



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04344/2019 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House
On 2 June 2021

Decision & Reasons Promulgated
On 25 June 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

EBBAH TADIWANASHE MABIZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

The hearing was conducted on Microsoft Teams

Representation:

For the appellant: No appearance

For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge E Grant (“the judge”), promulgated on 22 November 2019. By that decision, the judge dismissed the appellant’s appeal against the respondent’s decision, dated 7 February 2019, refusing her human rights claim, made by way of an application for entry clearance as the child of a refugee, pursuant to paragraph 352D of the Immigration Rules (“the Rules”).
2. The appellant, a citizen of Zimbabwe, was born in March 2001. She is the daughter of Mr Mabiza (“the sponsor”), who had come to the United Kingdom in 2002, initially

as a student. He subsequently claimed asylum and was granted refugee status in 2010. The appellant's human rights claim was made on 19 October 2018.

3. The date of the sponsor's departure from Zimbabwe meant that he left when the appellant was only a baby. Whilst still in Zimbabwe, the sponsor had not lived with the appellant and her mother. In refusing the human rights claim, the respondent concluded that the appellant had not been part of the sponsor's family unit prior to the latter's departure from the country. Therefore, sub-paragraph (iv) of paragraph 352D of the Rules was not satisfied. Article 8 was not given any additional consideration.

Relevant law

4. Although of course this has always been, and remains, a human rights only appeal, paragraph 352D of the Rules plays a very significant part. That provides as follows:

352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

- (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
- (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
- (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

The decision of the First-tier Tribunal

5. The respondent was not represented at the hearing. Her case was therefore as stated in the reasons for refusal letter.
6. DNA evidence provided by the appellant proved that she was the daughter of the sponsor: [15]-[16]. The judge found that the sponsor had separated from the appellant's mother soon after the appellant was born. She also found that the sponsor had been "closely involved with the appellant's care and upbringing prior to his departure for the United Kingdom and has remained closely involved in her life...": [18]. At [19], the judge concluded that the appellant was not part of the sponsor's family unit prior to the latter's departure from Zimbabwe. As a result, sub-paragraph (iv) of paragraph 352D not satisfied.

7. The judge went on at [19] to consider what she described as the “remaining issue” under paragraph 352D. On the basis of the reasons for refusal letter and in the absence of a Presenting Officer, there would not have been any such issue. However, it appears as though the judge raised another issue of her own volition and that the appellant’s Counsel was asked for submissions. The issue in question was whether the sponsor had left Zimbabwe “in order to seek asylum” within the meaning of sub-paragraph (iv) of paragraph 352D.
8. The judge found that because the sponsor had come to the United Kingdom as a student and only claimed asylum some years later, he had not left Zimbabwe “in order to seek asylum” and therefore this aspect of paragraph 352D could not be satisfied: [20]-[22]. In so concluding, the judge relied on the decision of the Upper Tribunal in MS and Others (family reunion: “in order to seek asylum”) Somalia [2009] UKAIT 00041.
9. No other issues in respect of the Rules arose.
10. Article 8 was considered on a wider basis and the judge concluded that the respondent’s decision was, particularly in light of the inability to satisfy paragraph 352D, proportionate.

The grounds of appeal and grant of permission

11. The grounds can be condensed into the following core assertions. First, it was said that the judge was wrong to have concluded that the appellant was not part of the sponsor’s family unit prior to his departure from Zimbabwe in 2002. Second, the judge erred in her application of MS.
12. Permission to appeal was granted by First-tier Tribunal Judge Osborne on 6 May 2020.

The hearing

13. The remotely-conducted hearing was listed for 12pm. The notice of hearing had been sent out 14 May 2021. That notice specifically stated that the parties should ensure that they joined the hearing “at least 30 minutes before the scheduled time.” There is a good reason for this stipulation: if there are any technical difficulties with one or other party joining the hearing, these can be addressed (in so far as is possible) during the 30-minute period prior to the commencement of the hearing.
14. Ms Jaja, Counsel, was due to appear on behalf of the appellant. However, she was not, for reasons unknown, able to join the hearing. Although it appeared as though she had entered as a “participant” at one stage, she could neither be seen nor heard. I am satisfied that she did not attempt to join the hearing 30 minutes before its commencement, as stated in the notice of hearing. It appears as though she only in fact sought to join very close indeed to the commencement time itself. Thereafter, I am satisfied that any technical difficulties she may have experienced were not as a result of anything on the Tribunal’s side of the equation. Ms Everett had no

difficulties and a member of the public observing the hearing was also able to see and hear proceedings and could be seen and heard by the Tribunal.

15. I allowed for a 20-minute delay to the commencement of the hearing in order for Ms Jaja to address whatever technical problems she seemed to have been experiencing. I was not prepared to delay the hearing any longer. The appellant has been waiting for an extremely long time for her appeal to be considered. The Tribunal's clerks had endeavoured to do whatever they could to assist Ms Jaja and I was not prepared asked them to do anything more. Adjourning the case purely because of Ms Jaja's inability to sort out her own technical problems out (particularly when she had not joined the hearing 30 minutes in advance, when such difficulties could perhaps have been dealt with) would have been contrary to the overriding objective and the interests of justice.
16. Combined with the circumstances set out above was the position adopted by Ms Everett in this case, to which I will refer shortly. I was satisfied that I could and should proceed with the hearing in Ms Jaja's absence.
17. Ms Everett, in her customary considered and realistic manner, accepted that the judge had materially erred in law when considering paragraph 352D of the Rules. On the "family unit" issue, the judge had failed to direct herself to the case of BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055. The fact that the sponsor had not been living with the appellant and her mother at the time he left Zimbabwe was not determinative, contrary to what the judge appeared to have found. On the question of whether the sponsor left Zimbabwe "in order to seek asylum", Ms Everett accepted that the judge had misapplied MS. That case concerned the scenario in which the sponsor had themselves come to the United Kingdom on a family reunion basis. That was not the situation in the present case, where the sponsor had originally entered as a student, but then successfully claimed asylum in his own right. As such, MS did not preclude the satisfaction of sub-paragraph (iv).
18. Ms Everett went on to accept that once the judge's decision was set aside, the decision in this case should be re-made at this stage based on the evidence on file and the judge's findings of fact (as opposed to her conclusions based thereon). Ms Everett accepted that the appellant had been part of the sponsor's family unit when the latter left Zimbabwe. She accepted that the sponsor had left Zimbabwe in order to claim asylum (albeit this occurred sometime after his arrival in the United Kingdom). She accepted that there was clearly continuing family life between the appellant and the sponsor. In response to an issue I raised at the hearing, she also acknowledged that the fact that the sponsor now had indefinite leave to remain was not a barrier to the satisfaction of paragraph 352D, in light of the respondent's own guidance on family reunion.
19. Ultimately, Ms Everett conceded that the appeal should be allowed on Article 8 grounds.

Conclusions on error of law

20. In my judgment, Ms Everett was entirely right to concede that the judge had materially erred in law.
21. The case of BM and AL makes it clear that question of what is a “family unit” for the purposes of paragraph 352D(iv) of the Rules is a question of fact. That the sponsor had not been living in the same household as the appellant prior to the former’s departure from the country of origin is not determinative.
22. The judge’s conclusion on this issue, as set out at [18] and [19], effectively treated the absence of cohabitation as determinative. That was a misdirection in law. It was a material misdirection because at the same time she found as a fact that notwithstanding the separation of the sponsor from the appellant’s mother, he was “closely involved with the appellant’s care and upbringing prior to his departure for the United Kingdom.” This factual basis would have formed a strong basis for a conclusion that the appellant had been part of the sponsor’s family unit prior to his departure.
23. On the second issue (and assuming that it was properly raised with the appellant’s representative at the hearing), the judge’s reliance on MS was misplaced. That case does not decide the point that she was seeking to make at [20]-[22]. MS precludes the ability of a sponsor who was themselves the beneficiary of family reunion from being an appropriate sponsor under paragraph 352D(iv) of the Rules. It does not extend any wider than that. Although the judge regarded the wording of sub-paragraph (iv) to be clear, thus precluding the sponsor’s eligibility, there is no support for this proposition to be found in the case-law or the respondent’s Family Reunion guidance (version 5.0, published on 31 December 2020). Further, Ms Everett has made the respondent’s position clear in this particular case.
24. I am satisfied that sub-paragraph (iv) of paragraph 352D does not include, expressly or by implication, a temporal requirement that a sponsor must, at the point of their departure from the country of origin, have had an intention to seek asylum upon arrival in the host country. Aside from the lack of any support for this from external sources, such a requirement would preclude a significant number of refugees from being family reunion sponsors; for example, all those who became refugees *sur place*. I find it highly unlikely that this was the respondent’s intention the Rule. Therefore, I conclude that the judge’s error in approach is not “cured” by any underlying correctness as to the meaning of the sub-paragraph.
25. I briefly address an issue that I raised during the hearing and mentioned earlier in this decision. On the sponsor’s evidence (which appears to have been accepted by the judge), he had been granted indefinite leave to remain in 2015 and that the respondent’s reasons for refusal letter was wrong to have stated that he only had limited leave: [6] and [36]. On the basis that he did have indefinite leave to remain at all material times, I had considered whether sub-paragraph (i) could have been satisfied. However, having regard to what is said at page 14 of the respondent’s

guidance on Family Reunion (cited above) and in light of Ms Everett's clear position, I conclude that the sponsor's status did not preclude satisfaction of that criterion.

26. Having regard to the foregoing, I exercise my discretion and set aside the judge's decision.

Re-make decision

27. There is a presumption that the Upper Tribunal will go on and re-make a decision once that of the First-tier Tribunal has been set aside. In the present case I have very carefully considered whether this was appropriate, given the absence of Ms Jaja from the hearing.
28. In light of the narrow issues involved, Ms Everett's position, the factual findings made by the judge, and the significant delay experienced by the appellant thus far, I concluded that I should indeed re-make the decision based on the relevant legal framework and materials on file.
29. I make the following findings of fact, based in the main on those stated by the judge:
- a) the appellant is the daughter of the sponsor;
 - b) the sponsor initially came to the United Kingdom as a student. He claimed asylum 2008;
 - c) the sponsor was granted refugee status under the Rules in 2010 and was then granted indefinite leave to remain in 2015. He has not yet become a British citizen;
 - d) although the sponsor separated from the appellant's mother soon after the appellant's birth, he played a significant role in the life of the latter prior to his departure from Zimbabwe in 2002;
 - e) the sponsor has remained closely involved in the appellant's life at all times thereafter;
 - f) the sponsor is a qualified mental health nurse.
30. I conclude that on the facts of this case, the appellant was part of the sponsor's "family unit" prior to the latter leaving Zimbabwe 2002, despite the absence of cohabitation. In this regard, I direct myself to what is said in BM and AL.
31. I conclude that the sponsor did leave Zimbabwe "in order to seek asylum", having regard to what I have already said in paragraphs 23 and 24, above.
32. I conclude that the sponsor is eligible as such, notwithstanding the fact that he has indefinite leave to remain.
33. Whilst the appellant is now over 18 years old, the human rights claim (entry clearance application) was made when she was still a minor.
34. All of the requirements of paragraph 352D of the Rules are satisfied.

35. It is quite clear that there has been, and is, family life between the appellant and the sponsor.
36. Following TZ (Pakistan) [2018] EWCA Civ 1109, and in the absence of any countervailing factors, I conclude that the satisfaction of paragraph 352D is, in all the circumstances, determinative of this appeal. The appellant's Article 8 rights outweigh the important public interest considerations under section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, and her appeal falls to be allowed on human rights grounds.

Anonymity

37. The First-tier Tribunal did not make an anonymity direction and nor do I.

Notice of Decision

38. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**
39. **I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**
40. **I re-make the decision by allowing the appeal on Article 8 grounds.**

Signed: *H Norton-Taylor*

Date: 3 June 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00.

Signed: *H Norton-Taylor*

Date: 3 June 2021

Upper Tribunal Judge Norton-Taylor