



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/14556/2018

THE IMMIGRATION ACTS

Heard at FIELD HOUSE

Decision and Reasons

Promulgated

On 11th June 2019

On 21st June 2019

Before

**DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK**

Between

**MR Z C
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: NO LEGAL REPRESENTATION

For the Respondent: MS J ISHERWOOD (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First Tier Tribunal (Judge Robertson) (FtT) promulgated on 22.3.2019 in which the appellant's human rights claim was dismissed.

Background

2. The appellant is a citizen of South Africa (SA), born on 1.2.2000, aged 19 years old. He entered the UK with visitor visa valid for two years. He entered the UK on 26th June 2016 and then returned to SA. He re entered

the UK on 2.4.2017 and then returned to SA. He re entered the UK on 6.12.2017. He made an application for leave to remain on grounds of family life with his mother who had ILR. The appellant claimed that he had suffered from physical and emotional abuse from his father. The appellant was diagnosed with Attention deficit disorder (ADD) and produced a psychological report.

3. The respondent refused the application with reference to Appendix FM. The respondent rejected the family life application based on the Eligibility requirements, stating that the sponsor had no leave to remain. [This was incorrect as it was accepted that she had ILR as stated in the refusal letter under exceptional circumstances.] Paragraph 276 ADE was considered and rejected as the appellant at the time of the application made on 18.12.2017 was under 18 years. There was no proper consideration of paragraph E ECC 1.6 of Appendix FM in the refusal letter. The appellant was under 18 years at the date of the application. There were no unjustifiably harsh consequences for the appellant such that Article 8 was breached. The appellant could relocate to a different area in SA away from his father or his mother could return to SA. The appellant was now aged 18 years at the date of decision.
4. The appellant was not legally represented at the FtT hearing and there was no Home office presenting officer in attendance. The FtT proceeded to treat the appellant as a vulnerable witness because of his age and the evidence as to possible abuse [16]. The FtT found that there was family life and Article 8 was engaged. The FtT considered the evidence of abuse [20 (a-i)] which included oral and written evidence, photographs and a psychologist's report.
5. The FtT found no compelling or compassionate circumstances [21]. The FtT found "even taking the evidence at its highest and accepting that there has been some sort of physical abuse, the full extent of which is unknown ...". The FtT found no evidence of significant trauma, no evidence that psychological support was unavailable in SA, the appellant did not have to live with his father, there was no evidence that other family members would not agree to look after the appellant, there was evidence of legal advice sought as to the best interests of the child in SA [21]. The FtT concluded that paragraph 297 Immigration Rules was not satisfied, nor any provision under paragraph 276ADE in terms of very significant obstacles to reintegration [23]. The FtT considered where the best interests of the appellant lay, notwithstanding that he was over 18 years at the date of hearing [24] and concluded that it was "marginally" in his interests to remain in the UK with his mother. The FtT observed that he had not finished his education in SA. The FtT considered section 117B factors and found that his private life was built up when his status was precarious [25 (v)]. The decision to refuse was proportionate and in the public interest in terms of immigration control.

Grounds of appeal

6. In grounds of appeal drafted by the sponsor, the appellant argued that it was unclear whether the FtT had all the documents and evidence supplied for the hearing. It was unclear if the FtT had the original bundle and the additional material. The FtT was provided with the full report from the psychologist. Copies of text messages were supplied but these were in Afrikaans and translated by the sponsor. The FtT indicated that the translation was not independent but that she would consider if the translations could be admitted as reliable evidence but failed to inform the appellant of the decision to admit that evidence or not. The appellant sought to rely on this evidence as it contained an admission from his father that he had assaulted him "You were given a hiding ..." Other evidence including the offer of an apprenticeship was not referred to as included in the bundle before the FtT. The FtT failed to place sufficient weight on the psychologist's assessment and place too much weight on her own assessment of the appellant at the hearing [16]. The FtT placed too much significance on the fact that there was only one (unclear) photograph showing the appellant with a bruised face and failed to properly consider the explanation for this. The FtT found it implausible that the sponsor would not have known about the abuse before the second incident (particularly if there was bruising) because "her mother" knew about the first incident from "her sister". The FtT erred factually because the evidence was that this was the appellant's paternal grandmother and aunt. The FtT's assessment of the appellant's emotional state and well being in the psychological report was unfair and unclear [20 (ii) (c)]. The FtT failed to consider all the evidence in assessing if there were very significant obstacles to reintegration, in particular teachers, domestic violence charity, legal personnel, social services and family members, none of whom wished to get involved. The FtT was wrong not to place weight on the 17 months during which the appellant had lived in the UK and during which his physical and emotional wellbeing have significantly improved [25 (v)].

Permission to appeal

7. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ S H Smith on 1.5.2019 on all grounds. FTJ Smith had regard to the fact that the grounds of appeal were prepared by the sponsor, but found there to be a single arguably material error in law, as follows.
8. The FTJ ought to have appreciated that it was not the sponsor's mother to whom the first incident had been reported but the appellant's paternal grandmother. Accordingly the credibility findings concerning the extent of the abuse suffered by the appellant and the sponsor's inaction were arguably tainted. The extent of the abuse was a material issue even though the FtT accepted that some abuse had occurred. This was relevant to the findings as to the compelling and compassionate circumstances under paragraph 297(i)(f).

Error of law hearing

9. At the outset I explained to the sponsor and the appellant the nature of the proceedings before the UT and that the focus was on error of law by the First-tier Tribunal. I explained the procedure and the possible outcomes. Ms Isherwood had also helpfully provided the sponsor with some explanation as to the proceedings and procedure. At the end of the hearing I reserved my decision.

Submissions

10. At the hearing before me Ms Daubney, the sponsor, expanded on the detailed grounds of appeal. She emphasised that she had lived in the UK for 10 years and had built her life here.
11. In response Ms Isherwood confirmed that all grounds were arguable. She confirmed that all the emails, WhatsApp messages had been included in the bundle for the FtT. Ms Isherwood submitted that the FtT erred factually but that the error was not material, given that the FtT had taken into account that there had been abuse and considered that at its highest. The FtT considered all the options open to the appellant on return to SA including that the sponsor could return with him.

Discussion and conclusion

12. In terms of the documentary evidence I was satisfied that the FtT had before it all the relevant material and that included the translated messages which had been taken into account [20 (c)]. The FtT was not required to specifically set out each and every document relied on. I had regard to the fact that the appellant was not legally represented at the FtT nor before me, in particular in terms of any grounds of appeal raised.
13. As to the factual mistake [20 (b)] I find that this was a material error of law. The FtT found that there was a lack of evidence in support of the abuse and took into account the sponsor's apparent lack of knowledge of the abuse believing (wrongly) that it was her mother who knew about the first incident. Such findings were clearly relevant to the FtT's credibility findings overall. Although the FtT did not find that the account of abuse was not credible, it found it to be lacking. The FtT premised consideration of compelling and compassionate family factors on a finding that "even taking the evidence at its highest and accepting that there has been some sort of physical abuse, the full extent of which is unknown ...". Thereafter the FtT gave reasons in rejecting the establishment of compelling/compassionate circumstances at [21(i) - (v)].
14. In addition although not specifically raise in in grounds of appeal, I am concerned that the FtT's approach was somewhat muddled in terms of Appendix FM and Article 8 outside of the Rules [17—20]. The FtT considers first the Appendix E.ECC 1.6 (c) referring to paragraph 297 Immigration Rules [23]. Then the FtT considers paragraph 276ADE(1) (iv). The FtT fails at that stage to properly consider if Article 8 outside of the rules is justified having regard to compelling circumstances and thereafter fails to go through the step by step approach in **Razgar**. The FtT launches into

consideration of proportionality in terms of private life only [25]. The FtT failed to adequately assess all the relevant factors in the assessment of the appellant's family life and best interests. The FtT took into account that the appellant was only just 19 years of age. He was a minor at the date of application. Yet the FtT failed to have regard to the fact that he had yet to finish his education and that he was vulnerable having been diagnosed with ADD. The FtT placed no proper weight on the assessment of the psychologist in terms of any emotional abuse. The FtT took the view that the appellant had not apparently displayed (at the hearing) nor was found by the psychologist to have experienced trauma, aside from "residual difficulties". I am satisfied that the FtT erred by placing too much weight on peripheral matters and insufficient weight on relevant and material matters in terms of the existence of serious and compelling circumstances, which in turn impacted on the assessment under Article 8.

15. There is material error of law disclosed in the decision which shall be set aside. The findings are preserved and I go on to remake the decision. At no stage in the decision did the FtT expressly find that the account was not credible. There is no need for further hearing or submissions.

Re making the decision

16. I find that the evidence of the first incident of abuse was communicated to the appellant's paternal grandmother who took no action. The sponsor did not know about the abuse until the second incident. There was ample evidence before the FtT as to the fact of physical and emotional abuse not only from the appellant and the sponsor but it included a photograph contained in a pamphlet entitled "Justice for Z" created by the appellant's friends in an endeavour to support him. There was evidence of communications with teachers, lawyers and social workers and there was evidence from the appellant's father admitting to giving him a "hiding" which he glossed over as "chastisement" that was "deserved" by the appellant. The expert evidence of the psychologist report was strong evidence in support. The FtT's approach to the treatment of the appellant as a vulnerable witness was flawed as having decided to make that decision, the FtT then observed that the appellant had failed to show any signs of distress during the hearing and in so doing failed to take proper account of the opinion in the expert report as to the appellant's emotional state and behaviour and the impact of his ADD.
17. Taking into account the evidence that was before the FtT I am satisfied that there are established serious and compelling (and compassionate) circumstances such the appellant's exclusion from the UK is undesirable. The appellant is a young man who is also vulnerable because of his diagnosis of ADD. He has experienced physical and emotional abuse from his father and has made attempts to get help in SA. The sponsor's evidence in her witness statement included her account of having been physically and emotionally abused by the appellant's father leading to her leaving him. The appellant has now established a close relationship with his mother in the UK where he feels safe in a stable environment. The appellant is only just 19 years of age and is dependent on his mother

financially and has yet to complete his education. He is not yet in a position to be independent and would not yet be able to set himself up in an area away from his father and potential further abuse. The fact that as found by the FtT he has not suffered “significant trauma” from physical abuse is a diminishing of the impact of domestic abuse on the appellant and the fact that it was found that there is psychological help available in SA fails to take proper account of the appellant’s age, vulnerability and the emotional damage to him. I place weight on the entirety of the psychological report. The appellant needs to be in a supportive environment with his mother. The report stated that *“his development and social-emotional needs appear to begin to be more than adequately met through his living with his mother and her partner ... his social and emotional - social development appears to be somewhat stunted because of the relative social isolation and tense atmosphere at home with his father.”* The report goes on *“there seemed to be a major degree of vigilance, tension and anticipation that could not be fully captured in this assessment. There may be a tendency to deny, dismiss or minimise psychological difficulties as part of ZC’s patterns of managing emotions and relationships through detachment, repression, avoidance and placation in order to avoid conflict, tension or upset. The true extent or long- term effects of how the events have impacted on ZC may become more prominent if he continues to feel safe and secure with the people around him (paragraph 7.1.1).”* The appellant has established that he meets E.ECC1.6(c) / paragraph 297 of the Immigration Rules. There was no issue raised by the respondent as to financial requirements.

18. Article 8 ECHR is engaged because there are compelling circumstances that justify its consideration outside of the rules, as evidenced by the abuse to the appellant. The appellant has established family life with his mother in the UK. There would be an interference with that family life if he were to be returned to SA because he would no longer have the support of his mother who has lived in the UK for 10 years and has ILR. The interference is not lawful as the immigration rules are met with reference to E.ECC 1.6 (c) “there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements had been made for the child’s care.” There was no issue taken as to financial requirements. In terms of proportionality there is no public interest in removal where the immigration rules are met. The appellant’s best interests are a primary consideration and he remains dependent on his mother financially and emotionally and his needs associated with his ADD diagnosis are being met. His mother has ILR and is established in the UK with employment and has lived here for a significant period of residence, 10 years, such that it would not be proportionate to expect her to return to SA with the appellant in such compelling circumstances. In applying section 117B the appellant speaks English and he would not be a burden on the State as he is dependent on his mother with whom his family life was established over a period in the UK where he had lawful leave as a visitor. I find no public interest that outweighs the interests of the appellant and his family in the UK.

Decision

19. The appeal is allowed on human rights grounds.

Signed

Date 18.6.2019

GA Black
Deputy Judge of the Upper Tribunal

ANONYMITY ORDER made.

Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

NO FEE AWARD - although I have allowed the appeal a hearing was necessary to consider all the issues.

Signed

Date 18.6.2019

GA Black
Deputy Judge of the Upper Tribunal