



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25653/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th April 2018

Decision & Reasons Promulgated
On 01st May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

DAVIDSON CHASOKELA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Mr Dolan, Counsel instructed by Genesis Law Associates Ltd
For the Respondent: Mr Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge James made following a hearing at Birmingham on 11th October 2017.

Background

2. The appellant is a citizen of Zimbabwe born on 29th May 1961. He applied for entry clearance to come to the UK as the spouse of Connie Chasokela but was refused on 21st October 2016.
3. The Entry Clearance Officer in the Explanatory Statement sets out the refusal in the following terms:-

"In your application, you failed to disclose the following facts.

In answer to Question 39 on your visa application form, 'Have you ever been convicted of any criminal offence in the UK or any country?' you have answered 'No'.

I am satisfied that this statement is false as Home Office records, confirmed by fingerprint match, show that on 18/12/03 you were convicted of failing to provide a specimen for analysis at North Hertfordshire Magistrates Court and you were ordered to pay a fine of £160, costs of £55 and your driving licence was endorsed.

I therefore refuse your application under paragraph EC-P.1.1.(c) of Appendix FM of the Immigration Rules. (S-EC.2.2(b))”

4. At the hearing before the judge the appellant gave evidence, through the sponsor, that he did not believe that he needed to disclose the offence because he thought that it was spent. His representative however accepted that the provisions relating to spent convictions contained in the Rehabilitation of Offenders Act 1974 were excluded for immigration purposes.
5. The judge concluded that the appellant had indeed failed to disclose a material fact. At paragraph 22 of the decision he wrote:-

“I find that in accordance with the language of the Rules the Respondent has made a proper determination and there is no basis, either under the Rules or on the basis of fairness under general law to find that the decision is not in accordance with the law.”

He then conducted a Razgar analysis without reference to the Immigration Rules and concluded that any interference with the appellant’s family life was proportionate. Family life between the appellant and the sponsor could continue and it was open to him to make a further application with full disclosure of the criminal offence which could be determined within 120 days at the most.

Grounds of Application

6. The appellant sought permission to appeal and was granted permission by Judge Gibb on 9th January 2018.

The Hearing

7. Mr Tarlow accepted that there was a material error in this decision. Although the Immigration Rules are of importance, this was a human rights appeal and there was no jurisdiction to consider whether the decision was in accordance with the Rules or in accordance with the law, or whether discretion ought to have been exercised differently.
8. The judge appears to have restricted his consideration of the Rules to a review when he stated that he was satisfied that the Entry Clearance Officer had made a proper decision and had then used that conclusion as determinative of the proportionality assessment. He did not engage with the crux of this appeal which was whether the proportionality of the interference with the appellant’s family life was established in the respondent’s favour.
9. The judge appears to have decided that the appellant could not meet the requirements of the Immigration Rules and had used that as the starting point for the

dismissal of the appeal on human rights grounds. What he did not engage with was the fact that S-EC.2.1. is a discretionary refusal. He did not decide whether the Entry Clearance Officer had properly exercised that discretion which would form the basis of his proportionality decision.

10. Accordingly, the decision of Judge James is set aside. He erred in law by failing to reach a decision on one of the matters which was before him.
11. Mr Tarlow, although he accepted that the judge had erred, nevertheless argued that the appellant and sponsor had lived apart by choice for many years and were in a position to submit another application if they wished. Accordingly the decision to refuse was proportionate.
12. Mr Dolan submitted that the facts of the original offence and the reasons why it had not been disclosed were relevant to the question of proportionality. It was not correct to say that this was a couple who had decided to live apart. The appellant had left the UK in 2006 because his father had died and remained in Zimbabwe for business reasons. He had however attempted to visit the UK since then but had been denied, and his wife had visited him in Zimbabwe. All of the factors to be considered in Section 117B were in his favour.

Findings and Conclusions

13. The original refusal was based on paragraph S-EC.2.2. which states that:-

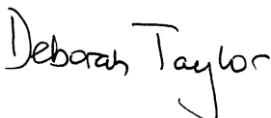
“Whether or not to the applicant’s knowledge -

 - (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
 - (b) there has been a failure to disclose material facts in relation to the application”.
14. It is not at issue that the appellant failed to disclose a material fact, namely the 2003 conviction for failing to provide a sample for which he received a fine and a licence endorsement. It is not for the Tribunal to substitute its discretion for that of the Entry Clearance Officer, but this provision is a discretionary refusal and it cannot be assumed that if the Immigration Rules were directly challengeable in the Tribunal that this refusal would survive.
15. The starting point for the assessment of proportionality cannot be that the appellant cannot meet the requirements of the Immigration Rules.
16. There is no dispute to the fact that there is family life between this husband and wife. The original judge was satisfied that there was family life between the couple and accepted that the sponsor has visited the appellant regularly in Zimbabwe. The appellant has made an application to join his wife here and this decision is therefore an interference with his ability to enjoy family life with her.

17. The real issue here is proportionality. So far as Section 117B of the 2002 Act is concerned, which sets out the public interest considerations applicable in all cases, it is not disputed that the appellant speaks English and that he is financially independent. No issues were raised by the original Entry Clearance Officer with respect to his maintenance.
18. The maintenance of effective immigration control is in the public interest. However, whilst it is indisputable that the appellant failed to disclose a conviction there are a number of mitigating factors which would indicate that this is a case where discretion may well have been exercised in his favour. I was told that the offence itself occurred when the appellant was parked, asleep in the driving seat. He failed to provide a specimen for analysis and was fined. The offence itself took place fifteen years ago.
19. The respondent's argument is not that there is a difficulty in relation to the conviction, the difficulty arises as a consequence of the failure to disclose. However the original judge did not make any adverse finding in relation to the appellant's honesty or his belief that the conviction would have been spent. The conviction itself is at the lowest possible end of the spectrum and took place many years ago.
20. I accept that the appellant may well have believed that it was spent and that his failure to disclose was as a consequence of an innocent mistake.
21. I do not accept the respondent's argument that this couple have been living apart for many years and there is no reason why they should not continue to do so, or indeed make a fresh application. The fact that this application has been made in itself indicates that they no longer want to remain apart for periods of time and only continue their married life through visits. Whether another application could be made is not an answer to the question of whether this refusal amounts to a disproportionate interference with the appellant's right to family life with his wife. In this case I am satisfied that the public interest here is outweighed by the strength of the factors in the appellant's favour.

Notice of Decision

22. The original judge erred in law and his decision has been set aside. The decision is remade as follows. The appellant's appeal is allowed.
23. No anonymity direction is made.



Signed

Date 30 April 2017

Deputy Upper Tribunal Judge Taylor