**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/07234/2018

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision and Reasons Promulgated** |
|---|---|
| **On 17 September 2019** | **On 20 September 2019** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**
**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**DAVID YAMIKANI PAULOSI**
**(anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs [P] - Sponsor.
For the Respondent: Mrs Pettersen – Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Kelly who in a decision promulgated on 10 April 2019 dismissed the appellant's appeal on human rights grounds.

**Background**

2. The appellant, a citizen of Zimbabwe, was born on 4 January 2000. An application for leave to enter the United Kingdom for settlement as the child or other dependent of a settled person was refused by an Entry Clearance Officer (ECO) based at the British High Commission in Pretoria on 15 February 2018.
3. The application was made pursuant to paragraph 297 of the Immigration Rules. The appellant's sponsor, the person settled in the UK, is his mother. The ECO refused the application stating the appellant had not demonstrated that his mother had sole responsibility for his upbringing, that the decision-maker was not satisfied the appellant had demonstrated there are serious or compelling family and other considerations which made his exclusion from the UK undesirable, and it had not been shown the appellant was not leading an independent life; leading to refusal pursuant to paragraphs 279 (e),(f), and (iii) of the Immigration Rules.
4. The decision-maker considered article 8 ECHR outside the Rules but concluded that as the appellant had not resided with his mother for at least 15 years and that as well as visiting the appellant in the past his mother could visit him in the future, it was not made out there were any circumstances sufficient to warrant a grant of leave outside the Rules.
5. The Judge, having considered the issues in the appeal, and having had the benefit of seeing and hearing oral evidence being given by the sponsor, sets out his findings of fact from [16] of the determination. In that paragraph the Judge writes:

> 16. With one exception (considered at paragraph 24 below) I found the testimony of the sponsor to be cogent, plausible, internally consistent, and either supported by or at least consistent with the documentary evidence that had been placed before me. So far as the latter is concerned, I have noted Mrs Brewer's submission that some of those documents bear signatures that appear to be in a similar hand to others that purport to be signed by other people. I am not however a handwriting expert. I thus feel that I lack the necessary experience and qualifications to make a judgement on the matter. I have not therefore attached adverse weight such similarities in my overall assessment of the appellant's credibility. I accordingly find that the following facts have been proved on the balance of probabilities.

6. Those findings are set out from [17] of the decision. At [23] the Judge writes:

> 23. I do not have any evidence at all concerning the wishes of the appellant himself in this matter. I do not have a witness statement from him, and neither did his mother (the sponsor) make mention of whether her son was desirous of leaving the country where he has resided his entire life in order to settle in a country that he has never even visited. Moreover, whilst the application and the appeal against its refusal have been brought in the name of the appellant, it is the sponsor who has clearly been the moving force behind both. I am not therefore satisfied that the decision to refuse his application for entry clearance is inconsistent with the best interests of this young man, who was just days away from legally qualifying as an adult at the date of application and who had achieved that status by the time that his application was refused.

7. The exception to the sponsor's credibility referred to by the Judge at [16] is set out at [24] in the following terms:

> 24. Although she acquired settled status in the UK some 7 ½ years prior to her son making his application to join him in the UK, the sponsor nevertheless claimed that she had been unable to afford the £1800 application fee until some 11 days before her son ceased to qualify for leave to join her in the UK on his 18th birthday. I find that explanation implausible given that she had by that time been in full-time employment for at least 6 years and did not have any other financial dependents. Her explanation is also undermined by her admission at the hearing that she had not wanted to disrupt her son's education at a boarding school in Zimbabwe. Having considered all the circumstances in the round, I find that it is far more likely that the sponsor wanted her son to be educated and to enjoy the company of his friends and family in Zimbabwe until such time as he became an adult and was ready to begin his university education.

8. As there is no appeal against the refusal under the Immigration Rules the appellant was required to challenge the decision by way of an appeal on human rights grounds. The Judge sets out the structured approach to be found in Razgar at [25] answering each of the questions consecutively between [26 – 28] in the following terms:

> 26. Although the sponsor and the appellant have not lived together for more than a few weeks at a time since the appellant was a mere 22 months of age, I am nevertheless satisfied that 'family life' continued to exist between them up to and including the date of application. I am satisfied of this because of the sponsor's involvement in her son's life and upbringing throughout that period as detailed in paragraphs 17 to 22 (above).
>
> 27. I am not however satisfied that the consequences of the decision to refuse entry clearance are of such gravity as to engage the potential operation of Article 8 of the Convention. In reaching this conclusion, I have borne in mind that the threshold for engagement is not an especially high one, and that Article 8 will readily be engaged where a consequence of the decision is that the person will be removed, thereby rupturing existing social and familial ties to the UK. However, the decision in the present case simply preserves the *status quo ante*. For reasons that I highlighted at paragraph 22 and 23 (above), the appellant is settled in Zimbabwe where he has friends and family members with whom he grew up and has thus known all his life. By contrast, he has never been to the United Kingdom and appears not to know anybody here other than his mother. Moreover, the decision to refuse them entry clearance for the purposes of settlement does not inhibit the sponsor's ability to continue visiting him in Zimbabwe, nor indeed his ability to begin visiting her in the UK as an unaccompanied adult.
>
> 28. The remaining 'Razgar' questions only arise for consideration if each of the first two are answered positively. As I have answered the second question negatively, it is unnecessary for me to consider if and to what extent the decision was in accordance with immigration rules and/or the relevance of that matter to the question of whether the decision was proportionate to the legitimate aim of maintaining the economic well-being of the country to the consistent application of immigration controls.

9. The appellant sought permission to appeal asserting the Judge erred in law in requiring separate evidence from the appellant on the basis the Tribunal should have been satisfied with the evidence of the sponsor which was found to be credible. The grounds also assert the Judge failed in the article 8 assessment in failing to consider that the appellant's relatives in Zimbabwe no longer wanted him to live with them and had provided statements to that effect and failed to consider other difficulties which the appellant was facing in Zimbabwe as detailed in the sponsor's witness statement.
10. Permission to appeal was granted by another judge of the First-Tier Tribunal the operative part of which is in the following terms:

> 3. It is arguable that the Judge fell into error by apparently making a further requirement to the Immigration Rules in addition to "sole responsibility" for the appellant's upbringing. The Judge's findings from paragraph 16 to paragraph 21, clearly indicates that it is accepted that the UK-based sponsor has had sole responsibility for the appellant's upbringing. It is arguable that the Judge went on to conflate this Rule with that requiring there to be compelling family or other circumstances making exclusion undesirable. The Judge then went on to consider Article 8 outside the requirements of the Immigration Rules; Rules which now reflect the respondent's Article 8 obligations save for any exceptional circumstances. It is arguable also that the Judge failed to make the Article 8 assessment through the "prism" of the Immigration Rules; Rules which the findings indicate were fulfilled.

**Error of law**

11. Whilst the Immigration Rules are not determinative of a human rights Article 8 appeal the fact they set out the respondent's requirements for an individual to securing entitlement to leave or remain in the United Kingdom shows they are of great importance when assessing the weight to be given to the public interest in an article 8 proportionality assessment.
12. It appears the Judge sets out the correct questions at [9] but then becomes totally distracted.
13. In this case the Judge did not undertake the assessment of the proportionality of the decision concluding that the consequences of the respondent's decision would not have such gravity so as to engage the potential operation of article 8.
14. It is important to consider the exact terms of the reasons for refusal which was upheld by an Entry Clearance Manager.
15. Paragraph 297 of the Immigration Rules is in the following terms:

> Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom
>
> 297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

> (a) both parents are present and settled in the United Kingdom; or
> (b) both parents are being admitted on the same occasion for settlement; or
> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and
>
> (vii) does not fall for refusal under the general grounds for refusal.

16. The finding the sponsor in the United Kingdom was exercising sole responsibility for the appellant's upbringing is only one of the reasons why the application was refused. The refusal pursuant to 297(f) is in the alternative but the concern at (iii) is not. The evidence of the sponsor, accepted by the Judge, appears to be that the appellant had not formed an independent life. In order for the appellant to establish that he is not "leading an independent life" he must not have formed through choice a separate (and therefore independent) social unit from his parents' family unit whether alone or with others. It is arguable on the facts as found by the Judge that the appellant had demonstrated an ability to satisfy the requirements of the Immigration Rules pursuant to paragraph 297. That being so it is hard to see what the Secretary of State has on her side of the scales in the proportionality balancing exercise. It is not made out the appellant needs to do any more. In particular we do not find the appellant needed to demonstrate that it is in his best interests as he would in effect have to do if he were relying on 297(1)(f).
17. What the decision is arguably silent about is the positive obligation incumbent upon a Higher Contracting State to promote family life. Whilst the refusal preserves the existing pattern it prevents the appellant and his mother from developing the family life the Judge finds does exist any further.
18. We find the Judge erred in law in a manner material to the decision to dismiss the appeal for the reasons set out above. We set the decision aside. We find the

issue is the proportionality of the decision, Razgar question 5, and that the respondent fails to establish the decision is proportionate when weighing the competing interests in light of the findings pursuant to the Immigration Rules. We substitute a decision to allow the appeal.

**Decision**

19. **The First-tier Judge materially erred in law. We set aside the decision of the original Judge. We remake the decision as follows. This appeal is allowed.**

Anonymity.

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 17 September 2019