Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/18610/2012
OA/18620/2012

THE IMMIGRATION ACTS

Heard at Birmingham, Sheldon Court	**Determination Promulgated**
On 4th July 2014	**On 14th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR LUTHER TUNGAMIRAI JAPE
(2) MISS DINAI JAPE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellants: No legal representation
For the Respondent: Mr Neville Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Grimmett promulgated on 7th January 2014 following a hearing at Birmingham Sheldon Court on 31st December 2013. In the determination,

the judge dismissed the appeal of Luther Tungamirai Jape and his sibling sister Dinai Jape. The Appellants applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are brother and sister respectively. The first Appellant, the brother, was born on 26th November 1987. The second Appellant, the sister, was born on 24th October 1989. Both are citizens of Zimbabwe. Both had originally applied for entry clearance to join their sponsoring mother, Mrs Beauty Jape, together with their two younger siblings, namely, Theodore Davis Jape, who was born on 29th April 1995, and Keith O'Brian Tadiwa Jape, who was born on 8th October 1999. Since the latter were of minor age, their appeals were allowed and they have now joined their sponsoring mother, Mrs Beauty Jape in the UK. The Appellants' appeals, however, were dismissed by the judge under paragraph 319V of HC 395 because both of them were over the age of 18 years, and had to show that they were "living alone outside the United Kingdom in the most exceptional compassionate circumstances", which the judge held they could not do.

The Judge's Findings

3. In coming to her conclusions, the judge had regard to the fact that the sponsoring mother, who gave evidence, was "an honest witness" who had left Zimbabwe in 2001, leaving behind her four children, together with "their older half-sisters who at the time she left were about 15 and 18" but "they were her daughters and they continued to live with the Appellants in South Africa" where they had moved afterwards. Subsequently, one of her older daughters had a child "and was now living apart from the family and Luther had found a job and was shortly to move in with his girlfriend" although "at the time of the decision they were still living as a family unit together" (paragraph 8).

4. The judge was clear that the Sponsor had been working in the United Kingdom soon after her arrival in 2001 and "there is evidence that she took out policies for them as long ago as 2002 shortly after she left and evidence, which is accepted, of contacts since 2009 although "it was difficult to obtain evidence prior to that because of the children leaving Zimbabwe and moving to South Africa." (Paragraph 9). The judge had regard to the existence of school reports for the children "who all bear their mother's name and their letters to her from them included in the bundle together with some antenatal records" (paragraph 9).

5. However, the two older children, namely, the Appellants in this appeal, could not show that they are living in the most exceptional compassionate circumstances. Moreover, they were adults, and Luther had been looking after himself for some time and he was working "and helping to support them and has clearly been living with them for the vast majority of the

time his mother has been away" but was not living in the most exceptional compassionate circumstances nor is he living alone" (paragraph 10).

6. As for the second Appellant, Dinai, the judge found that the evidence was that she "has the burden of caring for the children as she is not working and has to do all the work and they are living in a two bedroom flat which clearly would be very difficult for them all" (paragraph 10), but the judge still found that this did not show the existence of the most exceptional compassionate circumstances. Accordingly the appeals of the first and second Appellants were dismissed.

Grounds of Application

7. The grounds of application state that the family existed as a single family unit and they were desperate to remain so. The grounds also state that although Luther is working, he "works part-time to make extra money....., but I pay for his rent and general upkeep". Furthermore, now that the younger two siblings have come to the UK this "will be the first time they are separated from each other and I fear how this will affect the two younger ones" and that Dinai, "has been taking care of them" but that "Luther...has been like a father figure to them" to that "the separation will be so traumatic for my kids". The Grounds of Appeal were plainly written by the Sponsor in the UK.

8. On 1st April 2014, permission to appeal was granted on the basis that, although Article 8 ECHR was specifically raised in the original Grounds of Appeal, the judge had failed to make any findings on the issue of human rights.

The Hearing

9. At the hearing before me, the Sponsor, Miss Beauty Jape, attended as she had previously attended, entirely unrepresented legally. On behalf of the Respondent, Mr Nigel Smart was the Senior Home Office Presenting Officer. The Sponsor, Miss Jape stated that Luther had always lived with the rest of the family. She had left him behind when he was just 14. He had been a father figure to them. Although there were older half-sisters, he together with them managed the house, doing the cleaning, the washing up, and then working as well. He had been a father figure to the children. They had not been separated. In 2008, he had to go to South Africa and they all went with him. Subsequently, the half-sisters have got married and have settled in South Africa. He has been working there. He still needs support from the UK so that his sponsoring mother sends money because on a work permit in South Africa he is simply working as a waiter and living off the tips. Dinai, his sister, however, is not working as she still continues to look after the children as she has done before.

10. For his part, Mr Smart submitted that at the date of the decision they were all living together in South Africa. The family had voluntarily been broken up by the Sponsor choosing to come to the UK in 2001, and subsequently

it has been broken up again by the two younger sibling brothers coming to the UK leaving behind the Appellants in South Africa. This was a matter of their choice. The Immigration Rules were a complete code and there were no exceptional circumstances here necessitating a different decision under freestanding Article 8 jurisprudence. He asked me to dismiss the appeal. In reply Miss Jape, became evermore emotional and submitted that the two younger siblings only came to the UK this year on 4th February 2014, and they had never been separated before from Luther who had been looking after them ever since she had left them all behind, when Luther was 14 years of age.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (Section 12(1) of TCEA 2007) such that I should set aside this decision and to remake it (see Section 12(2) of TCEA 2007). The reason for this is quite simply the oversight of the judge below in not considering the situation on the same facts under Article 8 of the ECHR. This omission is entirely understandable given that, as before this Tribunal, the Appellants were unrepresented, and simply had their sponsoring mother, Mrs Jape, making representations in as best a way as she could. Although she did so truthfully then, as she has done before me today, she was not able to address legal questions, such as the position under Article 8 ECHR. However, it was a matter in the Grounds of Appeal and given that it was not dealt with, the decision now has to be set aside and remade.

Remaking the Decision

12. In remaking the decision, I have had regard to the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons. First, this is a case where the Appellants cannot succeed under paragraph 319V(i)(f) because both Appellants have to show both that they are living alone and that they are doing so in the most exceptional compassionate circumstances. The judge at first instance found that Luther had been "working and helping to support the family" (paragraph 10). There is no evidence of his ill-health or lack of wellbeing. The second Appellant, Dinai, was found by the first judge to be "living in a family unit with other adults...." (paragraph 10). In neither of their cases can it be said that they are living in the most exceptional compassionate circumstances.

13. Second, there is a question as to whether the position can be treated any differently under Article 8 ECHR. Before this step is taken, regard must be given to the judgment in **MF (Nigeria) [2013] EWCA Civ 1192**, where the Master of the Rolls decided that the Immigration Rules provided a "complete code" to the consideration of Article 8 claims. The word "exceptional" meant compelling reasons. In the balancing exercise, the "exceptional circumstances" which should be considered, involves the application of proportionality tests as required by the Strasbourg

jurisprudence (see paragraphs 43 to 44 of the judgment). That was a deportation case, but the judgment applies equally, as confirmed in the case of **Gulshan [2013] UKUT 00640**, to non-deportation cases. **Gulshan** confirmed that exceptional is an application of the consideration of the Strasbourg jurisprudence to assess why, if there are any reasons at all, that the usual result contained within the Immigration Rules, should not follow.

14. I find that "exceptional circumstances" exist in this sense because the Appellants, Luther and Dinai, lived as a family unit together, both in Zimbabwe when their mother left them in 2001, and then again in South Africa, where they followed Luther, until this year when the youngest two sibling children have come to the UK in February 2014. At this stage, their family unit has been disrupted.

15. Their relationship is that of father and son, between Luther and the remaining children. This is clear from the Grounds of Appeal before this Tribunal. In addition, two important pieces of evidence which were before the First-tier Tribunal Judge, are relevant.

16. First, the Sponsor, Mrs Beauty Jape, has never broken contact with her children, and has always been desirous of having them reunited with her since their arrival in the UK. There is evidence from as long ago as 2002 that she had taken out policies for them (see paragraph 9 of the determination). Thereafter, Luther, who was only aged 14 at the time, and looked after the remaining family members, left to go to South Africa where he worked, but he did so "working and helping to support them" (see paragraph 10), and the judge had found that he "has clearly been living with them for the vast majority of the time his mother has been away" (paragraph 10). In addition to this, the Sponsor has "continued to support us emotionally and financially" according to the statement before this Tribunal by Luther, so much so that the Sponsor stated in evidence that she still sends him money because he has to live off his waiter's tips. The Sponsor's statement also makes it clear that the arrival of the youngest sibling children now mean that this "will be the first time they are separated from each other" and this is likely to affect Keith and Theo adversely. It is in their best interests that this family is kept together so that a father figure is in the house and one who can act as a role model to them.

17. Second the same applies in relation to the second Appellant, where the finding of the original judge was that Dinai "has the burden of caring for the children as she is not working and has to do all the work" (at paragraph 10), and this is a role that she has performed consistently and constantly ever since the Sponsor came to the UK. The statement by the Sponsor before this Tribunal that this is the first time they had been separated applies equally to the second Appellant as it does to the first Appellant. In short, once the appeals of the younger two siblings were allowed, there was bound to be a disruptive impact on the family life of the remaining members. The question is whether that impact is

disproportionate to the legitimate public ends that have to be achieved by virtue of immigration controls.

18. The decision clearly interferes with the right to family life of the two Appellants. The interference has consequences of such gravity as to engage the operation of Article 8. The interference is in accordance with the law because paragraph 319V is not satisfied by the Appellants. However, as to the question whether it is necessary in a democratic society in the interests of the protection of the rights and freedoms of others, this is a more difficult question, and I find that is not.

19. Similarly, I find that the interference is not legitimate to the public end that is sought to be achieved. There are positive obligations inherent in effective "respect" for family life: see **Kroon v The Netherlands [1995] EHRR 263**. The youngest of the siblings in this family, Keith, who was born on 8th October 1999, was only two years of age when his mother, the Sponsor, left him behind in Zimbabwe and came to the UK, although it is clear she had not abandoned him, because the following year she took out policies in their name, and continued to support them with financial remittances from the UK.

20. During that time, however, it was the first Appellant, Luther, then aged 14, who became a father figure to the youngest siblings, and brought them up, and he has continued to do so, to such an extent that he took them to South Africa with him, where he continue to provide for them, and the entire family lived together until February 2014 this year, when the younger two siblings came to the UK. The impact, in Article 8 terms, where there is a positive obligation on the state to respect family life, on the separation of this family, is not one that can be regarded as proportionate, because the effect of the decision of the state is to prevent the union of these two Appellants with their remaining sibling brothers in the UK.

21. This was to say nothing of the mother, Beauty Jape, who has continued to maintain and support them, even when the older two Appellants have reached the age of majority. In these circumstances, I find that this appeal must be allowed.

Decision

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under Article 8 of the Human Rights Act.

23. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 12th July 2014