Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/28410/2011

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 11 March 2014	**On 01st April 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NATASHA GWARA

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Ms Ottilia Mugadzu, Sponsor
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Zimbabwe who was born on 9 June 2004. On 6 October 2011, the appellant applied for entry clearance under para 319X of the Immigration Rules (HC 395 as amended)to join her aunt, Ms Otillia Mugadzu in the UK. On 17 October 2011, the Entry Clearance Officer (ECO) refused the appellant's application. First, the ECO was not satisfied that the appellant and sponsor were related as claimed (para 319X(i)). Secondly, the ECO was not satisfied that there were "serious

and compelling family or other considerations which make exclusion of the [appellant] undesirable and suitable arrangements had been made for the [appellant's] care." (para 319X(ii)).

2. On 20 February 2012, the Entry Clearance Manager (ECM) reviewed the ECO's decision. On the basis of the documents submitted to the ECM, he was satisfied that the appellant and sponsor were related as claimed, namely niece and aunt respectively and that, therefore, the requirement in para 319X(i) was met. Nevertheless, the ECM upheld the refusal under para 319X(ii).

3. The appellant appealed to the First-tier Tribunal. She did not request an oral hearing. In a determination promulgated on 18 June 2012, Judge Devlin dismissed the appellant's appeal. First, he was not satisfied on the evidence before him that the requirement in para 319X(ii) of the Rules was met. Further, the Judge found that the refusal of entry clearance was not a breach of Article 8 of the ECHR.

4. The appellant sought permission to appeal to the Upper Tribunal. On 22 October 2013, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal on the basis that the Judge had made an error in stating the appellant's age and that this was relevant to his assessment of proportionality under Article 8. Thus, the appeal came before me.

5. At the hearing, the appellant was not legally represented but the sponsor, the appellant's aunt, attended the hearing and spoke on behalf of the appellant.

6. In his submissions, Mr Richards, on behalf of the ECO accepted that the Judge had misstated the appellant's age as being 14 (see paras 144 and 152 of the determination). In fact, at the date of decision on 17 October 2011 the appellant was 7 years of age having been born on 9 June 2004. Nevertheless, Mr Richards submitted that, although that error was unfortunate, it was immaterial. He submitted that given the Judge's findings in paragraph 121 of his determination, in particular that the appellant had not broken all ties with her parents, the Judge could not have reached any other decision even if he had correctly identified the appellant's age as 7. Indeed, Mr Richards submitted that at this younger age, it was even more likely that the Judge would have found, as he did, namely that it was in the appellant's best interests to remain with her parents in Zimbabwe. He invited me, therefore, to dismiss the appeal.

7. Ms Mugadzu relied on the fact that the appellant's father had died on 4 October 2012 and she drew my attention to his death certificate. She also relied on the fact that her mother was 62 years of age; she was getting old; and she had problems with her health which meant that sometimes it was difficult for her to look after the appellant. The sponsor also referred me to the fact that the appellant had been raped on the way from school in November 2013 and, again, she referred me to supporting documentation in the file.

8. The appellant's case before the First-tier Tribunal was that she no longer had any ties with her parents in Zimbabwe and that she was wholly dependent upon the sponsor who had sole responsibility for her. So far as relevant, para 319(ii) provides as follows:

> "319 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that:
>
> ….(ii) The relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and 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…"

9. In his determination, the Judge carefully set out the evidence relevant to his decision in relation to para 319X(ii). At para 121, the Judge made a number of findings on the evidence which, as I have already noted, did not include any oral evidence from the sponsor as no oral hearing was requested. Those findings were as follows:

> "121. Looking at all the documentary evidence in the round, I find that I cannot be satisfied that, as at the date of the Respondent's decision:
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> (i) the Appellant's parents had broken all ties with her;
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> (ii) the Appellant's father did not have settled accommodation;
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> (iii) her mother's whereabouts were unknown;
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> (iv) the Appellant's parents lived at a different residential address from the Appellant;
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> (v) they had abdicated all responsibility for the Appellant and had taken no part in her upbringing since 2007;
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> (vi) the sponsor had sole responsibility for the Appellant;
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> (vii) the Appellant was looked after by Mrs Mugadzu alone, or that Mrs Mugadzu was no longer able to look after her; or,
>
> (viii) there was no one other than Mrs Mugadzu to care for the Appellant."

10. Those findings led Judge Devlin to make the following finding at para 122:

> "122. It follows that I cannot be satisfied that, as at the date of the Respondent's decision, there were any serious and compelling family or other considerations which would have made exclusion of the Appellant undesirable or that suitable arrangements have been made for her care."

11. Those findings are not challenged in this appeal to the Upper Tribunal. Having carefully considered the determination, there is no conceivable basis upon which it can be said that the Judge was not entitled to make the findings that he did.

12. In the light of those findings, the Judge then went on to consider whether the refusal of entry clearance breached Article 8 of the ECHR. In doing so, both at para 144 and 152, the Judge referred to the appellant as being 14 years of age. That was clearly a mistake. The appellant was seven years of age (and not four as the Judge granting permission to appeal appears to have thought) at the date of the ECO's decision. Having noted that it was not established that the "appellant's parents had abdicated their role in the appellant's upbringing" (see para 147), the Judge went on to consider whether it would be in the best interests of the appellant to be separated from her family (her parents and grandmother) in Zimbabwe and to come and live in the UK with her aunt. At para 152, the Judge noted that it is:

> "almost inevitable that [the appellant] will have formed some bonds with those responsible for her day to day care. These bonds too may well be significant."

13. At para 153, the Judge concluded:

> "Consequently, I cannot be satisfied that separation from the Appellant's family in Zimbabwe is preferable to continued separation from the sponsor."

14. Whilst the Judge made that finding, on the basis that he thought that the appellant was 14 years old, it is inconceivable that he would have made a different decision if he had correctly directed himself to the fact that she was seven years old. Likewise, his finding that it was not established that it was in the appellant's "best interests" to settle in the UK (see para 157 of his determination) was inevitable given his earlier findings when rejecting the appellant's claim under the Immigration Rules. The appellant had simply failed to establish that her parents no longer had any ties with her in Zimbabwe; that they were not living at the same address as her; that they had abdicated all responsibility for her upbringing since 2007; and that if the appellant's grandmother was unwell there was no-one else to care for the appellant. It is difficult to conceive of any other finding in those circumstances, other than that the best interests of the appellant were to remain in Zimbabwe with her family with which she was currently living.

15. As I explained to the sponsor at the hearing, the evidence which she drew to my attention, namely that the appellant's father had died and that the appellant had been raped in November 2013, was not evidence before the Judge: the latter related to something which, if established, occurred after his decision was made. The Judge could not, therefore, be criticised for failing to have regard to this evidence. In any event, the evidence relates to circumstances which post-date the ECO's decision and was not relevant to the appellant's circumstances at the date of decision (see, ss.85(5) and 85A(2), Nationality, Immigration and Asylum Act 2002). At best, the evidence could form the basis of a new application and a claim by the appellant that in her new circumstances she should be granted entry clearance.

16. For the reasons I have given, the First-tier Tribunal did not err in law in dismissing the appellant's appeal both under the Immigration Rules and under Article 8 of the ECHR.

17. The First-tier Tribunal's decision to dismiss the appeal on all grounds stands.

18. The appellant's appeal to the Upper Tribunal is, therefore, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: