**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: AA/00175/2014**
**AA/06122/2014**

**THE IMMIGRATION ACTS**

| **Heard at Manchester Piccadilly** | **Decision and Reasons Promulgated** |
|---|---|
| **On 22 December 2015** | **On 22 January 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**PATIENCE THEMBELIHLE MOYO**
**PRUDENCE MOYO**
**(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms C Johnrose for Broudie Jackson and Cantor
For the Respondent: Mr A McVitie Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.

3. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Levin promulgated on 6 October 2015 which dismissed the Appellants appeals against a decision to remove them from the UK following a decision to refuse their claims for asylum .

Background

4. The Appellants are sisters born on 18 March 1993 and 29 April 1997 whose claim to be Zimbabwean nationals was disputed by the Respondent who believed them to be South African.

5. On 4 August 2011 the first Appellant applied for asylum and on 7 April 2014 the second Appellant applied for asylum in her own right having initially been a dependent in the appeal of her sister.

6. The Secretary of State refused the Appellants applications. The refusal letter in respect of the first Appellant was dated 19 December 2013 and in respect of the second Appellant dated 6 August 2014 . The reasons for refusal were, in essence:

   (a) The Respondent did not accept that the Appellants were Zimbabwean as claimed because they applied for transit visas in 2009 in Pretoria and produced South African passports giving their place of birth as Johannesburg where they lived with their parents; in her asylum interview the first Appellant sated she spoke English and Zulu and not Shona or Ndebele; the first Appellant demonstrated a lack of knowledge about the area of Zimbabwe where she claimed to live.

   (b) The first Appellants credibility was undermined by her claim in her screening interview that she had never been fingerprinted when she had been fingerprinted in Pretoria in 2009.

   (c) Considering their claim at its highest those who sought to harm the Appellants in Zimbabwe were opportunistic and would be unable to locate them if they relocated. The second Appellant was a minor but could return with the first Appellant and her parents whose claims had been refused.

   (d) In relation to Article 8 the Appellants did not meet the requirements of Appendix FM or paragraph 276ADE and there were no exceptional circumstances to warrant a grant of leave outside the Rues. The best interests of the second Appellant were best served by her returned to South Africa with her sister and her parents.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Levin ("the Judge") dismissed the appeals against the Respondent's decision. The Judge found :

   (a) The issue in the case was whether the Appellants were Zimbabwean as they claimed as Ms Johnrose conceded they would not be at risk in South Africa.

(b) He did not find their claim that their grandmother in Zimbabwe arranged for them to come to the UK after a friend was raped and they were threatened by Zanu PF activists.

(c) He found they had travelled to the UK using genuine South African passports because they were citizens of that country.

(d) Even if her were wrong and they were Zimbabwean he did not find that they would be at risk in their home area as they were not active MDC supporters.

(e) He found that the Appellants did not meet the requirements of Appendix FM or paragraph 276ADE.

(f) He considered the Appellants case under Article 8 outside the Rules and directed himself in accordance with the guidance in Razgar [2004] UKHL 27

(g) He accepted that family life existed between the two Appellants and with her parents and brother. He found that the decisions engaged Article 8.

(h) In considering the final question in Razgar, the proportionality of the decision he took into account s 55 of the Borders, Citizenship and Immigration Act 2009 and section 117B of the Nationality, Immigration and Asylum Act 2002 and found the decision proportionate.

8. Grounds of appeal were lodged arguing that :

(a) The Judge had given inadequate reasons for concluding that the Appellant s were South African nationals in that he failed to give sufficient weight to the age of the Appellants at the time of the events they described; he made a factual error in respect of the subject access documents which were from the Home Office and not Social Services as he asserted.

(b) In the assessment of proportionality, he failed to consider how the Appellants could continue family life with their mother if they were returned to South Africa and she were returned to Zimbabwe; he failed to take into account the views of Prince himself as to whether it was reasonable for him to leave the UK; he failed to take account of the fact that the parents could not be removed while they had an outstanding application; failed to take into account delay.

9. Permission was initially refused and the grounds were renewed. On 9 February 2015 Upper Tribunal Judge Reeds gave permission to appeal on both grounds although she found that there was less merit in the claim that the Judge had given inadequate findings in respect of the Appellants nationality.

10. There was a Rule 24 response which argued that the Judge made reasonable sustainable findings that were open to him in respect of nationality. The findings in relation to the proportionality of the decision were open to the Judge and the fact that the Appellant s parents and brother were granted discretionary leave after the date of hearing did not render the Judge's decision in error.

11. At the hearing I heard submissions from Ms Johnrose on behalf of the Appellants that:

(a) She relied on the grounds of appeal.

(b) She conceded that the ground in relation to the adequacy of reasons as to nationality had less merit and reiterated what was contained n the grounds.

(c) In relation to the Article 8 assessment she argued that the Judge did not carry out a full assessment and did not give proper weight to the fact that Prince was a qualifying child and why it was reasonable to remove him.

(d) The Judge did not consider that the parents would not be removed while applications were still outstanding.

12. On behalf of the Respondent Mr McVitie submitted that :

(a) The decision to grant the Appellants parent's discretionary leave was not before the Judge.

(b) The Appellants bundle as it was before the First-tier Judge made no reference to Prince.

(c) As to where they lived that was a matter for the family to decide, they were not British and their claim was not made out.

(d) A delay in relation to persons whose case was not before the Judge was not relevant to these Appellants and there was nothing in EB (Kosovo) [2008] UKHL 41 to suggest that. The Appellants in this case had their appeals dealt with in 2 years.

(e) The fact that the Respondent had assisted in reuniting the Appellant s with their parents did not prevent them being removed.

(f) In relation to the credibility findings the Judge had given strong reasons for his findings. He was clearly aware that the Appellants were minors as he mentions it several times.

(g) The factual mistakes were minor and not material.

13. In reply Ms Johnrose on behalf of the Appellants submitted:

(a) Delay was material if the Respondent was considering family life.

(b) The Judge was obliged to consider the reasonableness of removing a 'qualifying child'

(c) There was evidence in relation to Prince in the bundle.

**The Law**

14. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

15. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable

as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration judge concludes that the story told is untrue.

16. In relation to challenging credibility findings it was said in Mibanga v SSHD [2005] EWCA Civ 367 Buxton LJ said this:

> "Where, as in this case, complaint is made of the reasoning of an adjudicator in respect of a question of fact (that is to say credibility), particular care is necessary to ensure that the criticism is as to the fundamental approach of the adjudicator, and does not merely reflect a feeling on the part of the appellate tribunal that it might itself have taken a different view of the matter from that that appealed to the adjudicator."

17. I remind myself that this is an error of law appeal and therefore I rely on the principles set out in Edwards v Bairstow [1956] AC 14. There, in an error of law appeal, the House of Lords applied the standard of "*the true and only reasonable conclusion*" open to the Commissioners [at p10] and, notably, in doing so, employed the language of "*perversity*" [at p 6]. They defined the latter as a case in which -

> "… the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal."

In the language of Viscount Simonds [at p 6]:

> "For it is universally conceded that, although it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

**Finding on Material Error**

18. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

19. I will deal firstly with the challenge that the Judge's findings in relation to whether the Appellants were South African nationals were adequate, a challenge that was identified in the permission and accepted quite properly by Ms Johnrose as being one with less merit.

20. The difficulty with this argument is that even if I were to accept that this was an error it could not have been material. The Judge in paragraph 46 considered the Appellants claim at its highest, that they were, as they claimed, Zimbabwean nationals and found that in the light of the relevant country guidance given that they did not claim that either they or any members of their family were active MDC supporters they would not be at risk in North Matabeleland their home area.

21. Nevertheless I have considered their argument in relation to the findings on their South African nationality and I am satisfied that the Judge gave ample findings against a background of understanding the ages of the Appellants at the time of the

events described. He did so against the background firstly of findings in relation to the separate asylum claims of both parents which were refused with adverse credibility findings made in respect of their claims based on Zimbabwean nationality and MDC activities. Both parents had used South African passports to travel to the UK and in the father's appeal there was a positive finding that the passport was genuine and in the mothers appeal a finding that it may or may not have been genuine.

22. Against this background it was open to the Judge to find in paragraph 28 that their account of the circumstances in which they left Zimbabwe in 2011, the costs of travel, an agent who obtained false South African passports could be covered by the sale of two cows was not credible.

23. Moreover their claim never to have lived anywhere but Zimbabwe was inconsistent with the clear evidence he set out at paragraphs 29 - 31 that South African passports in the names of the two Appellants stating that they were born in Johannesburg were produced to the BHC in Pretoria in April 2009 in support of visa applications. Both the names, dates of birth and fingerprints of the passport holders matched those of the Appellants. It was open to the Judge to draw an adverse inference from the fact that both Appellants in previous screening interviews had denied ever being previously fingerprinted and conclude that they had not been provided with fraudulent passports by the agent in 2011 because there was clear evidence that they had the passports in 2009. I reject the suggestion that the Judge has failed to give sufficient weight to the fact that the Appellants were being asked to recall events when they were minors as he set out with meticulous care the chronology in this case nor does it alter the fact that their claim was that the agent produced the fraudulent passports whereas the evidence was that the passports in their details were in existence 2 years previously. I am therefore satisfied that the Judge gave adequate reasons for why he accepted that the South African passports were genuine and the weight he gave to each particular piece of evidence was a matter for him.

24. The Judge also gave a number of other reasons (paragraphs 36 - 45) why he did not accept that the Appellants were Zimbabwean which clearly he considered in the round with the passport evidence:

- He attached limited weight to the birth certificates which were obtained a number of years after their birth;
- He accepted they spoke Ndebele but noted they did not say this in their interviews. He rejected the explanations given orally for this and gave clear reasons for doing so.
- He found the first Appellants claim of events both in relation to political events and the claimed rape of a friend in Zimbabwe and why they fled was confused and incredible.
- There were discrepancies he noted in relation to where they lived between the evidence of the Appellants and their mother.(41 - 43)
- He found the credibility of their claim generally was undermined by the failure of their father to attend court and give evidence on their behalf. He rejected the explanation given for his absence that he was doing voluntary work

25. I accept that there was a factual error in relation to the documents contained in the 'subject access request' in which the authors appeared to accept that the Appellants were probably Zimbabwean. The Judge stated incorrectly that these were social services documents when they were in fact from case workers in the Home Office. Given that these were preliminary observations and that the basis of the Respondents case was, by the time of the refusal letter, that they were not Zimbabwean I am satisfied this made no material difference as the Judge was entitled to disagree just as the Respondent was entitled to change their mind if reasons were given.

26. The Judge's assessment of proportionality was also challenged in that there was no assessment of where, given the claimed contradictory findings as to the nationalities of the Appellants and their parents, family life would be enjoyed. I am satisfied that this was not a material issue: the Judge accepted the previous decisions that the father and mother had links to both South Africa and Zimbabwe and that they had passports for South Africa and that the Appellants were South African therefore the venue for family life was not something that rendered the decision disproportionate. The suggestion that they could if they chose all live in South Africa was not inconsistent with the findings made.

27. I am satisfied having listened very carefully to the arguments of Ms Johnrose and reading the skeleton argument that there is no identification of any fact that the Judge has failed to consider the challenge is as to the weight the Judge accorded the facts that underpinned his analysis. And clearly that was a matter for him.

28. In asserting that the Judge in essence failed to give adequate weight to the best interests of the Appellants brother I am satisfied that it was open to the Judge, given that at the time of the hearing while the parents and the brother had cases outstanding with the home office they had not been resolved to conclude at paragraph 19 that it would not be unreasonable for Prince to leave the UK with his parents. The suggestion that the Judge was requiring the parents to leave the UK at a time when they could not be removed does not reflect the findings made by the Judge: he made clear at paragraph 65 that this was a choice that was open to them to leave with the two Appellants.

29. There was some argument before me and before Judge Levin that paragraph 117B(6) applied and that Prince was a qualifying child: this was properly rejected by the Judge on the basis that it was reasonable for him to leave the UK. I am also satisfied that the Judge could also have found that for that section to apply the Appellant's would have had to be in a parental relationship with Prince which clearly they were not.

30. It was finally the Judge failed to take account of the delay and Ms Johnrose before me relied on EB (Kosovo) (FC) v SSHD [2008] UKHL 41. I have looked carefully at the decision of Judge Levin and there is no reference to there being any argument as to delay before him. I have also checked the notes of evidence he made as I accept that the decision itself may not record all of the submissions and I could find no argument recorded in the notes that delay was of relevance in this case. An error of law hearing is not the time to reargue a case in a way that was not before the Judge. This was not an obvious point given that decisions in the Appellant's cases were made relatively promptly as they only arrived in the UK in 2011 and while the first

Appellant made a claim in her own right the second Appellant did not make a claim in her own right until 2014. The case of EB was moreover addressing the issue of delay in an applicant's case not delays in another persons case. I do not accept that delays in addressing the appeals of the Appellants parents at a time when the Appellants were not even in the UK could be relevant to the Appellants appeal when at the time of the Judge's decision the parents and brother could have been removed.

31. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

32. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

**CONCLUSION**

33. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

**DECISION**

34. **The appeal is dismissed.**

Signed Date 20.1.2016

Deputy Upper Tribunal Judge Birrell