Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21452/2013

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 13 March 2015 **On 26 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS DONNA-LEE TAVENGWA

Respondent

Representation:

For the Appellant: Ms E Savage, Senior Home Office Presenting Officer
For the Respondent: Ms J Kyakwita, of Hounslow Legal Service

DECISION AND REASONS

1. Ms Tavengwa is a citizen of Zimbabwe whose date of birth is recorded as 11 October 1977. She made application for entry clearance in order that she might join her parents in the United Kingdom having regard to Section EC-C of Appendix FM to the Immigration Rules. On 28 October 2013 a decision was made to refuse that application which decision was maintained on review by the Entry Clearance Manager on 7 February 2014.

2. Ms Tavengwa appealed and on 6 October 2014 her appeal was heard by Judge of the First-tier Tribunal Owens.

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3. The basis upon which the Secretary of State refused the application was that both of Ms Tavengwa's parents held only discretionary leave in the United Kingdom and therefore did not meet the requirements of Paragraph E-ECC.1.6 which provides:-

> *"One of the Applicant's parents must be in the UK with limited leave to enter or remain, or be applying, or have applied, for entry clearance as a partner or a parent under this appendix (referred to in the section as the "Applicant's Parent") and*
>
> *a) The Applicant's parent' partner under Appendix FM is also a parent of the Applicant: or*
>
> *b) The Applicant's parent has had and continues to have sole responsibility for the child's upbringing; or*
>
> *c) There are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."*

4. Judge Owens gave weight to the fact that both Sponsors had been issued with residence permits which he said, stated they had: "Limited leave to remain in the United Kingdom." In fact the residence permits did not say that at all but simply say "Leave to remain in the United Kingdom". At my invitation both cards were produced and shown to me in the light of what Judge Owens had said at paragraphs 23 of his Statement of Reasons. Judge Owens looked to the policy guidance and found notwithstanding the documentary evidence to the contrary that Ms Tavengwa's parents had in fact been granted limited leave to remain.

5. Not content with the decision allowing the appeal, by notice dated 20 November 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal. The Secretary of State submitted that Ms Tavengwa's parents had been granted discretionary leave pursuant to Paragraph 353B. The Secretary of State further challenged the weight given by the judge to what was said on the permits. Additionally the Secretary of State took issue with the judge's finding that the parents had sole responsibility but a condition precedent to that, under the rules would be in any event that one of Ms Tavengwa's parents had to have limited leave.

6. On 9 January 2015 Judge Holmes granted permission. Thus the matter comes before me.

7. Ms Kyakwita took me through the chronology. She drew my attention to there having been a history of refugee status having been claimed with various proceedings following but with appeal rights having become exhausted on 6 May 2010. There were further submissions lodged in August 2010 and September 2011. In each case those submissions seeking still refugee status were rejected. The 2010 submissions were met with a refusal dated 11 March 2011 in which it was said that no leave would be granted. The further submissions of 6 September 2011 were met with a letter dated 24 January 2013 stating…."However a decision has been taken that it would be appropriate, because of the particular circumstances of your case, to

grant you leave to remain in the United Kingdom on a *discretionary basis outside the Immigration Rules for a specified period*."

8. Ms Savage pointed out that that discretionary leave had been granted under Paragraph 353B. Ms Kyakwita conceded that it was open to the Secretary of State to grant discretionary leave rather than any limited leave if she chose to do so and it was clear in my judgment on the face of the papers that that is what had happened. The observation of the judge below that limited leave was evidenced by the residence permits was patently wrong. The residence cards said no such thing.

9. There is clear authority that an appeal cannot be brought in respect of a decision under 353B before the Tribunal: Khanum and Others (Paragraph 353B) [2013] UK UT00311. Whether the Sponsors had remedy elsewhere was a matter in respect of which I was not concerned but it seems to me that there is no basis whatsoever for a finding that the Sponsors had any leave other than that which was granted to them. If, the judge was for saying that the decision against which the appeal was brought was not in accordance with the law then the proper basis upon which the appeal should have been allowed was pursuant to Section 86(3) of the Nationality, Immigration and Asylum Act 2002. That is not how the matter was put before me. In any event for the reasons that I have stated, it is clear that the judge simply erred and his decision was infected in my judgment from wrongly reading the residence permits.

10. The judge further erred by considering the policy guidance in relation to decisions to grant leave on Article 8 on or after 9 July 2012. What Judge Owens appears to have failed to recognise was that the leave was not granted because of Article 8 but because the Secretary of State in the exercise of her discretion decided to grant discretionary leave pursuant to Paragraph 353B of the Immigration Rules. A grant of leave under Paragraph 353B is entirely discretionary and indeed so much so that a decision not to grant leave pursuant to that paragraph is, as I have already observed not justiciable: Khanum. If therefore Ms Tavengwa's parents considered the status that had been granted to them in the discretion of the Secretary of State was wrong then it was not for this Tribunal to deal with the matter. It may be, and I make no observations as to whether such application would have been met with success, that it was open to Ms Tavengwa's parents to seek a remedy in another venue but that is not a matter for me. As it is the judge plainly erred and the decision is to be set aside and remade.

The Remaking

11. It is well established that the material date for the purposes of remaking this decision and indeed the decision in the first instance was the date of the decision itself and not the date of the hearing either before the First-tier Tribunal or before me as to which see AS Somalia [2009] UK HL32. It is for Ms Tavengwa to demonstrate on balance of probabilities that her family or private life is being interfered with by the decision of the Secretary of State and it is for the Secretary of State to demonstrate, again to the civil standard that any interference is justified. Whether

one takes as the guiding principles, that line of cases including Gulshan [2013] UK UT00640 or R (On the application of MM (Lebanon) – v Secretary of State for the Home Department [2014] EWCA Civ 985, the starting point in determining where the public interest lies is to be found in the Immigration Rules themselves. I remind myself however given the guidance in the case of Dube (SS117A-117D) [2015] UK UT90 (IAC) that I ought still to put to myself the five questions set out in the case of Razgar [2004] UK HL27.

12. I heard evidence from Linda Bingandadi. She is the mother of Ms Tavengwa. She adopted her witness statement of 6 October 2014. She confirms her history being that she came to the United Kingdom in 2002 as a visitor and then extended her stay as a student. Various applications were made for Ms Tavengwa's to come to the United Kingdom and these were concurrent, it would seem, with other applications that were made on the basis of it being said that there was a risk of persecution.

13. The last time that Ms Bingandadi saw Ms Tavengwa was twelve years ago when Ms Tavengwa was only five years of age. However, arrangements were made for Ms Tavengwa to continue her schooling with various friends both through primary and secondary school. Ms Tavengwa also has an aunt who has been looking after the financial aspects of matters. Money was sent to that aunt from the United Kingdom. Ms Bingandadi expressed to me her concern at having two of her children here in the United Kingdom with Ms Tavengwa being the only child of the family who is not in the United Kingdom. In the course of cross-examination it was put to Ms Bingandadi that it was always open to her to visit Ms Tavengwa in Zimbabwe but she said that currently her son was ten and studying for his 11+ examinations and so she had no plans to travel. Whilst I note that evidence, for the reasons set out above, I am concerned with matters as they were at the date of decision rather any developments which have occurred since then.

14. Ms Tavengwa's father also gave evidence by way of a witness statement though he was not called. In every material particular however the witness statement is the same as that of Ms Tavengwa's mother.

15. I have also had regard to a witness statement from Eunice Yosser. She is the mother of Ms Tavengwa's best friend. She confirms that Ms Tavengwa has spent weekdays with Ms Yosser and her family and then returns at weekends to the home of her aunt whose witness statement I have also read.

16. The material questions which arise from the guidance in Razgar are as follows:

    1. Will the proposed removal [in this case refusal] be an interference by a public authority with the exercise of the applicant's right to respect for [her] private or (as the case may be) family life?

    2. If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    3. If so, is such interference in accordance with the law?

4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

5. If so, is such interference proportionate to the legitimate public end sought to be achieved?

17. I accept that there is family life to be enjoyed between the Sponsors and Ms Tavengwa and I accept further that Article 8 is not only to do with the maintenance of family life but also the facilitation of it such that the decision of the Secretary of State to refuse admission to Ms Tavengwa has consequences of such gravity as potentially to engage the operation of Article 8. At no point was it suggested on behalf of the Secretary of State that that was not the case. It was Ms Savage's submission that the rules reflected a balance and the Sponsor's had made a life choice to remain in the United Kingdom. The decision to refuse admission was in fact no additional interference to the decision made by the Sponsors to come and then remain in the United Kingdom. On behalf Ms Tavengwa it was argued that she is 17 and I was also invited to have regard to the application of her brother for British citizenship which application is pending. Again however I remind myself that I am concerned with matters as they were at the date of decision. There was no suggestion that at that time there was any application pending.

18. I turn to the third question and that is easily answered in this case in the affirmative. The decision clearly is in accordance with the law and again it was not suggested otherwise.

19. I turn then as I must to the Immigration Rules themselves as the starting point. These are dealt with under Appendix FM at Section EC-C: Entry Clearance of a Child. The requirements are:-

a) The applicant must be outside the United Kingdom;

b) The applicant must have a valid application for entry clearance as a child;

c) The applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for Entry Clearance; and

d) The applicant must meet all the requirements in Section E-ECC: Eligibility for Entry Clearance as a Child.

20. E-ECC.1.6 provides that:

"One of the applicant's parents must be in the United Kingdom with limited leave to enter or remain, or be applying, of have applied, for entry clearance,

as a partner or a parent under this appendix (referred to in this section as the "Applicant's parent" and

a) The applicant's parents partner under Appendix FM is also a parent of the applicant; or

b) The applicant's parent has had and continues to have sole responsibility to the child's upbringing, or

c) There are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."

21. It will be observed that those factors which are set out in (a) to (c) are only relevant in circumstances in which one of the applicant's parents are in the United Kingdom with limited leave to enter or remain. The rule makes no provision in the case of discretionary leave. That was the point taken by the Secretary of State in refusing the application.

22. Matters do not end there however because regard is to be had to the financial requirements and in this case Ms Tavengwa's father was found at paragraph 31 of the statement of reasons of Judge Owens to have earnings of £23,490 and Ms Tavengwa's mother had earnings of £6,200. The threshold for the financial requirements was £27,200 so that the financial requirements were met.

23. When considering the issue of proportionality I am bound by law to have regard to those factors set out at Section 117B of the Nationality, Immigration and Asylum Act 2002. There is little point in me simply setting them out in the body of this decision but I do observe that made claim that I have regard to the entirety of 117B that this is a family which speaks English; that the financial requirements appear to have been met but on the other hand little weight is to be given to a private life established by a person at a time when the person's immigration status is precarious. I recognise that this case is advanced on the basis of family life but there is relevant private life aspects to the case too on the basis that there is in principle no right to choose where family life is to be enjoyed. I bear in mind that there have been attempts to acquire refugee status in the United Kingdom. I note that the Sponsor's status in the United Kingdom became appeals rights exhausted and I note that Ms Bingandadi was described by Judge Aujla in the determination and reasons following the appeal on 4 January 2010 to be an unreliable witness. The judge went on to say:

> "I have considered the Appellant's account with the most anxious scrutiny. I do not find the Appellant to be a witness of truth. I find that the Appellant has made the asylum claim solely for the purpose of obtaining status in the United Kingdom. I find that she has advanced a wholly fabricated account in support of her asylum claim."

24. I attach considerable weight in considering the Article 8 aspect of this case outside of the Immigration Rules to the fact that the Sponsors only have discretionary leave to

remain in the United Kingdom. In giving significant weight to the legitimate public end sought to be achieved, namely effective immigration control which is by statute in the public interest, there must be sufficient countervailing factors to justify the issue of proportionality being weighed in favour of the person seeking entry clearance albeit a family member and albeit a minor.

25. On the basis of the type of leave granted, it remains open to the Sponsor to go back to Zimbabwe or join her family member in another country. That the appeals for international protection and indeed earlier appeals on human rights bases have been unsuccessful demonstrate that there is, by judicial finding, no impediment to departure from the United Kingdom other than private life considerations to which, by statute little weight is to be given and all the more so if that private life has been established when the immigration status was precarious as indeed was the case here.

26. Although I accept that the Sponsors have set up a life for themselves in the United Kingdom and have now been granted discretionary leave, I do not find that there are sufficient countervailing factors even when I put the best interests of Ms Tavengwa in the mix. Ms Tavengwa's education is continuing and sufficient provision has been made for her welfare. If in the best interests of the child are that she should be with both parents then that is matter for her parents to resolve and still further if the best interests of the family are for the family to be together then there is a solution to that open to the Sponsors and Ms Tavengwa. Family life, such as it is, has continued for some years with the family separated. The best interests of the child are not a "trump card" see: Zoumbas v SSHD [2013] UKSC 74.

27. For these reasons I find that the decision of the Secretary of State was proportionate to the legitimate aim being pursued and that in these circumstances the appeal in the First-tier Tribunal is to be remade such that the appeal is dismissed.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is allowed.
The decision of the First-tier Tribunal is set aside and remade such that the appeal is dismissed.

Signed **Date**

Deputy Upper Tribunal Judge Zucker