Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06305/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April 2018	**On 2 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

KJ (ZIMBABWE)
(ANONYMITY DIRECTION MADE)

Appellant

And

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the Appellant: Mr J Rendle, Counsel instructed via Direct Access
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a minor, appeals against the decision of an Entry Clearance Officer to refuse her entry clearance to join her parents in the UK for the purposes of settlement.

The Reasons for Granting Permission to Appeal

2. On 25 January 2018 First-tier Tribunal Judge Keane gave his reasons for granting permission to appeal:

> "The grounds disclose an arguable error of law but for which the outcome of the appeal might have been different. Where the Judge referred at paragraph 43 of his decision to those requirements of the Immigration Rules which concern the establishment of serious and compelling family or other considerations which made the exclusion of the appellant undesirable, the Judge did not arrive at a finding where the appellant satisfied the requirements of the Rules. At the hearing the appellant's mother gave evidence. In his decision the Judge did not suggest a reason for doubting the gravamen of her evidence, namely that the consequence of the refusal to grant entry clearance was that the appellant would be living on her own. It was incumbent upon the Judge to arrive at a finding whether the appellant satisfied the requirements of the Immigration Rules. In the light of the evidence and the Judge's tacit acceptance of the evidence the Judge might arguably have found that the applicable Immigration Rules were satisfied and such a finding might materially have borne on the outcome of the appeal insofar as it concerned Article 8 outside the Immigration Rules."

Relevant Background

3. The appellant is a national of Zimbabwe, whose date of birth is [ ] 2002. On 29 November 2015 she applied for entry clearance to settle in the UK with her parents, who are Zimbabwean citizens who had discretionary leave to remain in the UK until 15 December 2017.

4. The application was refused on 21 January 2016. She did not qualify for entry clearance under the Rules, as her parents were not present and settled here. The letter from the Home Office which was sent to her mother clearly stated that her leave did not entitle her minor children to join her in the UK "*unless there are any compelling compassionate circumstances".* Her parents had left Zimbabwe in 2004, and they had left her in the custody of her grandmother when she was only 2 years old. So, she had been residing with her grandmother for the past 12 years. It was stated that her grandmother was no longer able to take care of her as she was blind. However, she had not provided any medical evidence to substantiate her grandmother's medical condition, and the Entry Clearance Officer was unable to determine how long her grandmother had suffered from her current condition. She had submitted a letter from the Deputy Head of her primary school confirming that she was a pupil in Grade 7. She was therefore engaged in schooling in Zimbabwe, and she had not demonstrated that she personally had any health concerns or issues that would warrant issuing her with entry clearance outside the Rules. As she already had an established life in Zimbabwe, the Entry Clearance Officer was not satisfied that she demonstrated any compassionate or compelling circumstances.

The Hearing Before, and the Decision of, the First-Tier Tribunal

5. The appellant's appeal came before Judge MA Hall, sitting at Sheldon Court, Birmingham, on 26 June 2017. Mr Rendle appeared on behalf of the appellant, but there was no representation for the Entry Clearance Officer.

6. The Judge received oral evidence from the appellant's mother, "GC", who adopted as her evidence in chief her witness statement signed by her on 18 June 2017. At paragraph 4 of her witness statement, she said that her mother was now 80 years old and was in failing health. In particular, she had lost her sight in both eyes. She was no longer capable of looking after 'K', who was now 15 (and was 14 at the date of the ECO's decision), and K was not capable of looking after her mother. They were looking for a suitable care home for her mother, where she would receive the specialist care that she required.

7. At paragraph 6, she said that she had no other family members in Zimbabwe apart from her mother. K would therefore have no one in Zimbabwe to whom she could turn for support.

8. At paragraph 7, she said that she had received a copy of her mother's handwritten medical notes via DHL from Zimbabwe. These had been photocopied and sent by a church member, DC, whom she knew in Zimbabwe. These records detailed her mother's deteriorating health from 2007 to 2017.

9. In his subsequent decision, the Judge summarised GC's oral evidence at paragraphs [21]-[33]. She confirmed that she had been granted discretionary leave in June 2015 but this expired in December 2017. The leave had been granted because she, her husband and her daughter in the UK, suffered with HIV. She confirmed that in 2004 she and her husband had made an asylum claim, which was refused and their appeals were subsequently dismissed. Thereafter, the claim for leave to remain on medical grounds was made. She believed that her claim for leave to remain was made in 2014. She confirmed that she had not been back to Zimbabwe since 2004. She explained that her mother (the appellant's grandmother) had been without sight since 2014.

10. The Judge also received oral evidence from the appellant's father, "IJ", who adopted a brief witness statement confirming that he agreed with his wife's witness statement.

11. The Judge set out his findings and conclusions at paragraph [38]-[59]. The appellant could not satisfy the Immigration Rules in relation to entry clearance as a child. He found it relevant to consider what would need to be proved by a child seeking entry clearance to the UK in relation to the Immigration Rules. If the child had a settled parent or parents, and was seeking indefinite leave to enter the UK, the requirements in paragraph 297 would need to be satisfied. These included whether there were serious and compelling family or other considerations which made the exclusion of the child undesirable, and whether suitable arrangements for the child's care had been made; and the child must be adequately maintained and accommodated.

12. The Judge found that the appellant and her parents had not physically met since 2004. He accepted the oral evidence given that there had been

some telephone contact, and he accepted that the DVD which had been produced at Court, but whose contents he had not seen, contained a video chat between the appellant and her mother in 2008.

13. The fact that the application could not succeed under the Immigration Rules did not mean that it must fail. He considered the guidance in **Mundeba [2013] UKUT 020 (IAC)**. There had to be an inquiry as to whether there was any evidence of the child being neglected or abused, or whether the child had unmet needs not catered for, and whether there were stable arrangements for the child's physical care. This assessment involved consideration as to whether the combination of circumstances was sufficiently serious and compelling to require admission.

14. The Judge found that the appellant's parents had not taken responsibility for her upbringing since 2004. There was insufficient evidence to prove this. The evidence did not indicate that her parents had taken the important decisions in relation to the appellant's life. The responsibility of the appellant's upbringing had been carried out by her grandmother. He did not find that there were any relevant medical issues regarding the appellant to be considered: "*There is no evidence of neglect or of the Appellant living in unacceptable conditions. The Appellant lives with her grandmother in a property owned by her grandmother. The Appellant attends school.*"

15. There was no witness statement from the appellant expressing her wishes. In her letter dated 22 November 2015, the appellant did not actually state that she wished to come to the UK. She explained that she had not seen her parents for the past 12 years and felt lonely when her friends talked about their parents. The Judge found, on balance, that the appellant's best interests would be served by her living with her parents, despite her having been brought up by her grandmother since 2004. However, while the best interests of the appellant were a primary consideration, it was not the only consideration, and could be outweighed by countervailing factors: "*I accept that the Appellant's grandmother has lost her sight. This has been the case since 2014, according to GC's oral evidence. I do not find the Appellant has proved that there are compelling or compassionate circumstances in this case. As previously stated, there is no evidence to indicate that she has unmet needs or is being neglected. The evidence indicates that she lives in adequate accommodation, and has access to school and medical facilities, although thankfully the medical facilities are not required at present. The Appellant's parents wish her to join them in the United Kingdom, and I accept that this is her wish. However, I do not find that this amounts to compelling or compassionate circumstances.*"

16. The Judge went on to consider section 117B of the Nationality, Immigration and Asylum Act 2002. He held that the evidence given regarding financial maintenance and accommodation was not satisfactory. Both parents had given oral evidence to the effect that they were in employment and lived in a rented property, but no documentary evidence had been provided to prove the level of income and outgoings that the family in the UK had.

17. The Judge concluded that, while family life had been established between the appellant and her parents, considerable weight had to be attached to the fact that the application for entry clearance could not succeed under the Rules, and he was not satisfied that sufficient evidence had been submitted to prove that there were any compelling circumstances which justified granting entry clearance outside the Rules, and insufficient evidence had been provided to show adequate maintenance and accommodation in the UK.

18. At paragraph 59, the Judge said that it was open to the appellant to make a further application for entry clearance, if it was believed that there was evidence to prove compelling circumstances and adequate maintenance and accommodation in the UK. The Judge found that the importance of maintaining effective immigration control outweighed the best interests of the appellant in joining her parents in the UK.

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Mr Rendle developed the case advanced in the grounds of appeal. The appellant's family faced an impossible dilemma. If the grandmother was to move into suitable accommodation, then the appellant would be left alone in circumstances that could clearly be described as compelling and compassionate, and would thereby trigger the grant of entry clearance. However, her having to move away, leaving the appellant alone and without support, would be *"unthinkable".* This dilemma was not contemplated by the Judge in his decision, and as a consequence the Judge had erred in his conclusion that the refusal of entry clearance was proportionate.

20. I put to Mr Rendle that the scenario envisaged in the grounds of appeal was one which lay in the future, not in the present. Mr Rendle submitted that it was "*a glaringly obvious future scenario"* that the Judge ought to have addressed, having regard to paragraph 4 of the witness statement of GC.

21. Mr Tarlow submitted that no error was made out. In essence, the appellant was expressing disagreement with findings of the Judge that were reasonably open to him on the evidence.

22. In reply, Mr Rendle submitted that the Judge's reasons were not adequate, as they failed to address "*the impossible dilemma"* identified by GC in her evidence, about which no adverse credibility findings had been made by the Judge.

Discussion

23. In **South Bucks District Counsel -v- Porter (No 2) [2004] UKHL 33**, Lord Brown said at [26]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration."

24. As was acknowledged by Mr Rendle in the course of his oral submissions, the issue which is raised in the grounds of appeal is a very narrow one, albeit of pivotal importance. The Judge's reasoning is extensive, and it is not suggested that any of the other reasons which he gave for dismissing the appellant's appeal are flawed.

25. The premise which underlies the error of law challenge is that the Judge did not make any adverse credibility findings, and accordingly he is to be taken as having tacitly accepted GC's evidence that her mother was no longer capable of looking after the appellant, and that the appellant was not capable of looking after her grandmother.

26. However, the premise does not stand up to scrutiny. It is apparent from, for example, the Judge's discussion of the evidence on maintenance and accommodation in the UK, that the Judge was not prepared to accept the oral evidence given by the parents about their level of income and their professed ability to be able to adequately maintain and accommodate the appellant, as well as the two children they already had in the UK, without recourse to public funds.

27. I accept that the Judge did not overtly cast doubt on the evidence of the appellant's mother that neither her daughter nor her grandmother were capable of looking after each other. However, since the grandmother had been blind since 2014, and he was assessing the appellant's human rights claim in mid-2017 when she was considerably more mature than she had been in 2014 – and when she and her grandmother must have been providing each other with companionship and support for the past two to three years as they were the only two people in the household - it was open to the Judge to find, having regard to the surrounding evidence, that the appellant was not suffering from neglect or unmet needs or living in unacceptable conditions. In making these sustainable findings, the Judge was obliquely rejecting the evidence of the appellant's mother insofar as it suggested the contrary.

28. While it was a clear preference of the parents that the appellant should join them in the UK, and that the grandmother should go to a care home, it did not follow that the maintenance of the *status quo* would inevitably lead

to the appellant's abandonment at a future date. An obvious alternative option was for the parents to pay for a carer to help look after the grandmother in the house which she owned, thereby ensuring a continuity of grandparental love, support and companionship for the appellant. In short, although the appellant's mother presented in her oral evidence what Mr Rendle describes as "*an impossible dilemma*", the Judge was not bound to treat the family as in reality facing such a dilemma.

29. Moreover, the error of law challenge can be said to contain the seeds of its own destruction, in that it is *"unthinkable"* that the appellant's parents would so organise matters that the appellant was left alone. Since such an outcome is unthinkable, it is by definition not a glaringly obvious future scenario which the Judge ought to have addressed.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 20 April 2018

Judge Monson
Deputy Upper Tribunal Judge