The Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
OA/05021/2015 OA051062015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 25th April 2017	**On 27th June 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

L M
A P M
(ANONYMITY DIRECTION MADE)

Appellant

And

THE ENTRY CLEARANCE OFFICER FOR ZIMBABWE BASED IN PRETORIA, SOUTH AFRICA

Respondent

Representation:

For the Appellant: Her sponsor, M.
For the Respondent: Mrs.Aboni, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Zimbabwe born in April 2001. He, along with his paternal older brother, PM, applied on 21 January 2015 for entry clearance. This was in order to join their father M, hereinafter referred to as the sponsor for the purposes of settlement. The applications were considered under paragraph 352D of the immigration rules. This is concerned with applications to join a parent who has refugee status. It must be shown that (i) the applicant's parent has refugee status;(ii) that the applicant is under 18 and (iii) not leading an independent life and(iv) where part of the sponsor's family unit when they left.

2. The entry clearance officer accepted that the sponsor had refugee status and was the father of the children. The latter was evidenced by DNA testing. The application was refused because the entry clearance officer was not satisfied they formed part of the sponsor's family when he left. Home Office records show that the sponsor came to the United Kingdom in April 2003. At screening he did not refer to PM but did mention LM.

3. It was originally indicated that the sponsor had separated from PM's mother, IM, and the child lived with her and that he financially supported them. In the grounds of appeal he indicated that he separated from the child's mother in 1999 and that initially the child stayed with her. They then changed this arrangement to the sponsor having custody from Friday through to Monday.

4. He then began a relationship with Ms A.N and she gave birth to LM. LM lived with them until he left in 2003. During this time PM joined them for part of the week. He said LM's mother died in December 2005. The sponsor said they were cared for by his sister and then subsequently his brother. Subsequently neither could care for the children and they are in the care of the sponsor's school friend. This is only a temporary arrangement.

5. The respondent accepted the sponsor had been in contact with the children since 2010 and sent money for them. However, the entry clearance officer questioned the whereabouts of PM's mother and why other family could not care for them. Regarding LM, there was no confirmation that his mother had died. Furthermore, there was no evidence that he was part of the sponsor's family unit when he left.

The First Tier Tribunal

6. A restricted right of appeal applied. The appeal was heard by Designated Judge of the First-tier Tribunal McClure at Manchester on 19 July 2016. In a decision promulgated on 2 August 2016 both appeals were dismissed.

7. The judge set out how in considering article 8 the provisions of rule 352D were relevant as this was the respondent's attempt to comply with the U.K.'s article 8 obligations. Reference was also made to the section 55 duty in the Borders, Citizenship and Immigration Act 2009. The judge pointed out that he also took into account the provisions of sections 117 A and B of the Nationality Immigration and Asylum Act 2002.

8. The judge heard from the sponsor. The judge had his original asylum interview in which he said he married Ms AN, the mother of LM and they lived in the Plumtree area of Zimbabwe. Matters became complicated when the sponsor told the judge that AN was not her real name. He said her name was CN aka SN.He said both children were born in Plumtree.

9. The sponsor submitted birth certificates. The certificate in respect of LM indicated he was born in Hawange. This is North West from Bulawayo, the area originally identified and 270 km distant. The certificate indicated the birth was registered in November 2006 and SN the informant. That was one of the names the sponsor said the child’s mother went under. If so, this was not consistent with the claim that LM's mother had died in 2005. The sponsor was asked about this and said it was his sister who had obtained the birth certificate and suggested she had given incorrect information. There were similar contradictions in the birth certificate for his elder brother, PM. His birth was not registered until December 2009 and in Bulilimanangwe. The informant was named as the sponsor. The judge commented that if he had returned to Zimbabwe he would have been jeopardising his refugee status. The judge commented on the fact that the births had been registered in offices considerable distances apart.

10. Dealing with the appeal of PM the judge referred to the application where it was indicated he had been living with his mother from 1998 through to 2006.Later, as set out above, the account was that he had living with the sponsor several days a week. He was not referred to in the asylum interview but LM was. The judge was not satisfied that PM was part of the sponsor's family

when he left Zimbabwe. Consequently, the requirements of the rules were not met for him.

11. With regard to LM, the judge concluded that the birth certificate produced in respect of him was not accurate with regard to the informant; the place of birth and other details. It also called into question the claim that the child's mother was dead. The judge found that false facts in the form of the birth certificate had been put forward in support of the application for entry clearance. The judge was also not satisfied that the truth had been told in respect of his mother. The judge referred to the sponsor's claimant she used different names and concluded the sponsor had been altering his evidence in an attempt to fit in with the documents produced. The judge did not find the sponsor to be credible.

12. The judge did accept at paragraph 50 that LM was a member of the sponsor's family when the sponsor left. He also accepted he had not formed an independent family unit and was dependent upon his parents. The judge commented on the different names given for his mother and the absence of documentation to support the claim she was deceased. The judge pointed out that if you were still alive this was clearly a material consideration. However, under the rules this was not determinative as the applicable rule makes no reference to the other parent. On this basis LM would meet the requirements of the rules.

13. The judge then referred to rule 320(7A). This provides as follows:

Grounds on which entry clearance or leave to enter the United Kingdom is to be refused.

> (7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

14. The judge stated and paragraph 47 that for the false representations to be material they must be produced dishonestly. The judge acknowledged that such dishonesty could not be placed upon the minor LM.However; those making the application on his behalf clearly knew it had been produced dishonestly.

15. The judge accepted the sponsor had the ability to support LM but did not accept the child's mother was dead or that the child no longer had any accommodation. The judge concluded

that whilst there was family life between LM and the sponsor and the decision prevents that family life becoming closer it was proportionate. This was in the interests of immigration control. The judge was clearly influenced by the birth certificate produced and the false details found to be presented.

The Upper Tribunal

16. Permission to appeal in respect of LM was granted on the basis it was arguable that there was a material error of law in the decision. This was on the basis that irrespective of the use of false documents or whether or not his mother was alive, the judge had found he met the requirements of rule 252D. The rules are meant to be article 8 compliant.

17. At hearing the sponsor attended and was not represented. He confirmed there was no further appeal in respect of PM. PM is now an adult but that would not make a material difference because he was under 18 at the time of application. The sponsor indicated he was there to try and obtain the right for his child LM to live with him. He indicated he had lost one child, namely the elder appellant. He denied any wrongdoing in the application. The presenting officer opposed the appeal and relied upon the rule 24 response.

Consideration

18. The judge’s decision reflects a distinction between the cases of PM and LM. The distinction is that the judge found as a fact that PM was not living as part of the sponsor's household. In support of this was the fact that the sponsor had not named him when he claimed protection. Furthermore the application it did not indicate he was part of his household but suggested the child was his mother. It was only later that the suggestion he lived part-time with the sponsor was introduced. From the findings PM would not have meet the rules. However, in the case of LM the judge did accept that the child lived with the sponsor when he left. The judge acknowledged that therefore the requirements of 320(7A) were met. This rule is concerned with reuniting refugee families and there was no stipulation that the child only have one parent. However, the judge indicated he was influenced by the false documentation submitted and the misrepresentation that the child's mother was deceased.

19. It can be implied from the grant of leave that meeting the rules could have led to a successful outcome on an

article 8 basis. However, it has to be born in mind that there was a restricted right of appeal. The judge was not considering on appeal whether the immigration rules were met. Rather, the judge was considering matters on freestanding article 8 basis. This is a wider concept. Certainly the ability to meet the relevant rule is a consideration. It is not the only consideration however. The judge was entitled to consider the deception used, albeit not by the appellant personally. The credibility of the sponsor was a relevant factor in considering whether this was an abuse of application. The judge did not find the claim that the child would be homeless or motherless credible.

20. It is clear this is a carefully prepared decision .The judge appreciated the limited right of appeal and carefully examined the claims made in respect of both appellants and the evidence produced. The judge was entitled to raise paragraph 320(7A) as this is part of the control mechanism for immigration. It indicates the wider factors taken into account in considering the proportionality of the decision. It is my conclusion that no material error of law has been demonstrated. Consequently, the decision dismissing the appeal shall stand.

Decision.

No material error of law has been demonstrated in the decision of Designated Immigration Judge McClure. Consequently, that decision which dismisses the appellant's appeal shall stand.

Deputy Judge Farrelly

26th June 2017