Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18999/2014
IA/35001/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10th April 2015	**On 5th May 2015**

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE FINCH

Between

ALASTAIR BRAINBRIDGE TINASHE CHINZOU
AYISHA ROSE CHINZOU
(No anonymity order made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Nyamayaro, RBM Solicitors
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 12th January 1987, is a national of Zimbabwe. He married his wife in Zimbabwe in a customary marriage on 12th December 2011 and entered into a civil marriage on 3rd January 2013. She was born in Zimbabwe on 5th

October 1990 but has indefinite leave to remain in the United Kingdom. Their daughter, the Second Appellant, was born in Zimbabwe on 28th November 2011.

2. The Appellants were granted entry clearance as visitors on 16th August 2013 and arrived in the United Kingdom on 18th October 2013. Their visas were due to expire on 16th February 2014. The Appellant applied for further leave to remain on 14th February 2014 as the partner of a person who was settled in the United Kingdom and named the Second Appellant as his dependent.

3. On 3rd April 2014 the Respondent refused their applications and decided to remove them from the United Kingdom by way of directions under S.47 of the Immigration, Asylum and Nationality Act 2006. The Respondent asserted that they were not entitled to leave to remain under paragraph 276ADE or Appendix FM of the Immigration Rules. In particular, it was asserted that the Appellant was not entitled to leave under EX.1., as there were no insurmountable obstacles to family life being continued in Zimbabwe. She also took into account S.55 of the Nationality, Immigration and Asylum Act 2002 and considered whether there were no exceptional circumstances in the Appellants' case which required her to consider their applications under Article 8 of the European Convention on Human Rights outside the Immigration Rules.

4. The Appellants appealed and their appeals were heard by First-tier Tribunal Judge Phull on 26th September 2014. She allowed their appeals in a determination and reasons promulgated on 16th October 2014. The Respondent applied for permission to appeal against this decision on 23rd October 2014. She submitted that the First-tier Judge materially misdirected herself in allowing the appeals on Article 8 grounds as the Appellant's partner had not provided any corroborative evidence to show that she could not internally relocate away from the campus on which she had previously been studying. She also submitted that the First-tier Judge had neglected to consider the divergent public interests in the case and noted that the Appellant could have had no legitimate expectation of being granted further leave to remain after entering as a visitor. She also noted that there was a clear public interest in a firm and coherent system of immigration control and submitted that the First-tier Judge should not have placed determinative weight on the Second Appellant's rights. The Respondent also submitted that the First-tier Judge had reached unsustainable conclusions in relation to the ability of the Appellants to continue to enjoy a family life in Zimbabwe as the Appellant had previously worked there and they would be able to seek assistance from the Appellant's family. Therefore, she submitted that the Appellants and the Appellant's wife would be able to enjoy a family life together in Zimbabwe or, in the alternative, the Appellants could return to Zimbabwe and apply to enter as the Appellant's wife's dependents when she was able to meet the financial requirements of Appendix FM to the Immigration Rules.

5. First-tier Tribunal Judge Simpson granted the Respondent permission to appeal on 13th February 2015 on the basis that the Respondent's grounds identified arguable errors of law. She noted that, although the Judge found that the Appellants could not meet the requirements of Appendix FM or paragraph 276ADE and went on to consider the 5-step *Razgar* approach, she did not give adequate weight to the Respondent's concerns and, in particular, did not give adequate consideration to Ss.117A & B of the Nationality, Immigration and Asylum Act 2002. She also found

that her reasoning was terse and lacked clarity, particularly when finding that the Appellants' removal would be disproportionate.

Error of Law Hearing

6. At the hearing before us Mr. Nayamayaro relied on the bundle submitted at the hearing before the First-tier Tribunal and a Rule 24 Response. This response asserted that the submissions made when the Respondent appealed were a mere disagreement with the First-tier Judge's findings and did not amount to a material error of law and were findings which she was entitled to make in the course of her assessment. It was also submitted that the Respondent had not taken into consideration the negative effect of a possible separation of the family unit if the Appellants were required to leave the United Kingdom and that, if the family were to return to Zimbabwe, there would be insurmountable obstacles to establishing a life there.
7. At the hearing, Mr. Nayamayaro accepted that the Appellants were not entitled to leave under the Immigration Rules as the sponsor could not meet the financial requirements contained in Appendix FM but asserted that the Appellants' circumstances in Zimbabwe had not been challenged at the appeal hearing. He also submitted that the witness statements had made it clear that the Appellant's wife would not be safe anywhere in Zimbabwe. In addition, he asserted that the Judge had considered all the evidence before her in the round and reached a sustainable decision. He also asserted that in *Dube (ss117A-117D)* [2015] UKUT 90 (IAC) the Upper Tribunal had noted that the factors in these sections did not provide an exhaustive list of what should be taken into account in Article 8 cases.
8. However, we find that in *Dube* the Upper Tribunal held that judges are required statutorily to take into account a number of enumerated considerations and that sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified consideration. Judges do not have to refer to each sub-section but do have to show that they have considered the substance of the content of relevant sub-sections.
9. In this case the First-tier Judge failed to do so. In particular, she did not give sufficient consideration to the fact that S.117B states that the maintenance of effective immigration control is in the public interest and that it is in the interests of the economic well-being of the United Kingdom that persons who seek to remain in the United Kingdom are financially independent. The Judge also failed to take into account the fact that the Appellants had entered as visitors and that, therefore, their immigration status was precarious, when they developed a private life here.
10. The Judge also failed to take into account the fact that Ayisha is not a "qualifying child" for the purposes of S.117D of the Nationality, Immigration and Asylum 2002
11. Furthermore, she failed to take into account that her starting point, when considering the Appellants' rights under Article 8 of the ECHR, should have been whether there were factors which had not been adequately covered in the Immigration Rules and which could lead to a successful Article 8 claim.
12. In addition, we find that the Judge did not give proper consideration as to whether the sponsor would be able to relocate within Zimbabwe if she were to return there with the Appellants, when her only difficulties in the past had arisen on the university campus where she was studying and where her uncle was a senior employee of the Government.

13. For all of these reasons we are satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and findings and that it should be set aside in its entirety. We are also satisfied that, as there will need to be a complete re-hearing that this is a proper case for remission to the First-tier Tribunal.

Conclusions:

1. The First-tier Tribunal Judge's decision and findings did include material errors of law.

2. The decision should be set aside in its entirety.

3. The appeal should be listed for a *de novo* hearing before the First-tier Tribunal.

Directions

1. The appeals are remitted to the First-tier Tribunal for a *de novo* hearing.

2. The appeals should be listed at the First-tier Tribunal in Birmingham but not before First-tier Tribunal Judge Phull.

Date: 24 April 2015

Upper Tribunal Judge Finch