Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06254/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 March 2019	**On 01 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[R M]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the Appellant: Mr Oshunrinade, Legal Representative
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Zimbabwe, was aged 10 years of age when she applied on February 7, 2017 for leave to enter the United Kingdom under paragraph 297 HC 395. She had applied to join her mother and stepfather who live in the United Kingdom.

2. The respondent refused her application on April 5, 2017 on the basis that she did not satisfy the requirements of the Immigration Rules. The respondent considered the application with reference to paragraph 297 HC 395.

3. Her appeal came before Judge of the First-tier Tribunal E M M Smith on April 11, 2018 and in a decision promulgated on April 13, 2018 her appeal was dismissed on human rights grounds. In dismissing her appeal, the Judge considered the appeal under Appendix FM of the Immigration Rules and, in particular, Section EC-C. The reason the Judge considered it under this provision rather than paragraph 297 HC 395 was the appellant's mother only had discretionary leave to remain and in order to succeed under paragraph 297 HC 395 the appellant's mother had to have settled status.

4. The appellant appealed this decision on April 23, 2018 arguing the Judge had materially erred. The grounds stated the appellant wished to provide further evidence of her school attendance and performance and to provide a statement outlining her own wishes to live in the United Kingdom. The grounds themselves did not identify a specific error in law, although I found on the Tribunal file additional grounds that were dated May, 25 2018 and had been submitted later, albeit only received by the Tribunal on August 8, 2018.

5. Judge of the First-tier Tribunal O'Callaghan granted permission to appeal on July 13, 2018 without having seen these additional grounds. The Judge noted that the appellant/sponsors were unrepresented at the First-tier Tribunal hearing and found there was an "obvious and arguable issue" arising from the Judge's finding that a 12 year old child was leading an independent life with her grandmother, and having found the sponsors maintained the appellant to a large degree, it was also arguable the Judge had erred in saying there was no evidence of a strong mother/child relationship.

6. The respondent filed a Rule 24 response dated September 26, 2018 in which he argued that as the appellant failed to demonstrate they met the Immigration Rules, the Judge was entitled to reach the findings contained in the actual decision.

7. No anonymity direction is made.

SUBMISSIONS

8. Mr Oshunrinade accepted the additional grounds received by the Tribunal on August 8, 2018 may have been filed as additional grounds as they postdated not only the date of the written grounds but also a date that the Judge granting permission had considered them. He raised two issues, namely the finding by the Judge that the appellant was leading an independent life; and secondly, the Judge's finding about family unit. He submitted that the finding at paragraph 26 of the Judge's decision was flawed because the appellant was a 12-year-old child and could not be living an independent life. He pointed out that she was under the age of 18, unmarried and had maintained contact with her mother and her stepfather and the latter had visited her on three occasions. There was evidence financial support was being provided. The Judge erred by placing too much weight on the fact the appellant's mother had not visited her daughter since leaving Zimbabwe, but overlooked the fact that her partner had visited the appellant. The Judge was wrong to find the appellant was living a separate/independent life.

9. Mr Bramble relied on the Rule 24 response and submitted that the appellant had not demonstrated compliance with the Immigration Rules and having considered the limited evidence placed before the Tribunal, the Judge concluded that the appellant's family unit was with her grandmother and no longer with her mother. At paragraph 19 of the decision the Judge set out the evidence that was considered and at paragraph 30 the Judge made it clear that he had tried to extract as much information as possible out of the sponsors and that the appellant's bundle, handed in on the day of hearing only contained a single letter from a doctor in Harare and evidence of money transfers that dated back to 2010. He submitted that paragraphs 26 and 28 of the decision adequately dealt with the issues and that the current grounds of appeal amounted to a disagreement. The Judge had made it clear in the decision that if additional evidence had been adduced it would have given him more to consider.

10. Mr Oshunrinade responded to these submissions and pointed out that the stepfather was a British citizen, although he accepted the appellant had never lived with the stepfather but had met him on three occasions. He reiterated that the finding the appellant was leading an independent life was flawed and he invited the Tribunal to set aside the decision.

FINDINGS ON GROUNDS

11. This appeal originally came before Judge Smith who unfortunately had no representatives before him. The appellant's mother and partner attended at the appeal hearing, but there was no representation from the respondent's office and the Judge took this into account as evidenced by the content of paragraph 30 of the decision where he wrote:

> "… as the sponsor and the mother were unrepresented I had endeavoured to extract as much favourable evidence from them as possible …"

12. The grounds for which permission has now been granted did not identify any error in law but sought to address the concerns raised by the Judge with additional evidence. I was satisfied that the additional grounds of appeal that were received by the Tribunal on August 8, 2018 had not been lodged with the application or considered by the Judge who gave permission. Nevertheless, I have considered those grounds alongside the submissions that were made to me as permission to appeal had been granted.

13. The main challenge centred around paragraph 26 of the Judge's decision in which the Judge wrote:-

> "I am satisfied that the appellant cannot satisfy the provisions of paragraph E-LTRC.1.4. and 1.5. in that it is clear that she is not part of the sponsor or the mother's family and that for the last 10 years she has formed an independent life with her grandmother in Zimbabwe".

14. Paragraph E-LTRC.1.4. and 1.5 of Appendix FM are the wrong provisions to apply because they relate to eligibility requirements for leave to remain as a child and the Judge in this appeal was concerned with an application for entry clearance. Having

said that, the relationship requirements referred to by the Judge mirror the correct provisions, namely paragraphs E-ECC.1.4. and 1.5. The reference to the wring provision would not amount to an error in law.

15. The question for this Tribunal to consider was whether the wording of paragraph 26 amounted to an error in law.

16. Having considered the submissions I am not persuaded that it does.

17. What the Judge stated, albeit perhaps the use of independent should have been omitted, was that the appellant had formed a life with her grandmother in Zimbabwe and the Judge concluded that the appellant was leading a separate life to one led by her mother and was no longer wholly dependent upon either her mother or her partner.

18. In order to meet entry clearance requirements, the Judge had to be satisfied that either the appellant's mother had and continued to have sole responsibility for the appellant, or there were serious and compelling family or other considerations which made exclusion of the child undesirable and that suitable arrangements had been made for the child's care.

19. Whilst the Judge accepted at paragraph 28 of his decision that the appellant's mother had provided financial support, it is clear from the content of paragraphs 26 to 29 of the decision that the Judge did not accept the appellant's mother had sole responsibility or that there were any serious and compelling family or other considerations which made her exclusion undesirable.

20. In order to satisfy the Immigration Rules the appellant also had to demonstrate that the financial requirements of E-ECC.2.1. of Appendix FM and the provisions of Appendix FM-SE of the Immigration Rules were met. Looking at the respondent's bundle it may well be that the minimum income requirement could be met because the appellant's mother's partner's annual salary was over £38,000 and the appellant's mother had earned £13,000 at the date of application in the previous financial year.

21. However, there was no evidence that Appendix FM-SE was complied with and this was a requirement of the Immigration Rules. Whilst the financial requirements were not considered by the Judge, the absence of the relevant documentation in either bundle meant the appellant could not satisfy the Rules. It therefore follows that the Judge's decision correctly addressed the relevant issues and the reference by the Judge to "independent life" had to be read in context rather than in isolation.

22. It was argued that the Judge did not attach enough weight to the evidence concerning the appellant's mother's partner visiting the appellant, but ultimately this was something which would have had to be considered outside of the Immigration Rules where the starting point would have been were the Immigration Rules for entry clearance met. The Judge was clearly hampered by a lack of evidence and whilst the concerns raised have potentially been addressed, in part, by the grounds

of appeal those documents were not before the Judge and are not matters that I can consider.

23. Having considered the evidence that was placed before the Judge and looking at his decision as a whole, I find there is no error in law and I dismiss the appeal.

NOTICE OF DECISION

24. There is no error in law and I uphold the original decision.

25. No anonymity direction is made.

Signed Date 28/03/2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have dismissed the appeal.

Signed Date 28/03/2019

Deputy Upper Tribunal Judge Alis