Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02451/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th August 2015	**On 13th August 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER, Pretoria

Appellant

and

MR ERIC MUTANDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mrs E Mutanda, Sponsor

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Thew, who in a determination promulgated on 23rd May 2015, allowed the appellant's appeal against a decision to refuse him entry to the United Kingdom in order to join his wife and three children in the United Kingdom.

The Entry Clearance Officer is the appellant in this appeal but for the sake of convenience I will identify the parties as they were before the First-tier Tribunal.

2. The appellant is a national of Zambia, born on 22nd September 1964. His wife, the sponsor, is a national of the Democratic Republic of Congo. They married on 6th October 1991 in the DRC and then lived together in Zambia following their marriage. They have three children, all born in Zambia in 1993, 1995 and December 1997. At the date of the decision under appeal only the youngest child was still a minor. He was 16 years old. The appellant first entered the United Kingdom in 2002 as a student. The sponsor and their children joined him later that year. After being granted further periods of leave to remain the appellant eventually overstayed. The sponsor and the children lived with the appellant from 2002 until he voluntarily returned to Zambia in 2009.

3. At the hearing in the First-tier Tribunal the sponsor said the appellant was advised that he should returned to Zambia as this would have assisted his wife's asylum claim, she having claimed asylum in December 2008. Although her asylum appeal was dismissed the sponsor and her children were successful in respect of the Article 8 aspect of their appeal in 2011. This was, in turn, based on the extent of the children's private lives in the United Kingdom. They were all issued with discretionary leave to remain (DLR) until 8 July 2014. The children have not seen the appellant since 2009 but they have communicated via the internet and telephone. The sponsor returned to visit the appellant in May 2014 for two weeks and she saw him in January 2015 for nine days.

4. It is not altogether clear how many applications the appellant made to re-enter the United Kingdom following his voluntary departure. In his application form at section 32 he refers to a student application that was refused on 29th May 2009 and a visit application refused on 1st January 2013. The Entry Clearance Manager review dated 8th May 2014 claimed that the appellant was previously refused entry clearance under paragraphs 320(7A) and 320(7B) of the Immigration Rules. Paragraph 26 of the determination refers to a refusal of a visit application and refers to a student application in September 2009 and vague reference was made to the appellant's adverse immigration history and use of deception. The same paragraph also refers to a visitor application refused on 17th January 2012.

5. In respect of the present application the appellant applied for entry clearance in a settlement category although he maintains that he merely wished to be granted status in line with that of his family. His application was refused on 6th February 2014. The application was not refused under paragraphs 320(7A) or 320(7B). It was refused under paragraph 320(1) on the basis that the entry clearance was being sought for a purpose not covered by the Immigration Rules. This was because the appellant sought to join his sponsor and children who had all been granted discretionary

leave to remain (DLR). There is no provision within the Immigration Rules for a dependant to join someone granted DLR. The Entry Clearance Manager was not satisfied that the appellant had shown "extreme" compelling or compassionate circumstances that would warrant overlooking the Immigration Rules in light of Article 8". This is clearly the wrong test.

The decision of the First-tier Tribunal

6. The First-tier Tribunal Judge heard oral evidence from the sponsor and from the appellant's youngest son. The judge took account of a letter written by all three children. It was acknowledged by the appellant's representative that the application could not succeed under the provisions of the Immigration Rules. The judge referred to the previously successful Article 8 appeal. The judge found that there was family life between the appellant and the sponsor and between the appellant and his three sons.

7. The judge then considered the public interest and referred to the requirements of Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. The judge was satisfied that the appellant would be proficient in English and would be able to find a job. The judge noted that the appeal was not a removal case but that the youngest child was a qualified person within the definition in Section 117D. Crucially, the judge made reference to the fact that, in December 2014, the sponsor and the children were granted DLR until December 2017. This was some ten months after the date of the decision under appeal. This is clear from paragraphs 37 and 41 of the determination.

8. At paragraph 41 of the determination, and in conclusion, the judge said this:

> "However, the decision was based upon the circumstances appertaining at the date of the decision, that is discretionary leave for his wife and sons until 8th July 2014. In those circumstances I allow the appeal to the extent that I remit it to the respondent for consideration of the changed circumstances of that leave having been extended until 3rd December 2017, with particular reference to the family life considerations relating to the youngest child, his interests being a primary consideration."

The Grounds of Appeal

9. The grounds of appeal take issue with the judge's reliance on the post-decision grant of a further three years' DLR. The grounds contend that the judge impermissibly took account of this postdecision evidence, with supporting reference to the House of Lords decision of **AS (Somalia) v Secretary of State for the Home Department [2009] UKHL 32**.

10. The grounds further contend that the judge exceeded her powers by remitting the appeal on human rights grounds in circumstances where, at paragraph 30 of her determination, she had already found the respondent's decision lawful.

The hearing before the Upper Tribunal

11. At the hearing Mr Duffy briefly amplified those grounds. He submitted, with reference to paragraph 30 of the determination that the judge should have stopped at the third **Razgar** step. If she was going to remit the matter back to the respondent she could only have so on the basis that the decision was unlawful, yet she found that the decision was not unlawful.

12. In response the sponsor, who was not represented at the hearing as she could not afford funding for a representative, indicated that, at the date of the application, she still had leave to remain and could have spent time together with her husband if he was granted leave to enter. The sponsor indicated that one needed to approach family life with a heart and that it was very difficult raising her children in the appellant's absence. She reiterated that her children missed their father.

Discussion

13. I am satisfied, for the reasons essentially set out in the grounds of appeal that the judge did materially err by taking into account post-decision events when she was not entitled, by virtue of section 85A of the Nationality, Immigration and Asylum Act 2002, to do so. Despite reminding herself at paragraph 39 of her determination that only circumstances appertaining at the date of the decision were relevant to the appeal, she then went on, at paragraphs 40 and 41, to take into account the grant of a further three years' DLR to the sponsor and the children. Whilst such an extension may have been expected it did not occurred for a further ten months after the refusal of entry clearance. By taking account of this post-decision event and seeking to remit the matter back to the respondent the judge has clearly had regard to a matter in respect of which she was not entitled to consider (applying **AS (Somalia)**).

14. I am further satisfied that, having found the respondent's decision lawful under the **Razgar** analysis, the judge was not entitled to remit the matter back to the respondent. One should only remit when a consideration has been unlawful in order for an application to be lawfully considered. If the respondent's decision was in accordance with the law, as the Judge had already established, there seems to me to be no scope in remitting back to the respondent.

15. I indicated my decision to the sponsor and that I would remake the decision afresh. Given that this was an entry clearance appeal I can only take account of the factual matrix in existence at the date of the decision.

The sponsor had already given evidence before the First-tier Tribunal as had the youngest son, who was not present at the hearing. I gave the sponsor an opportunity to present any further evidence appertaining to the date of the decision that had not been provided to the First-tier Tribunal. The sponsor gave evidence relating to post-decision matters involving medical tests and indicated that she wished her husband was by her side.

16. I reserved my determination.

Remaking of Decision

17. It was accepted in the First-tier Tribunal hearing that the appellant cannot succeed under the Immigration Rules. In determining whether the failure to grant entry clearance would be disproportionate I have had regard to the decision of **The Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387**, in particular paragraphs 39, 40 and 41. I have to be satisfied that there are compelling circumstances outside of the Immigration Rules that would render the decision under appeal disproportionate under Article 8 ECHR.

18. At the date of the decision the appellant's two oldest children were over the age of 18. Following the authority of **Singh v The Secretary of State for the Home Department [2015] EWCA Civ 630,** and within the context of immigration control, I note that there is no legal or factual presumption as to the existence or absence of family life for the purpose of Article 8 between adult children and their parents. It all depends on the particular facts. The love and affection between an adult and his parents will not of itself justify a finding of family life. There has to be something more.

19. I am not satisfied that there is anything more in respect of the relationship between the appellant and his two adult children. I have taken account of the letter written by all three sons and the fact that they genuinely miss their father. But the love and affection between the appellant and his two adult children do not, in the absence of any other factor, amount to family life for the purpose of Article 8.

20. I am satisfied that there is family life between the appellant and the sponsor and between the appellant and his younger son, who was 16 years of age at the date of the decision. I am satisfied that the interference is sufficiently serious to engage the operation of Article 8 in respect to both sets of relationships. I am satisfied that the decision is lawful and in pursuit of a legitimate aim.

21. I must now consider the nature of the actual family life relationships between the appellant and his sponsor and youngest son. I first note that the appellant voluntarily departed the United Kingdom, albeit he claims on the basis of bad legal advice. The choice however was his. He voluntarily

left his family even if he believed it may assist his wife's asylum application, which was rejected. I find this a relevant factor when assessing the existence of compelling circumstances. The youngest son had not seen his father for over four years at the date of the decision although he had been in communication via telephone and the internet. The sponsor had been able to visit the appellant and I see no reason why the youngest son could not have done the same. I accept that there may be financial difficulties but given that the sponsor was able to visit the appellant there was no reason why the youngest son would not be able to do the same.

22. I take into account the age of the youngest son at the date of the decision. As a 16 year old he was not a young child. Whilst the evidence before the First-tier Tribunal indicates that he clearly missed his father and that it had been tough not having the appellant present, there was nothing in the evidence to indicate that the absence of the appellant had been significantly detrimental in respect of the youngest son's emotional or mental health. There was nothing to indicate that the youngest son had any medical concerns or other needs.

23. I must also identify the best interests of the youngest son, which is a primary consideration pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. In his determination of 14th July 2011 Judge Hodgkinson found that it would be disproportionate to remove the youngest child in terms of the length of time he had lived, the fact that they were the formative years of his life and his level of integration. I am satisfied that the best interests of the youngest son are that he be brought up by both parents, and that his best interests would therefore require the appellant's admission to the UK.

24. I also take into account the fact that the sponsor and the youngest son, at the date of the decision, were only in receipt of DLR until May 2014, some three months after the date of the decision. I must also consider the factors identified in Sections 117A and 117B of the NIAA 2002.

25. I take into account the fact that the maintenance of effective immigration control is in the public interest. I am prepared to accept that the appellant is probably proficient in English given that he entered the United Kingdom as a student. There is, however, no evidence that the appellant would be able to obtain employment in the UK and no evidence at all of the sponsor's financial circumstances. I note that the relationship between the appellant and the sponsor and the youngest son was not formed when they were in the UK unlawfully.

26. In relation to Section 117B(5)(vi), this indicates that the public interest does not require a person's removal where the person has a genuine and subsisting relationship with a qualifying child, that is one who has lived in the UK for seven years or more. However, this provision relates to a situation when an individual is facing removal from the UK. Parliament has

indicated a clear distinction between a situations where a person is being removed and where a person is applying for entry clearance. I also have regard to the fact that the status quo, as it has existed since 2009, in terms of the relationship between the appellant and his sponsor and youngest son, will be maintained by a refusal of entry clearance.

27. I have also, following **SS (Congo)** and earlier authorities, to look at the appellant's position and the position of proportionality through the prism or lens of the Immigration Rules, which do not provide for entry clearance when the sponsor is only in receipt of DLR.

28. In terms of the appellant's personal position in Zambia I note that he has his father there, albeit living four hours away. The appellant was self-employed in Zambia and received financial support from the sponsor. The appellant has been described as well-educated and a qualified mechanical engineer but no qualifications have been provided in support.

29. Having taking account of the best interests of the youngest son as a primary consideration, and having regard to the nature of the relationship between the appellant and his sponsor and his youngest son as it has been over the last five years since he voluntarily left the United Kingdom, and having regard to the public interest factors identified in Section 117B, and to the age of the youngest child and to the absence of any evidence that the separation is having a damaging impact on him, I am not satisfied that the appeal does disclose compelling circumstances sufficient to render the refusal of entry clearance unlawful or a disproportionate interference in the family life relationship between the appellant and his family in the UK. I consequently dismiss the appeal.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed

Upper Tribunal Judge Blum Date: 10 August 2015

I have dismissed the appeal and therefore there can be no fee award.

Signed

Upper Tribunal Judge Blum Date: 10 August 2015