



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

OA/03120/2013

Appeal Number

THE IMMIGRATION ACTS

Heard at Sheldon
On 9th September 2014
Prepared 16th September 2014

Determination Promulgated
On 18th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

T C A C
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr N Nwaiwu (Legal representative,
For the Respondent: Mr D Mills (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Snape promulgated on the 27th of May 2014 in which the Appellant's appeal had been allowed. The grounds of appeal are to the effect that the Judge relied on post-decision evidence in reaching the decision and that the position of the Appellant's mother was such that she did not meet the requirements of the rules, the article 8 findings were vitiated by the errors.
2. The Appellant's case had to be considered as it stood at the date of the decision in respect of the Immigration Rules and article 8. Post-decision, if admitted, must relate to the situation "appertaining at the date of the decision", section 85A(2) of the Nationality, Immigration and Asylum Act 2002.
3. The Judge correctly directed herself on legal issues in paragraph 30 of the determination including the relevance of the date of the decision. However, in paragraph 33 the Judge referred to the Appellant's mother having been granted leave to remain by the date of the hearing and at

paragraph 35 referred to the Appellant's sister having been granted ILR on the 18th of December 2012, again post-decision.

4. In paragraph 37 the Judge noted that at the date of the decision the Appellant's mother's application was undecided and that she was considering whether there were serious and compelling circumstances that would make his exclusion from the UK undesirable.
5. Paragraph 38 related to his step-father being granted asylum in 2002. Paragraph 39 related to the Appellant's mother appeal being allowed, this was clearly post decision. Paragraph 40 concerned the Appellant who "remains in Zimbabwe" and was also post decision. Paragraph 41 the Appellant's circumstances "now" were considered. Paragraph 42 set out the conclusion that "taking all those circumstances into consideration" the Judge was satisfied that there were serious and compelling family circumstances that made his exclusion undesirable.
6. That finding was followed by paragraphs 43 and 44. Paragraph 43 related to the duty that applied under section 55 of the Borders, Citizenship and Immigration Act 1955 and in paragraph 44 she referred to an absence of evidence to show that the ECO had taken account of his sister's impending admission to the UK. The latter again being post decision. Article 8 was considered in paragraphs 47 and 48 where it was found that the decision was disproportionate as evidence did not show he would be a burden to the public purse if admitted.
7. If the post decision findings are removed the only matters that the Judge referred to were the section 55 consideration and the fact that the Appellant's step-father had been granted refugee status in the UK in 2002, some 12 years ago.
8. Given that the bulk of the Judge's findings were on matters that were post-decision and that the matters that appertained at the date of the decision were so limited I find that the determination is fundamentally flawed by the errors set out. So far as article 8 is concerned the findings are flawed as it was based on the "reasons outlined above", article 8 also has to be assessed at the date of the decision. The decision cannot stand and has to be set aside. At the hearing I indicated that that would be the course of action undertaken and submissions were received from the representatives on what the final decision should be.
9. At the date of the decision under appeal, the 27th of November 2012, the Appellant's mother had no leave to remain in the UK and had no expectation of being permitted to remain here, the fact that she was later granted leave is not relevant. There is nothing in the evidence to suggest that the Appellant was in danger or that there was a risk of abuse or anything of that nature. At the time of the decision the Appellant had relatives in South Africa and in Zimbabwe and was receiving education.
10. Having regard to the terms of paragraph 297 of the Immigration Rules the Appellant would face a number of problems. Even if his step-father has supported him for years his step-father is not to be regarded as a parent unless the child's natural father is dead, Immigration Rules paragraph 6. I am not aware of any evidence to that effect. The Appellant's mother's circumstances did not bring her within the ambit of the rule either.
11. There is no evidence that I can find to show that the Appellant's circumstances amounted, at the date of the decision, to being such that there were serious and compelling family or other circumstances that would make his exclusion undesirable. At the time of the decision the Appellant was being cared for and receiving education. His circumstances might have been better but the evidence did not show that they could be regarded as being serious and compelling

and at the date of the decision neither his mother or sister had leave to enter or remain in the UK.

12. I find that the Appellant has not discharged the burden of proof to show that he meets the requirements of the Immigration Rules. He is not assisted by the provisions of section 55 of the 2009 Act, there is no evidence to show that at the date of the decision there were protection or safeguarding issues in relation to him. With regard to article 8 of the ECHR the absence of evidence to show that there were serious or compelling circumstances justifying his admission effectively answer the questions that have to be addressed and I find that the decision is proportionate.

CONCLUSIONS

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

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of T C A C.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.)

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 17th September 2014