



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/05081/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On Friday 20 April 2018**

**Determination
Promulgated
On Wednesday 25 April
2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS FRANCISCA TADIWANASHE SHANICE MUTUNGAMA

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr N Garrod, Counsel instructed by RMB solicitors
For the Respondent: Mrs Z Kiss, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. No order was sought by the Appellant. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. The Appellant appeals the decision of First-tier Tribunal Judge R G Walters promulgated on 2 August 2017 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the

Respondent's decision dated 27 February 2017 refusing her human rights claim as contained in an application made on 5 January 2017 seeking entry as the child or other dependent of a settled person under paragraph 297 of the Immigration Rules.

2. The Appellant is a national of Zimbabwe. She was born on 22 March 2001. She applies to join her half-sister who is settled in the UK ("the Sponsor"). It is said that the Appellant cannot continue to reside in Zimbabwe as there is no-one to look after her. Her mother is said to be too ill to do so. One of her aunts also has a depressive illness and cannot care for her. The other aunt who was caring for her has relocated to the Middle East.
3. The Judge found that the Appellant could not show that there are serious and compelling family or other considerations which make the exclusion of the Appellant desirable for the purposes of paragraph 297 ([18] of the Decision). The Judge did not accept that Article 8 ECHR was engaged on the evidence before him. He therefore dismissed the appeal.
4. The first of the grounds relies on the Respondent's failure to provide the Respondent's bundle. The Sponsor was unrepresented at the hearing and it is asserted that the Respondent's bundle would have included "crucial evidence" which was put before the Respondent with the application. It is suggested that the Judge should have alerted the Sponsor to the Respondent's duty to provide a bundle, the implication being that there was a procedural unfairness rendering the Decision unlawful.
5. The second ground challenges the Judge's findings (or lack of findings) on certain of the evidence. It is there noted that the Judge has failed to give due consideration to the Sponsor's oral evidence.
6. The third ground concerns the Judge's finding that there are no serious and compelling family or other considerations. It is pointed out that the Appellant is a minor child. It is asserted that she has "experienced trauma" and does not have anyone to care for her or the ability to care for herself. Reference is made to a failure to consider the Appellant's best interests. The Appellant notes that the Judge has disregarded the guardianship order made by a Court in Zimbabwe.
7. Permission to appeal was granted by First-tier Tribunal Judge Blundell on 31 January 2018 in the following terms so far as relevant:-

"...

[2] Whilst the judge was evidently faced with a paucity of evidence, I consider it arguable that he has failed to consider the question presented by paragraph 297(i)(f) in accordance with the guidance given by the Upper Tribunal in Mundebe [2013] UKUT 88 (IAC). It is arguable that the judge failed to make clear findings of fact regarding the appellant's family and other circumstances in Zimbabwe, and that he failed to consider (in particular) whether the

appellant has unmet needs in her present situation. He arguable failed, in the circumstances, to consider the appellant's best interests and to reach a lawful decision.

[3] Whilst I would not have been minded to grant permission to appeal on the other points raised in the grounds of appeal, all grounds may be argued."

8. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

Discussion and conclusions

9. I can dispose shortly of the point about procedural fairness. The Respondent was unrepresented before the First-tier Tribunal Judge. The Judge could not therefore simply ask for a copy of the bundle. Furthermore, Mrs Kiss confirmed that she still did not have a Respondent's bundle on file. Although the Judge noted at [4] of the Decision that he might have found a copy of the Visa Application Form ("VAF") helpful, I was shown a copy of that and I cannot see how that would have assisted at all. I was also given a copy of the list of documents submitted with the VAF. Having checked through the list with the benefit of Mr Garrod's submissions, it was clear that the only evidence which the Judge did not have in the bundle submitted by the Appellant consists of two letters, one from the Sponsor and the other from her partner which merely confirm the position. Since the Sponsor gave oral evidence at the hearing, those add nothing. It certainly cannot be said that the Appellant was deprived of the opportunity to rely on "crucial evidence".
10. However, that does cross over with some of what is said in the remaining grounds, particularly in relation to the Judge's treatment of the evidence which he did have before him.
11. First, the Sponsor gave oral evidence at the hearing, although since she was unrepresented, there may have been a blurred line between what was evidence and what submissions. Whether evidence or submissions though, the Judge has failed to refer to what was said at all. That is of potential materiality because, for example, Mr Garrod pointed out that the Judge has misunderstood the Appellant's case at [7] of the Decision where he refers to the Appellant moving to live with the aunt who is relocating to Dubai whereas the position is that the aunt moved in with the Appellant and her mother. That is relevant to one of the reasons given for refusing the application, that the Appellant lived at the same address as her mother in the four years after her mother's stroke, with the inference that her mother had been able to care for her.
12. In similar vein, the Judge refers in two places to the Appellant's mother as the Appellant's grandmother. It appears therefore that he has not understood the factual premise behind the claim that the Appellant has

no-one left in Zimbabwe who can care for her because her mother is too ill and the aunt who was caring for her is no longer in the country.

13. Second, at [8] of the Decision, the Judge refers to the supporting letter from the Appellant's aunt who has moved to Dubai and then says at [9] of the Decision that, although it is endorsed by a Commissioner of Oaths, it does not take the form of an affidavit. He does not though reach any conclusion on the content of that letter or make any finding that, as a result of what he says at [9] of the Decision, he does not give this evidence any weight.
14. In this and other regards, Mrs Kiss is right to point out by reference to the documents that they do not say very much at all. This is so, for example, in relation to the Guardianship Order in the Sponsor's favour which states merely that "The applicant, Matha Mtambalika [the Sponsor] be and is hereby appointed as the guardian of Francisca Shanice Mutugamba". As the Judge observes at [15] of the Decision, due to the lack of other paperwork, there was nothing to show on what that order was based or the reasons for it. For example, in the UK, there would generally be some form of interlocutory procedures and the Family Courts would generally have at the very least a report as to whether the proposed guardianship arrangement is in the child's interests. In this case, that is of particular importance because it is not clear whether the Court was told that the Sponsor lives in the UK and that placing the Appellant in her care involves uprooting the Appellant from the country where she was born and has grown up. It also involves separating the Appellant from her mother.
15. Another area of evidential omission is the absence of any statement from the Appellant herself. Although she is still a child, the Appellant is now aged seventeen years. She is educated. She attends a boarding school. I would in such circumstances expect a statement from her setting out some information about her family and other circumstances in Zimbabwe. There is a lack of evidential underpinning for example for the assertion in the grounds that the Appellant has experienced trauma and is incapable of looking after herself.
16. The Judge has made the point at [11] to [13] of the Decision that the medical evidence supporting the assertion that the Appellant's mother (there said to be her grandmother) cannot care for the Appellant is not comprehensible. That may be so in relation to the illnesses there described and I agree with Mrs Kiss's submission that the medical report is highly unsatisfactory due to lack of detail on the crucial points. However, the doctor does say that the Appellant's mother is unable to look after a minor in her condition. The Judge has not had regard to that aspect of the report.
17. Mr Garrod also pointed out that the Judge has failed to consider at all the evidence that the Appellant attends boarding school. As I observed, I am unclear how that assists the Appellant given that, at least in term-time, she will have the care of the school to meet her day-to-day needs.

However, Mr Garrod is right to note that this evidence is not considered at all.

18. I agree with what is said in the grant of permission about the paucity of the evidence before the Judge. There is however a paucity of reasoning on the part of the Judge and a failure to make findings on the central aspects of the appeal. In that regard, whilst the appeal is only on the basis that the decision breaches the Appellant's human rights, it is central to that issue whether she can meet the relevant rule. As Mrs Kiss also pointed out, there are no findings on the accommodation and maintenance requirements of that rule, although, once again, there is very limited evidence in that regard.
19. Although, as I say, there was limited evidence as to the "serious and compelling family or other considerations which make the Appellant's exclusion undesirable" justifying a conclusion that paragraph 297(f) is met, the Judge needed to make findings about the evidence which there was and provide reasons for finding that the rule is not met. The Appellant is entitled to know the reasons why she has lost.
20. For those reasons, I am satisfied that there is a material error of law in the Decision and I set it aside. Mr Garrod initially submitted that the appeal should be remitted for findings to be made. However, as I pointed out, this may not be in the Appellant's interests in this case for two reasons. First, although the issue whether the Appellant meets the relevant rule has to be determined by reference to date of application, the Article 8 issue more generally will need to be determined as at date of hearing. If there is any significant delay in the listing of that further hearing, the Appellant may already have turned eighteen years old. Second, and more importantly, if it is being asserted as I understand is the position, that the Appellant has no-one to take care of her needs in Zimbabwe and there are serious family or other considerations justifying her entry to the UK, it is incompatible with her position for there to be any major delay in the resolution of her case.
21. For that reason, and with the agreement of the Sponsor and the Respondent, I determined that the Decision should be re-made in this Tribunal. However, in light of the comments I make above about the unsatisfactory nature of the evidence, I agreed that I would make directions for the production of further evidence from the Appellant to deal with the evidential deficiencies which I have identified and to update the Tribunal on the current factual position.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge R G Walters promulgated on 2 August 2017 and make the following directions for the re-making of the decision.

DIRECTIONS

1. Within 28 days from the promulgation of this decision, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which she wishes to rely at the resumed hearing (taking into account my comments above about the sort of evidence which is likely to be required).
2. The appeal will be relisted for a resumed hearing on the first available date after 28 days from the date of promulgation of this decision with a time estimate of half day.

Signed



Upper Tribunal Judge Smith
2018

Dated: 23 April