IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01779/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th February 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR JEREMIAH SANYANGOWE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr Max Bhebhe (Solicitor)
For the Respondent: Mr Carlton Williams (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Parkes, promulgated on 9th June 2021, following a hearing in Birmingham on 2nd June 2021. In the determination, the judge dismissed the appeal of the Appellant, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male, a citizen of Zimbabwe, who was born on 29th August 2002 and who appeals against the decision of the Respondent, Entry Clearance Officer, dated 20th December 2019 refusing his application for entry clearance (deemed to constitute a human rights claim) to the UK under paragraph 297 of HC 395, on the basis of his family and private life with his aunt, Mrs Valaria Chowa.

The Appellant's Claim

3. The essence of the Appellant's claim is that in 2015, the Appellant's mother, Ms Elina Muzenya, abandoned the Appellant and remarried, after the Appellant's father had also done the same by finding a new partner for himself in South Africa where he had migrated from Zimbabwe. He now had no one to look after him, except his aunt, Valaria Chowa, who had provided for him, and had even been to visit him from the UK in Zimbabwe.

The Judge's Findings

4. The judge properly found that although the application had been made under paragraph 297 of HC 395, on the basis that the Appellant's aunt in the UK had sole responsibility for him, that provision only applied in the case of a parent settled in the UK, of which the aunt was not. It was significant that there had been no legal transfer of parental responsibility to the Appellant's aunt in the UK. (See paragraph 11). However, even when "taken at its highest" the Appellant could not meet the provisions of paragraph 297 (see paragraph 12). The Appellant had a sister in Zimbabwe, but the latest evidence showed that she was now at university "and living apart from the Appellant, and during vacations the sister continues to remain on campus rather than returning back home to look after the Appellant" (paragraph 14). The photographic evidence before the Tribunal demonstrated how the Appellant was living in "fairly basic living conditions" and that "he is effectively living in a single room" (paragraph 15). There was medical evidence from Dr Karembo to the effect that the Appellant "has a major depressive disorder over the years" which was affecting his overall wellbeing. During the COVID-19 lockdown he was unable to travel to the hospital for review and resupply which "had not helped the Appellant's recovery" (paragraph 16). The judge, however, made no findings in relation to these issues. What he did conclude was that the medical evidence from Zimbabwe indicated that the Appellant received appropriate medical care (paragraph 22), and although "there are serious problems in Zimbabwe" such that the "Appellant's circumstances are not ideal", nevertheless, the position cannot be said to be serious and compelling so as to justify the Appellant's entry to the UK (paragraph 21). The appeal was dismissed.

Grounds of Application

5. There are two grounds of application. First, that the judge failed to give consideration to the leading guidance in **Mundeba [2013] UKUT 88**, even though that the decision had been cited at page 9 of the appeal bundle, which stood as authority for the principle that "the child's welfare including emotional needs, taking into account the child's age, social background and developmental history" are relevant matters. Second, there was a failure to consider the Appellant's situation outside the Rules when it came to the application of Article 8 of the ECHR, which was particularly important given that the judge had found that the provisions of paragraph 297 of HC 395 did not apply to the Appellant's situation.

Submissions

6. At the hearing before us on 9th February 2022 Mr Williams, appearing on behalf of the Respondent, promptly conceded that there had been a failure to properly consider the issues that were before the judge, such that the determination fell into an error of law. Faced with this helpful concession on the part of Mr Williams, Mr Bhebhe, appearing on behalf of the Appellant, found it unnecessary to add anything further to this.

Analysis

7. We find that there is indeed an error of law in the determination of the judge below. This is so for the following three reasons. First and foremost, given that paragraph 297(i)(a) to (e) patently did not apply to the Appellant's situation, there has been no consideration of Article 8 ECHR, even though the judge had at the outset (see paragraph 4) accepted that Article 8 stood to be applied eventually. Second, a major issue in the refusal letter was the discrepant evidence given by the Appellant's aunt and his father regarding the breakup of the Appellant's parents' marriage. The aunt had said that the Appellant's father had divorced his mother in 2009. The father had made no statement to this effect. The Respondent's review of 21st May 2021 also emphasised the fact that no evidence had been provided to support the proposition that Ms Elina Muzenya, the Appellant's mother, had in fact absolved herself of all responsibility of the Appellant or that she no longer had any contact with him. Yet, the judge does not engage with this discrepancy. Third, the judge does consider paragraph 297(f) and (ii) to (vii) to be potentially applicable on the basis that there are serious and compelling family and other circumstances making exclusion undesirable (see paragraph 12). However, there is only an oblique reference to the evidence of the aunt here, notwithstanding the judge's acceptance that she had visited the Appellant in Zimbabwe, with a reference simply being made to the "curiously opaque" church letter to the effect that the sponsoring aunt "has proven motherly over the years" (paragraph 20). The reality is that there was extensive evidence from the Appellant's aunt and this has not been fully considered. In the same way, although reference is made to the Appellant's medical condition, and the fact that he "has a major depressive disorder", no findings are made in relation to Dr Karembo's statement that during the COVID-19 lockdown the Appellant has had intermittent medical treatment by not being able to

travel to the hospital for review and resupply and that his problems currently were "exacerbated" (paragraph 16). Similarly, there is no engagement with the objective evidence that the healthcare system in Zimbabwe has effectively collapsed (paragraph 17). Without a full and proper analysis of the factual situation, it is clear to us that the judge's overall conclusion is unsustainable, as has been conceded by Mr Williams.

Disposal

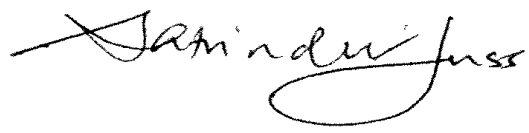
8. Both sides were given some time during a short adjournment break after we had decided that the determination could not stand to enable them to consider whether the appeal should now be remitted back to the First-tier Tribunal or be retained in the Upper Tribunal for final disposal. Upon consideration, Mr Bhebhe, having taken instructions, returned to say that he would prefer the matter to be kept in the Upper Tribunal. For his part, Mr Williams submitted that it was proper that it went back to the First-tier Tribunal. We have decided to remit this appeal back to the First-tier Tribunal in the light of the fact that first, extensive fact-finding exercise needs to be engaged in by a decision maker at the first instance at the judicial level; second, that in all probability the Appellant will want to adduce new evidence, given the matters that we have highlighted above in this determination. There is also the question of how oral evidence may be adduced from the Appellant in Zimbabwe in the light of recent guidance from the Upper Tribunal in that regard. Those representing the Appellant will need to communicate with the First-tier Tribunal to ensure that this runs smoothly and in accordance with the latest procedural requirements so, whilst we have decided to remit this matter back to the First-tier Tribunal in Birmingham, it is not to be heard by Judge Parkes, and evidence is to be heard on the basis of a face to face hearing.

Notice of Decision

9. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. We set aside the decision of the original Immigration Judge. This appeal is remitted back to the First-tier Tribunal in Birmingham to be heard by a judge other than Judge M. Parkes.

10. No anonymity direction is made.

Signed Date



Deputy Upper Tribunal Judge Juss 10th March 2022