



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001937
UI-2021-001938
First-tier Tribunal No: HU/08121/2016
HU/08124/2016

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 15 July 2023**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

**ATG
GKG
(ANONYMITY ORDER MADE)**

Appellants

and

Entry Clearance Officer

Respondent

Representation:

For the Appellants: Mr Bhebhe, Legal Representative
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard by remote video at Field House on 3 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellants, citizens of Zimbabwe, have been granted permission to appeal to the Upper Tribunal against the decisions of the First-tier Tribunal (Judge Myers) promulgated 16.5.18 dismissing their linked appeals against the respondent's decision of 23.2.16 to refuse Entry Clearance to the first appellant, ATG, as the Adult Dependent Relative of his mother, AG. The second appellant, GKG, has been granted permission to appeal Judge Myers linked decision of the same date, dismissing that appellant's appeal against the decision of 23.2.16 to refuse Entry Clearance as a dependent child of AG.
2. I heard succinct submissions from both Mr Bhebhe and Mr Tan, for which I am grateful, following which I reserved my decision to be given in writing, which I now do.
3. I first observe that it is astonishing that these two linked appeals to the Upper Tribunal comes some nine years after the respondent's refusal decision. The First-tier Tribunal Judge considering the grant of permission in each of the two cases accepted that the appeal had originally been sent in June 2018 but was relodged in February 2021.
4. It is something of a mystery why these two very closely linked cases were dealt with separately at the First-tier Tribunal and in the grants of permission. Why they took until now to be listed before the Upper Tribunal when permission was granted on 19.3.21 is also a mystery.
5. Permission was granted by the First-tier Tribunal in respect of the appellant ATG on the basis that it was arguable that the reasoning at [17] of the 2018 decision gave rise to unfairness because of the respondent's failure to comply with Rule 23 of the Tribunal's Procedure Rules and in particular the failure to provide documents submitted in support of the Entry Clearance application in the refusal letter.
6. Permission was separately granted by the First-tier Tribunal (but by the same judge) in respect of the appellant GKG on the similar basis of an alleged failure of the respondent to comply with Rule 23 in not providing a copy of the documents submitted in support of the Entry Clearance application. It was further considered in that case that when considering the issue of sole responsibility, the judge adopted the respondent's position without the benefit of having considered the documents on which the respondent's decision was based.
7. At [4] of the impugned decision in relation to ATG, the First-tier Tribunal noted that before the Tribunal were the documents that accompanied the notice of appeal but not those documents which were submitted by the appellants with the application and considered by the Entry Clearance Officer in making the decision. Why copies of those documents were not retained by those acting on behalf of the appellants is not clear. However, the appellants rely on the duty under Rule 23 of the Procedure Rules, where respondent is obliged to provide copies of those documents within 14 days of the notice of appeal.
8. Directions had twice been issued by the Tribunal in 2017 for the respondent to provide those missing documents but there was no compliance with those directions. At the substantive hearing before Judge Myers on 1.5.18, the Tribunal was informed by the Home Office Presenting Officer that the documents in question could not be found and were believed to have been returned to the appellants.
9. In granting permission to appeal to the Upper Tribunal in respect of ATG, the First-tier Tribunal considered it to be arguably procedurally unfair for the First-tier Tribunal Judge to proceed on an excerpt from a medical report referenced in the

refusal letter and to have “adopted the respondent’s conclusion that it did not indicate the requirements of the Rules were satisfied. In doing so the judge essentially adopted the respondent’s position without the benefit of having considered the document on which the respondent’s decision was based.”

10. However, it is important to note that after the judge investigated whether the missing documents might be made available, neither party sought any further adjournment and, as explained at [5] of the decision, the appeal proceeded on the basis of the documentation submitted with the appeal. As noted at [18] of the decision, the judge was told that no copy of the medical letter had been retained by the appellants but at [19] the judge struggled to understand how the detailed skeleton argument could have been prepared without it or “why attempts were not made to provide an up-to-date medical report about the appellant’s condition, particular as the Tribunal gave directions on 31/10.2017 that the appellant was to file and serve copies of all medical reports upon which he seeks to rely at least seven days before the hearing.” For the reasons set out at [19], the judge rejected the sponsor’s evidence that it was not possible to obtain an up-to-date medical report.
11. It follows from the above that Judge Myers was obliged to proceed doing the best she could on the basis of the available documents. Even today, the Upper Tribunal is in the similar position; the Upper Tribunal has not been provided with copies of the missing documents which had been submitted to the Entry Clearance Officer. In dealing with this matter in the Upper Tribunal at this late stage, and in light of any evidence to the contrary, I have to proceed on the basis that the missing documents were not available to the First-tier Tribunal and remain unavailable, despite the elapse of time. It was not suggested to me by either party that anything could be served by adjourning to search for the missing documents. I reason from that scenario that there would have been no practical purpose in Judge Myers adjourning for missing documents to be provided; those documents remain missing and Judge Myers is not to be criticised for proceeding with the appeal hearing.
12. I am satisfied that there was no error of law in the judge proceeding on the limited material then before the Tribunal and had no practical alternative to doing so. The documents submitted with the application and considered by the Entry Clearance Officer were no longer available. Given the extraordinary delay between the refusal decision and the appeal, it is perhaps not surprising that documents considered by the respondent were no longer available, perhaps because they had been returned to the appellants when the time limit for an appeal expired. Whatever the explanation, I am satisfied that there were no other documents able to be put before the First-tier Tribunal or available to it.
13. In the circumstances, the judge was entitled and indeed had little option but to proceed on the material that was then before the Tribunal. If the appellants wanted to adduce further evidence on any issue, they had ample time to do so and could have applied for an adjournment, if necessary. I note that they had been directed to file up-to-date medical reports but did not comply with that direction and their explanation for not doing so was rejected. No adjournment application was made at the substantive appeal hearing and the appellants cannot now complain that the appeal was decided on the available documentation.
14. In any event, it does not appear to be even arguable that the appellants or either of them could have met the high evidential threshold required for Entry Clearance as an Adult Dependent Relative on evidence that was considered or referred to in the refusal decision. As the respondent has pointed out in the

refusal decisions, there was no indication that the appellant needed help to perform everyday tasks or whether the required level of care could be provided in Zimbabwe, both essential elements. The sponsor's evidence was considered but was not found reliable. In any event, the sponsor's evidence alone could and would not have met the specified evidence criteria for an Adult Dependent Relative under Appendix FM-SE, as it has to come from a central or local health authority, a local authority, or a doctor or other health professional.

15. Mr Bhebhe's submissions before me were to the effect that Judge Myers fell into error by not making proper findings and in relying on documentation not available to the First-tier Tribunal, effectively making assumptions about that evidence. However, as Mr Tan submitted, the judge appears to have proceeded on the basis of the appellants' cases taken at their highest. I also note that the appellants' representatives could have obtained replacement evidence for that missing but did not do so and made no application to adjourn to do so. Effectively, the First-tier Tribunal Judge was put in the position of having to deal with the appeal on the limited evidence available, doing her best. For example, in relation to the appellant ATG, the judge cited the medical evidence quoted in the skeleton argument, taking it at its highest at [20] of that decision but nevertheless found that it failed to demonstrate that that appellant needed help with personal care to perform everyday tasks, an essential requirement. Similarly, at [23] the judge noted the absence of evidence that that appellant required long-term personal care. It has not been demonstrated that the missing evidence could have cured the evidential gaps required to meet the Rules for an Adult Dependent Relative. Nothing in the grounds begins to demonstrate that the appellant ATG could have met the requirements of the Rules. Unarguably, the judge went on to do the best she could, considering the evidence outside the Rules, pursuant to article 8 ECHR.
16. Similarly, in relation to the appellant GKG, where the issue was sole responsibility, the judge did the best that could be done by considering the evidence that was before the First-tier Tribunal as to sole responsibility and assuming the representations as to the missing evidence contained within the skeleton argument to be accurate. It is true that the judge did not have access to a number of documents, listed at [17] of that decision, which were submitted with the application. However, the judge accepted at [17] that the sponsor did send money to the appellants, but found there to be no evidence that she made all the important decisions in his life. The letters from the church and the school that had been submitted to the Entry Clearance Officer were not available to the First-tier Tribunal but the judge accepted the summary of the contents of that evidence as set out in the skeleton argument, finding at [20] that even if the contents of the skeleton argument were to be accepted as an accurate reproduction of the content of the missing letters, the evidence nevertheless was insufficient to discharge the burden of proof to demonstrate that the sponsor exercised sole responsibility. It follows that even had the missing evidence been able to be placed before the judge, the appeal could not have succeeded, and the outcome would be the same, a dismissal of the appeal.
17. In all the circumstances, whilst some substantial part of the documentary evidence submitted to the respondent Entry Clearance Officer in support of the two applications was no longer available for consideration by the First-tier Tribunal, there was no prospect of that missing evidence ever being produced by the respondent, as confirmed by its absence even now. The nature of that evidence is clear from the refusal decision and the submissions on behalf of the appellants. It was open to the appellants' representative to seek to obtain further copies or replacement evidence for that missing evidence, but no effort was made to do so. As the judge stated, it is difficult to understand how the skeleton

argument could have been drafted without access to that missing evidence. In any event, there was no application to adjourn for the missing evidence to be obtained or replacement evidence provided, leaving the judge to make the decisions on the linked appeals doing the very best she could. I am satisfied that the judge gave the benefit of any doubt as to the content of that missing evidence but doing the best that could be done, and apparently taking that evidence at its highest, it is reasonably clear that the missing evidence would have been insufficient for the appeal of either appellant to succeed. It follows that the appeals as made were both bound to fail.

18. In reality, whilst the fact that submitted evidence is now missing is not the fault of the appellants, the appellants seek to take tactical advantage of the fact that evidence produced on their behalf went missing, probably through the effluxion of time when there was no appeal brought against the decisions of the Entry Clearance Officer for a number of years. It may have been returned to the appellants, but I can make no finding to that effect. I accept that the appellants are not to be blamed for the absence of that evidence, but I do question why they did not attempt to recreate or replace that evidence. However, for the reasons set out above, I am not satisfied that the missing evidence could or would have made any material difference to the outcome of the appeals. In the circumstances, I am not satisfied that the First-tier Tribunal's treatment of the appellants' cases was procedurally unfair, noting that the judge appears to have largely accepted the alleged content of that evidence as set out in the skeleton argument.
19. In reaching my conclusions, I have carefully considered the case of Cvetkovs (visa - no file produced - directions) Latvia [2011] UKUT 212 (IAC), as relied on by the appellants and cited to me in submissions. Whilst the respondent was unable to comply with the requirements of the Procedural Rules, and that failure is not to be visited on the heads of the appellants, as stated for the reasons set out above, I am not satisfied that on the facts of this case the missing documentation could or would have made any difference to the outcome of the appeals as the evidence submitted clearly did not and could not comply with the specified requirements of Appendix FM-SE, leaving the appeals to be determined outside the Rules on article 8 ECHR considerations, which were clearly applied with an adequate proportionality balancing assessment.
20. I am also not satisfied that the First-tier Tribunal erred in its references to the previous appeal from 2013 and the adverse credibility findings of Judge Hollingworth at [21] of the decision in relation to the appellant GKG. It is clear that Judge Myers made an independent assessment but was not satisfied that the detailed requirements of the Rules could be met. Looking at the nature of the evidence adduced, I am more than satisfied that the appellants could never have succeeded under the Immigration Rules.
21. In the circumstances, I am satisfied that no material error was made by the First-tier Tribunal in the making of the decisions in respect of each of the two appellants.

Notice of Decision

The appeal of each appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal in respect of each appeal stands as made and each appeal remain dismissed on all grounds.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 July 2023