer Miss Johnstone. It is relevant to note that the Appellants are represented by their Sponsor, and father Mr D Maphosa, and that he appeared before the First-tier Tribunal. However he does not appear before me on this appeal and I am advised by the administration that he has telephoned the Tribunal to indicate that it is not his intention to attend the appeal. In such circumstances the appeal proceeds in the absence of representation by the Appellant's Sponsor albeit that I have given due consideration to the evidence that was considered by the First-tier Tribunal.

## **Submissions**

4. Miss Johnstone points out that the judge has failed to make any reference to the credibility findings made by Judge White in his determination which dates back to October 2010 where a previous application was considered. In particular she contends the judge has failed to consider Judge White's conclusion that the Sponsor's testimony was unreliable. The judge made a number of findings on credibility and Judge Ennals in his recent determination has failed to have any regard to those findings. She notes that at paragraph 15 there is reference by Judge Ennals to Judge White's determination in particular with regard to the fact that Judge White had commented that an application would be more appropriate under paragraph 297 rather than one that came before him for family reunion but she submits that the judge has failed to refer to any of the findings made by Judge White.
5. As far as the second ground is concerned Miss Johnstone points out that the refusal notice in respect of Thulani mentions that the Appellant

claimed to have been abandoned by his mother “early last year” and that he had lost contact with his mother but no more details on this had been made but it was noted that Thulani appeared to have secured affidavits some two years earlier from his mother before she allegedly abandoned him. Miss Johnstone points out that a similar point is made in respect of Effort in the refusal notice namely that his stepmother abandoned him “early last year” yet submitted an affidavit of 2012 that would appear to predate this abandonment. Whilst she notes at paragraph 17 Judge Ennals acknowledged those affidavits in the absence of any reasoning the Respondent was unable to understand why the judge did not treat the points raised as of importance. She contends that for all of the above reasons there are material errors of law in the decision of the First-tier Tribunal and that it is unsafe and she asked me to set it aside and to remit the matter to the First-tier Tribunal for rehearing.

## **The Law**

6. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
7. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge’s factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge’s assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Findings**

8. The decision of the First-tier Tribunal Judge is brief in the extreme. That of course in itself does not mean that the decision is not satisfactory but it is clear that there has been a previous application made albeit for family reunion other than pursuant to paragraph 297 made in 2010 and that within that determination the Immigration Judge, has made findings on the Sponsor’s credibility and that the determination made negative credibility findings in respect of and rejected some of, the documents relied upon. This application involved the same Appellants and Sponsor and I accept

the submission that the judge fell into error in failing to treat the previous determination as the starting point in the assessment of credibility or by failing to take it into account in any respect in the assessment of credibility.

9. Further whilst the judge acknowledges that affidavits were filed by the Appellants' mother/stepmother (I acknowledge that the two Appellants have different biological mothers) the judge at paragraph 17 of his determination simply acknowledges the affidavit and fails to address in any manner any reasoning or to explain why these documents are or of not of any importance.
10. The reasons given by the judge in this matter are brief in the extreme. He has failed to address the principles of *Devaseelan* and the various credibility issues raised when the Appellants had previously sought to enter as well as to give due or proper consideration to documents filed within these proceedings. In such circumstances the decision of the First-tier Tribunal discloses material errors of law and is unsafe and I set aside the decision and give directions herein in the decision paragraph remitting the matter back to the First-tier Tribunal for rehearing.

### **Notice of Decision**

- (1) The decision of the First-tier Tribunal contains a material error of law and is set aside.
- (2) The following directions are given.
  - (a) None of the findings of fact are to stand.
  - (b) The matter is remitted back to the First-tier Tribunal sitting at Manchester to be heard on the first available date 28 days hence before any First-tier Immigration Judge other than Immigration Judge Ennals with an estimated length of hearing of two hours.
  - (c) There be leave to either party to serve and file an up-to-date bundle of documents upon which they intend to rely at least fourteen days prior to the rehearing of the appeal.
  - (d) In the event that the Sponsor requires an interpreter he must notify the Tribunal at least fourteen days prehearing.

No anonymity direction is made.

Signed

Date 7<sup>th</sup> January 2016

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**  
**FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris