



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/00065/2012
OA/00069/2012
OA/00072/2012

THE IMMIGRATION ACTS

Heard at Birmingham
on 10th June 2013

Determination Promulgated
on 23rd August 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MICHAEL MAKAYA TATENDA
LENEKAR MAKAYA
MAKAYA CLARA

Appellants

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Mrs Gwashawanhu of Bake & Co Solicitors.

For the Respondent: Mr Smart – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hubball promulgated on 19th June 2012 in which he dismissed the appellants' appeals against the refusal of entry clearance. They are all minors being born on 23rd August 1994, 11th November 1995 and 11th December 1999 respectively who wish to settle with their mother in the United Kingdom. The date of decision is the 29th November 2011.
2. Judge Hubball comments upon the sponsor's immigration history and the evidence made available to him. In paragraph 81 of the determination he finds the sponsor does not have continuing control and direction over the upbringing and the lives of the children or that she has made all the important decisions in

their lives. It was found that it is their maternal grandmother who fulfils this role.

3. In paragraph 87 Judge Hubball he did not accept the appellants are leading independent lives in Zimbabwe as they have been living under the control and direction of the sponsor's mother. The Judge was therefore not satisfied that the appellants met the requirements of paragraphs 297 (i) (e) and (f) of the Immigration Rules. He also dismissed the appeal under Article 8 ECHR.
4. Permission to appeal was granted on 30th August 2012 by another judge of the First-tier Tribunal who notes that the Entry Clearance Officer does not appear to have disputed the fact the father of all three children had died although the application, for reasons that are not yet clear, was not considered under paragraph 297 (i) which requires an applicant to show that one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead. The death certificate says he died on 26th February 2000. Permission is granted on the basis that this was a 'Robinson obvious' point that the First-tier Judge should have considered.
5. The appeal is opposed by the ECO who does not accept that the only issue is 297 (i) (d). It is argued in the Rule 24 response that the Judge having concluded the appellants were under the care and control of their grandmother should have concluded they now lived in a family unit independent of their parents and therefore the underlying purpose of paragraph 197 was no longer engaged.
6. On behalf of the ECO Mr Smart did concede that it appeared from a reading of the determination that Judge Hubball had become 'sidetracked' by a discussion in relation to the issue of sole responsibility which it was agreed is not an issue in this appeal, as a result of submissions made to him by the appellants representative. As a result he failed to determine the issue under 297 (iii) such as to amount to an error of law. The Judge considered an irrelevant matter before going on to dismiss the appeal which amounts to a material error of law. The basis of the refusal by the ECO is that the appellants are leading independent lives and, although in paragraph 87 of the determination Judge Hubball makes a specific finding with regard to this matter, Mr Smart submitted this paragraph contains inadequate reasons to address the concerns of the ECO who is unable to understand from a reading of the determination why the decision has gone against him.
7. I announced in court that I am satisfied Judge Hubball erred for the reasons set out in the application for permission to appeal, the grant permission, and the submissions made to the Upper Tribunal such that the determination must be set aside. There shall be no preserved findings although the sponsor's immigration history and the relationship between the appellants and the sponsor is not in dispute. Due to a lack of time, as on this day the Upper Tribunal was dealing with two list which had been amalgamated as a result of

the Upper Tribunal Judge Coker being unable to attend as a result of serious injury following a road traffic accident, the appeal was remitted to the First-tier Tribunal to be heard afresh on 21st October 2013.

8. However, following consideration of the issues for the purposes of drafting this document on 12th June 2013 it appeared appropriate to give the parties an opportunity to make further submissions in light of the issues raised in the grant of permission to appeal. A direction to this effect was sent to the parties and an e-mail response received from Mr Smart on 20th June 2013 requesting that the matter remains listed for the oral hearing before the First-tier Tribunal on 21st October 2013. In all the circumstances I accede to this request.
9. The following direction shall apply to the future conduct of this appeal:
 - i. The determination shall be set aside. There shall be no preserved findings.
 - ii. The appeal shall be remitted to be heard afresh by a salaried judge of the First-tier Tribunal sitting at Sheldon Court in Birmingham, to be nominated by Resident Judge Renton, on 21st October 2013. Time estimate 1.5 hours.
 - iii. The appellants shall file and serve a consolidated, indexed, and paginated bundle containing all the evidence they seek to rely upon in support of their appeal no later than Monday, 14 October 2012.
 - iv. No interpreter is required.
 - v. These directions shall remain in force unless varied by Resident Judge Renton. Applications for further directions or a variation of these directions must be made in writing and addressed to Resident Judge Renton at Sheldon Court.

Anonymity.

10. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as there was no application for anonymity and no basis for such an order established on the facts.

Signed.....

Upper Tribunal Judge Hanson

Dated the 21st August 2013