



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

Appeal Number: HU/06363/2017

**THE IMMIGRATION ACTS**

**Heard at Birmingham Civil Justice Centre  
On 23 November 2018**

**Decision & Reasons  
Promulgated  
On 15 January 2019**

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

**JOSPHAT MUSHONGAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Brown, Counsel, instructed by Genesis Law Associates Ltd

For the Respondent: Mr D Mills, Senior Presenting Officer

**DECISION AND REASONS**

(Given orally on 23 November 2018)

**Introduction**

The appellant is a citizen of Zimbabwe, born 7 March 1966. His application for a entry clearance to visit his spouse and children in the UK, who at that time had Discretionary Leave to Remain, was refused by an Entry Clearance Officer in a decision dated 27 October 2016.

## **Entry Clearance Officer's Decision**

The ECO's decision relevantly states:

"In your application form you state that you applied for leave to remain in 2010 and I note this is the case and that it was granted. You also stated you had never been required to leave the UK. However, I note that you also submitted an application for leave to remain outside of the Rules in 2011. As you did not submit this application upon arrival in the UK you were therefore an illegal entrant who had used verbal deception and committed an offence in breach of the 1971 Immigration Act. You subsequently departed the UK before a decision on this application was made. At the date of your departure you did not hold valid leave to remain and I am therefore satisfied that you were required to leave the UK.

In light of the above I am satisfied that you have not disclosed material facts in your current application and that you have made a false statement. Your application is therefore refused..."

## **First-tier Tribunal's Decision**

The appellant appealed to the First-tier Tribunal ("FtT") on human rights grounds (Article 8 ECHR). The appeal came before First-tier Tribunal Judge Robertson on 1 May 2018 and was dismissed in a decision promulgated on 17 May.

In its decision the FtT engaged with the ECO's assertion of deception, at [21]:

"As to the first issue, I do not accept the assertion in the Notice that the appellant used verbal deception to gain entry to the UK, because he was in the UK with lawful leave before his leave expired and he submitted an asylum claim. He was already in the UK when he made his application for leave to remain outside the Immigration Rules in 2011. Whilst he was an overstayer by this time, he had not used verbal deception to gain entry to the UK."

Ultimately, however, the FtT concluded that the appellant did not meet the requirements of the Immigration Rules, for the following reasons:

"[25] ... the appellant did overstay for more than 90 days after the refusal of his 2011 application on 4 January 2012. He did not leave the UK until 12 April 2012. However, he was not removed; he departed voluntarily."

And then:

"[28] ... This is sufficient to find that between 4 January 2012 and 20 April 2012, when he was in the UK without leave, the appellant knew that he was required to leave the UK pursuant to the terms of the decision letter of 4 January 2012 and the respondent has discharged the evidential burden.

[29] I find that the appellant has not offered an innocent explanation. ..."

When considering whether the ECO's decision would breach the appellant's human rights, the FtT found that:

"The consequences of the decision are therefore that they [the appellant and his family] would continue to meet abroad as they have done in the past and are therefore not so grave as to potentially engage the operation of Article 8."

The FtT also concluded in the alternative (at [32] to [34]) that even if Article 8 was engaged then the decision not to grant entry clearance was, nevertheless, proportionate.

### **Discussion and Decision**

The grounds of challenge, which were not drafted by Mr Brown, assert (i) that the FtT made a mistake of fact when concluding that the appellant had overstayed in the UK for longer than 90 days and (ii) that the FtT erred in concluding that Article 8 was not engaged.

It is prudent for me to initially consider the second of the grounds. The appellant was only entitled to pursue human rights grounds before the FtT and, consequently, the issue of whether the appellant met the requirements of the Rules was relevant to but not determinative of the appeal.

The appellant had to first demonstrate that Article 8 was engaged. After giving careful consideration to all the relevant matters, the FtT concluded against the appellant on this point. The appellant's challenge to this finding, in reality, amounts to an assertion that the FtT's decision on this issue was irrational.

In my conclusion, on the limited evidence made available to the FtT, it was entirely open to it to conclude that Article 8 was not engaged, for the reasons it gave - indeed I would have come to the same conclusion on the available evidence. This conclusion disposes of the appellant's appeal to the Upper Tribunal, irrespective of my conclusion on the second of the grounds which, if made out, would necessarily have infected the FtT's proportionality assessment but does not impinge upon the assessment of whether Article 8 is engaged.

Nevertheless, for completion I will go on and make observations in relation to the challenge to the FtT's finding that the appellant overstayed in the UK for a period of over 90 days. In this regard, I have been provided with a number of documents which ought to have been put before the First-tier Tribunal - certainly by the Secretary of State pursuant to his duty of candour and, if the appellant had access to them, by the appellant as well - but were not.

It is clear from these documents that the appellant previously claimed asylum in the UK. This claim appears to have been made on 20 November 2011. I have been provided with a copy of Form IS.151A in the appellant's name, dated 20 November 2011. This form provides notice to the appellant that he is a person liable to removal, and it also identifies that he is being treated as an illegal entrant. This form does not state on its face when it was served. In addition, I have been provided with a notice dated 4 January 2012 which records that it

was served on the appellant on 6 January 2012. This notice is headed "Variation of Leave to Enter or Remain". In its body it identifies that the appellant's asylum claim was refused on 30 December 2011, and it states thereafter:

"The leave to enter or remain you had at the time you made this application [20 November 2011] is statutorily extended for the period when you can appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002, or until an appeal brought under that Section is finally determined, withdrawn or abandoned."

This latter notice (which generated a right of appeal to the FtT) is mutually inconsistent with the IS151A. The fact that the First-tier Tribunal did not have this document before it has, in my conclusion, led to it misunderstanding the material circumstances prevailing in the period immediately prior to the appellant departing the UK in 2012. In particular, it appears that the FtT were unaware that the appellant had appealed against the decision served on the 6 January 2012.

Applying the terms of the 6 January 2012 notice, the applicant had section 3C leave during the period from 6 January until the exhaustion of the appeal process, which was on 11 April 2012. The applicant, having lost his appeal and not having pursued matters further, left the United Kingdom on 29 April 2012, which, by my calculation means he remained in the UK as an overstayer for a period of only 18 days - not in excess of 90 days As a consequence, the appellant is not excluded from obtaining entry clearance as a visitor by operation of paragraph 3.9(a) of Appendix V of the Rules.

I make one further observation. The FtT found at [21] of its decision that the appellant had not engaged in deception. Despite Mr Mills submission to the contrary, I conclude that the FtT was entitled to make such a finding on the available evidence.

For the reasons given above, I find that the FtT's decision does not contain an error of law capable of affecting the outcome of the appeal and, consequently, the decision of the FtT must stand.

Signed:



Upper Tribunal Judge O'Connor

Date 7 January 2019