Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/17788/2013
OA/17790/2013
OA/00939/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2015	**On 20 April 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

TSM
TM
TPM
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms M Rhind, Legal Representative of IR Immigration Law LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants who are brothers and citizens of Zimbabwe respectively born on 17 July 1995, 30 July 2002 and 28 July 1998 against the decision of First-tier Tribunal Judge A M Black who sitting

at Taylor House on 27 November 2014 and in a determination subsequently promulgated on 8 December 2014 dismissed the appeal of the Appellants against the decisions of the Respondent to refuse them entry clearance to settle in the United Kingdom as the dependants of their two aunts under paragraph 297 of the Immigration Rules, the decisions in respect of the first and second named Appellants having been dated 6 September 2013 and that in relation to the third Appellant dated 27 November 2013. The parties had agreed before the First-tier Tribunal Judge, that their appeals should be considered and determined together.

2. In granting the Appellants permission to appeal that decision, First-tier Tribunal Judge Lambert considered that the Appellants' first ground (that argued procedural unfairness in that the judge made findings on an issue concerning the address of the Appellants and who they were living with at the date of application, that had not been in dispute between the parties) as being "both arguable and in the circumstances of this case material to the outcome".

3. It was indeed apparent that as submitted by the Appellants, it was at no stage suggested in the refusal of entry clearance, cross-examination or submissions to either of the Sponsors, that the Appellants did not in fact live with their cousin and in that context no further evidence was provided in relation to evidence that was believed to have been accepted.

4. The Appellants' application for entry clearance was made on the basis that the first two named Appellants were residing with their cousin, that there were no other family members who could assist in their care and that the arrangement was temporary. The appeal forms for the first and second named Appellants identified them as living in one room with their cousin who was unable to look after them any longer. The witness statements provided in support of their appeal further confirmed that the Appellant's were living with their cousin.

5. Additionally the Sponsors gave oral evidence that after the death of the Appellants' father they sought temporary care for the children and it was their cousin with whom the children were left. The Appellants' father had died in March 2011.

6. In their grounds of application, the Appellants submitted that it was not put as part of the Entry Clearance Officer's case either in the refusal letters, cross-examination or submissions that it was not accepted that the children lived with their cousin. It was submitted that had that been raised as an issue, the Appellants would have sought to have addressed this point with further evidence (such as school records) as well as oral evidence of the Sponsors and other evidence which pointed towards the children living in Kadoma with their cousin and not in Harare as found by the First-tier Judge.

7. Paragraph 10 of the grounds continued:

> "Given that this has become the key reason that the appeal failed, fairness demands that the Tribunal ought to have had the benefit of evidence on this point before making its decision. This evidence had and has the potential to materially affect the outcome of the hearing."

8. At the outset of the hearing before me on 7 April 2015 I drew to the parties' attention relevant case law guidance.

9. In HA and TD [2010] CSIH 28 it was held in considering the issue of fairness in the context of proceedings before the Tribunal that inter alia; the Tribunal might identify an issue which had not been raised by the parties to the proceedings, but it would be unfair ordinarily for it to base its decision upon its view of that issue, without giving the parties the opportunity to address it upon the matter. Further, although the Tribunal were entitled to reject evidence notwithstanding the evidence had not been challenged before it, fairness might require it to disclose its concerns about the evidence.

10. In ML (Nigeria) [2013] EWCA Civ 844 it was held inter alia that the essential question was, did the Appellant have the fair hearing to which he/she was entitled, before adverse findings of credibility were found as everyone, however poor their case was entitled to a fair hearing. Singh & Others v Belgium (Application No: 3321/11) applied. Further, in determining whether an Appellant had had a fair hearing, the Upper Tribunal or the Court of Appeal should look at the determination including the cogency of the reasons given and the procedure by which the judge reached his adverse conclusion. In that case, the procedure was considered to be so flawed that it was plainly in error of law because the claimant had no prospects of a fair hearing at all.

11. I was also mindful that as held in MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) it was held that where there was a defect or impropriety of a procedural nature in the proceedings at first instance, this might amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside.

12. With that in mind both parties' representatives agreed with me that for the reasons relied upon in the Appellants' grounds, there had clearly been procedural unfairness in that it was apparent that at the very heart of the First-tier Judge's reasoning that led her to conclude that the Appellants' immigration appeal should be dismissed, was her conclusion that she was unable to find that the first and second named Appellants were living with their cousin at the date of decision but rather they were living in the family home where they had grown up. She also found that the third name Appellant would have been living in the family home. At paragraph 43 of her determination the judge found that the Appellants had "contrived to change their accommodation arrangements in an effort to demonstrate that they are entitled to entry clearance".

13. It was accepted most helpfully and realistically by Mr Tufan, that these were not matters raised in the refusal of entry clearance or in the parties' submissions or the subject of cross-examination to either of the Sponsors that the children did not in fact live with their cousin and that in those circumstances there had indeed been procedural unfairness that amounted to a material error of law requiring the determination to be set aside. and that the appropriate course was that there should be a fresh hearing on all issues with none of the First-tier Judge's findings preserved.

14. I further agreed with the parties that this was a case that should be remitted to the First-tier Tribunal before a First-tier Judge other than First-tier Tribunal Judge A M Black to determine the appeal afresh at Taylor House Hearing Centre on the first available date.

15. In that regard I was informed by Ms Rhind that the two Sponsors would give oral evidence in relation to which no interpreter would be required. For this purpose anonymity was to be preserved given that minors were involved in the appeal.

16. I was satisfied that there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement as to why the decision should not be re-made by the Upper Tribunal. It was clearly in the interests of justice that the appeal of the Appellants be heard afresh in the First-tier Tribunal.

Notice of Decision

17. The First-tier Tribunal erred in law such that its decision should be set aside and none of their findings preserved. I remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than the Judge to whom I have above referred.

Anonymity Direction

18. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed Date 15 April 2015

Upper Tribunal Judge Goldstein