



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

Appeal Number: HU/13541/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 29 April 2019**

**Decision &
Promulgated
On 2 May 2019** **Reasons**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

and

**PHANANKOSI SIBINDI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Ms S Jones, Senior Home Office Presenting Officer

For the Respondent: Ms M Kalanda, Counsel, of JK Immigration Legal Services

DECISION AND REASONS

1. This is an appeal by an Entry Clearance Officer (ECO) against the decision of Judge of the First-tier Tribunal Herbert OBE (the judge), promulgated on 9 November 2018, allowing the appeal of Mr Phanankosi Sibindi (hereafter claimant) against the ECO's decision, dated 3 October 2017, refusing his application for entry clearance to the UK, which was considered as a human rights claim.

Background

2. The claimant is a national of Zimbabwe, born in 1999. He was 17 years old at the date of his entry clearance application and at the date of the ECO's decision. He applied for entry clearance pursuant to paragraph 301 of the immigration rules (HC 395) to join his mother, Ms Sikangezele Sibindi (the sponsor), who resides in the UK. The sponsor is a Zimbabwean national who has been living in the UK since 23 December 2000. The sponsor was granted Discretionary Leave (DL) on 30 June 2016 following the Secretary of State for the Home Department's exercise of discretion outside the immigration rules. The grant of DL was for 30 months. In a statement prepared for the appeal before the First-tier Tribunal the sponsor did not explain the basis for her grant of DL.
3. In refusing the application for entry clearance the ECO noted that the sponsor had not been granted leave to remain under Part 8 of the immigration rules and that she did not have limited leave to remain with a view to settlement. The ECO noted that the sponsor left Zimbabwe 5 days after the claimant's first birthday. The ECO was not satisfied there was evidence that the sponsor and claimant had met since she left Zimbabwe and believed, with reference to the timing of the application, that the statements as to why the claimant could no longer be cared for in Zimbabwe were "devices" created with the intention of allowing his application for settlement prior to his 18th birthday "as opposed to being genuine accounts regarding the welfare of a child." The ECO was not satisfied the sponsor had sole responsibility for the claimant, or that there were any serious and compelling family or other considerations making the claimant's exclusion undesirable. The ECO also considered the application under Article 8 ECHR but concluded there was no breach of the Human Rights Act 1998. The ECO's decision attracted a right of appeal as it was a refusal of a human rights claim. The claimant exercised his right of appeal.

The First-tier Tribunal decision

4. At the appeal hearing at Taylor House on 3 October 2018 the claimant was represented by Ms Kalanba and the ECO was represented by Ms S Sreeraman, a Home Office Presenting Officer (HOPO). The judge considered a 102-page bundle of documents produced on behalf of the claimant which included statements from both the claimant and his sponsor. The judge heard oral evidence from the sponsor and considered a letter from the claimant's school via the sponsor's phone.
5. In the section of his decision containing his findings and conclusions the judge said (at [28]) there was clear evidence in the decision granting the sponsor DL that the claimant could make an application

for family reunion if there were “compelling compassionate circumstances” prior to the sponsor being granted settlement. According to the judge the “key question” was “whether there are compelling compassionate circumstances that apply and that the [claimant’s] further exclusion would be undesirable because of the family or other circumstances and that the [claimant] sponsor [sic] mother has had sole responsibility for him for a significant period of time.”

6. At [29] the judge found the claimant and his mother to be credible witnesses and that their evidence was internally and externally consistent. The judge found that “culturally” the sponsor did not abandon the claimant to other family members but monitored his well-being, his education and his progress, and that she was able to recently provide him with financial support. At [31] the judge referred to the decision of **TD (Paragraph 297(i)(e): "sole responsibility") Yemen** [2006] UKAIT 00049 and found that the sponsor made all decisions concerning the claimant with reference to her contact with him and the money she remitted. At [32] the judge found there was “overwhelming evidence” that the sponsor was solely responsible for the claimant. The judge rejected the ECO’s assertion that the application was a deliberate attempt to abuse the immigration rules. At [33] the judge found there was “ample evidence” that the claimant’s progress in school had “diminished in recent years and that he has clearly struggled without the direction and emotional support of his mother.” Based on the sponsor’s visits and the regular social contact on social media the judge found there was a ‘deeper meaning’ to the claimant’s relationship with his sponsor [35].
7. At [36] the judge stated,

I am satisfied that therefore there are compelling compassionate circumstances which means the [claimant] should be reunited with his mother and I do not find there is anything save for speculation in the opinion expressed by the entry clearance entry officer that this is anything other than a genuine attempt by the mother to be reunited with her son. She has clearly satisfied all the relevant criteria under the immigration rules and therefore I do not need to go on to consider his rights under article 8 of the ECHR. If I have been called to do so, I would have clearly found applying the principle in the case of *ex parte Razgar* [2004] UKHL 27 that the balancing exercise in terms of proportionality clearly falls in the favour of the [claimant] and not in the favour of maintain [sic] immigration control on the facts of this case.

8. Under the ‘Notice of Decision’ the judge stated:

- I allow this appeal under the immigration rules.

The grounds of appeal, the grant of permission and the ‘error of law’ hearing

9. The Grounds of Appeal contend that the judge acted in a procedurally unfair manner by restricting the HOPO’s cross-examination and asking questions of the sponsor in a leading manner. The curtailing of the HOPO’s cross-examination meant that she was unable to elicit information in respect of crucial matters relating to sole responsibility. Relevant matters could not be properly considered and the ECO was unable to make its case. The judge was said to have shown bias in favour of the claimant by asking leading questions designed to show that the sponsor had made important decisions for the claimant. A proforma spreadsheet dated 3 October 2018 and referred to in the Grounds as the “Appeal Hearing minute” was attached to the Grounds.
10. The grounds additionally contend that the judge failed to specify the “overwhelming evidence” relating to sole responsibility. There were said to be no clear reasons to support the finding of ‘compelling compassionate circumstances’. The grounds further contend that the appeal was not a family reunion case and that the judge fundamentally misunderstood the nature of the appeal.
11. Permission was granted on all grounds.
12. At the outset of the ‘error of law’ hearing Ms Jones provided a copy of the HOPO’s contemporaneous hearing notes. I heard submissions from both Jones and Ms Kalanda. Having considered the parties submissions I indicated that I was not satisfied that the allegations of bias and procedural unfairness were made out, but that I was satisfied that the judge failed to give adequate reasons for his decision, that the judge failed to make material findings of fact, and that the judge erred in law concluding that the requirements of the immigration rules were met and by failing to undertake a full Article 8 assessment.

Discussion

13. The Grounds make serious allegations against the judge relating to the fairness of the proceedings. Allegations of bias cannot be made lightly and need to be supported by accurate, cogent evidence. The correct approach to an allegation of actual or perceived bias is set out in **Alubankudi (Appearance of bias)** [2015] UKUT 00542 (IAC) and **Sivapatham (Appearance of Bias)** [2017] UKUT 00293 (IAC). I must consider whether a fair-minded observer properly informed of all the relevant facts and circumstances would conclude that there was a real possibility that the judge was biased.
14. The ECO relies on a document that is described in the Grounds as the HOPO’s ‘Appeal Hearing minute’. This is not a contemporaneous note

of the proceedings. It is apparent from the structure of the document that it is a pro forma document and that it was completed after the hearing on 3 October 2018. The general assertion in the 'minute' that the judge impeded and took over the questioning of the witness is not particularised. No detail is provided of what particular questions were allegedly hijacked by judge or what areas of questioning he prevented the HOPO from investigating. There is a general allegation that the judge led the witness (wrongly referred to as 'appellant') but there is no description of the leading questions said to have been asked. The 'minute' sets out in bullet form the submissions that were actually made by the HOPO.

15. The contemporaneous hearing record provided by Ms Jones on the morning of the 'error of law' hearing first sets out questions asked in examination in chief and then questions asked in cross-examination. The contemporaneous note identified just three instances where the judge interjected in the cross-examination. In the first instance the judge asked two questions. In respect of the other two instances the judge briefly commented on the particular question asked by the HOPO. Although it is not entirely clear from the contemporaneous note when the judge's questions finished and the cross-examination resumed, given that the two questions asked by the judge were recorded on single lines without any spacing, and all the other questions were recorded with a space between them, I find it more likely than not that the HOPO asked the majority of questions contained in her contemporaneous record. The other two interruptions recorded related to directions given by the judge to the HOPO to consider cultural norms, and his comment that there would be little research involved in choosing schools in a village in Zimbabwe. The contemporaneous note does not support the serious allegation that the HOPO was inhibited from carrying out a full cross-examination, or that the judge asked questions in a leading manner with a view to obtaining answers in order to allow the appeal. I additionally note the absence of any statement in support from the HOPO. Nor was there any indication, either in the HOPO's contemporaneous notes, or the judge's notes or the hearing record provided by the claimant for the 'error of law' hearing, that the HOPO raised with the judge any concerns she had that he was behaving in an inappropriate manner (see headnote 2(4) in **PA (protection claim: respondent's enquiries; bias) Bangladesh** [2018] UKUT 0337 (IAC)).
16. I am entirely unpersuaded that the ECO has produced sufficient evidence indicating that the judge acted in a biased or procedurally unfair manner.
17. I do however have concerns that the judge erred in law in allowing the appeal "under the immigration rules" and in concluding that the requirements of the immigration rules were met. The sponsor was granted DL on 30 June 2016. A grant of DL is not a grant of limited

leave “with a view to settlement”, as required by paragraph 301 of the immigration rules. This was a point clearly made by the ECO. This point was specifically considered by Mr Justice Gibbs in **Acan, R (on the application of) v Immigration Appeal Tribunal** [2004] EWHC 297 (Admin), a decision also concerned with the interpretation of paragraph 301 of the immigration rules.

18. The term “with a view to settlement” is used within certain categories of the immigration rules where, from the outset of the initial application, there is an expectation that compliance with the rules will lead to settlement. Within these categories an individual may be granted an initial temporary period of leave, but the grant of temporary leave is along a planned pathway to settlement. An example of this category includes paragraph 298 (applications for indefinite leave to remain as the child of parents present and settled in the UK). This must be contrasted with other categories within the immigration rules that do not lead from the outset along a path towards settlement (such as Tier 4 applicants), and with grants of leave outside the immigration rules such as DL.
19. A grant of DLR **may** lead to settlement (for example, in compliance with the Secretary of State’s policy on DL in respect of applications prior to 09 July 2012) but the grants are not ‘with a view to settlement’. DL may be issued to individuals who would otherwise qualify for asylum or humanitarian protection, or where removal would lead to a breach of Article 3 on medical grounds. DL can also, for example, be granted in respect of victims of trafficking. In each case the duration of the grant of DL will be determined by the particular facts of the case. Support for this analysis can be found in **Acan**. Mr Justice Gibbs found that the requirement of paragraph 301 were intended to refer back to previous rules in which the use of the expression “limited leave with a view to settlement” occurred. *“It had a purpose intended to be secondary to those earlier rules so as to permit a child of a person within the categories earlier referred to to have limited leave to enter or remain”* (para 83). Mr Justice Gibbs concluded, *“... the provisions in rule 301 and following, relating to leave, constitute part of a carefully constructed scheme intended, in my judgment, to flow from the particular situations contemplated by the earlier rules, 281 and 282, 295A and 295B”* (para 85).
20. The sponsor was not granted limited leave “with a view to settlement” and the claimant could not meet the requirements of the immigration rules. The judge was wrong in concluding otherwise at [36].
21. The extent to which the claimant’s circumstances fell within the terms of the DL policy relating to family reunion and the existence of ‘compelling compassionate circumstances’ was a relevant factor, but only in the context of an Article 8 assessment outside the immigration

rules. The judge did not undertake any such assessment. Although the judge referred to the **Razgar** [2004] UKHL 27 approach at [36] of his decision, no detailed balancing exercise was actually undertaken.

22. I additionally have difficulty in identifying the 'overwhelming evidence' referred to by the judge in support of his finding that the sponsor was solely responsible for the claimant. While there is certainly some evidence that the sponsor remitted funds for the claimant's benefit since she became entitled to work, and that she has visited him in 2017 and that they communicate with each other via WhatsApp, there was in fact relatively limited evidence, other than the sponsor's own word, that she was solely responsible for the claimant. The letter issued by the claimant's school dated 19 May 2017 briefly described how the school's Director of Communication became aware that the sponsor's uncle "could no longer look after" the claimant because of "old age, ill health and lack of income." The assertions contained in the letter were not otherwise supported by any other evidence. The inquiries undertaken by the school occurred in November 2015, which calls into question the circumstances and manner of the claimant's support since that time. There was no statement from the claimant's uncle, and no medical evidence that he was incapable of looking after the claimant. There was no evidence from the school that the sponsor was the one who made any of the important decisions regarding the claimant's education. There was no evidence that the sponsor paid any school fees.
23. The judge has also failed to identify the 'compelling compassionate circumstances' that he found existed and which, in his view, were sufficient to meet the requirements of the Secretary of State's DL Policy. There was no evidence that the claimant had any medical issues or that he had any other particular vulnerability. The fact that there was a deterioration in his schoolwork cannot, on any rational view, itself amount to a 'compelling compassionate circumstance'. The judge found there was a 'deeper meaning' to the claimant's relationship with his sponsor based on the sponsor's visits and their regular social contact on social media but failed to explain what that 'deeper meaning' was and failed to identify any of the social media messages that supported this finding. It therefore remains unclear whether there were any 'compelling compassionate circumstances' sufficient to render disproportionate the refusal of entry clearance. Nor has there been any assessment as to why the sponsor could not relocate to Zimbabwe in order to maintain her relationship with the claimant.
24. For all these reasons I am satisfied that the decision contains errors on points of law and must be set aside. Given the absence of adequate findings in relation to the claimant's circumstances and the failure to undertake any lawful Article 8 assessment it is appropriate

for this matter to be remitted back to the First-tier Tribunal for a fresh hearing before a judge other than Judge Herbert.

Notice of Decision

The First-tier Tribunal's decision involved the making of an error on a point of law.

The case is remitted to the First-tier Tribunal for a de novo hearing before a judge other than Judge Herbert.



Signed

29 April 2019

Date

Upper Tribunal Judge Blum