Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15116/2012
OA/15118/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 6th November 2013	**On 17th December 2013**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MASTER D C
MISS K C
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr M Steward, Home Office Presenting Officer
For the Respondents: Miss S K, (Sponsor)

DETERMINATION AND REASONS

1. The Appellant in this appeal is the Secretary of State. The Respondents are DC and KC (twin siblings born 15th January 1999) and who are citizens of Zimbabwe. For ease of reference, throughout the determination I shall refer to DC and KC as "the Appellants" and the Secretary of State as "the Respondent".

2. The Respondent seeks a review of the decision of a First-tier Tribunal Judge (Judge Turnock) who in a determination promulgated on 20th June 2013, allowed the Appellants' appeals against the Respondent's decision made on 11th July 2012, refusing them entry clearance as the dependent children of their mother Mrs SK "the Sponsor" a woman now settled here.

History

3. The Appellants who are twin siblings were born on 15th January 1999 and they are now 14 years of age. In 2002 when the twins were 3 years old, the Sponsor arrived in the United Kingdom. The twins remained in Zimbabwe being looked after by their grandmother. The Sponsor was granted indefinite leave to remain in the UK in 2010. She has two other children living with her here; T who is now 20 years of age and G, 2 years of age. The Sponsor's husband is the Appellants' father and the father of G but not of T. The Sponsor reports that her husband is a British citizen and she understands he is in the UK but his whereabouts are unknown.

4. The Sponsor on behalf of the Appellant's made application for them to join her as her dependent children. The Respondent refused the application on 11th July 2012 as the Appellants were unable to meet the financial requirements of the Immigration Rules under paragraph 297. There was no evidence that the Sponsor was in employment; indeed she was in receipt of a host of benefits including a student grant, student allowance and job seekers allowance.

5. When the appeal came before Judge Turnock, he dismissed the appeals under the Immigration Rules but allowed them under Article 8 ECHR. The Respondent sought and was granted permission to appeal.

The Permission

6. The main grounds seeking permission stated that the Judge erred in taking into account post-decision evidence when assessing proportionality under Article 8. Further having found that the Appellants could not meet the Immigration Rules because of a lack of finances, he should have given weightier consideration, to the public interest element of proportionality. UT Judge Reeds granted permission and the relevant part of that grant reads as follows,

> *"The grounds make a number of assertions concerning the judge's assessment of the legal issues in this appeal; that the judge erred in law in failing to have regard to the new Immigration Rules in force at the date of decision and in this context, in allowing the appeal on "classic" Article 8" grounds the judge failed to have regard to take that into account in the assessment of proportionality. Further, the judge found on the facts that the Appellants could not meet the maintenance provisions (see paragraph 27) yet when considering Article 8 appeared to make a contradictory finding (see paragraph 36)".*

7. Thus the matter comes before me to decide initially if the First-tier Tribunal Judge has erred; and if so whether the decision should be remade without a further hearing.

8. Mr Steward on behalf of the Respondent drew my attention to the apparent inconsistency between paragraphs 27 and 36 of the Judge's determination. In paragraph 27 the Judge states, "*The burden is, of course on Mrs K. In those circumstances I am not satisfied that she has discharged the burden upon her and I determine that her appeal under the Rules fails*". That of course is incorrect because Mrs K is not the Appellant, her children D and K are. That aside in paragraph 36 the Judge states, "*In terms of the threat to the economic well-being of the country it is relevant that Mrs K is now in stable employment with the prospects of future enhancement of salary and that she has achieved a university degree. It is clear that any additional burden which might fall on the State is not significant*". Mr Steward submitted that the Judge has not focussed as he was tasked to do, on the date of decision.

9. Further paragraph 40 contains a factual error because the Judge records, "*Importantly they have a brother and half-brother who are settled in the UK and who have been here for approximately 12 years. Their half-brother is studying in the UK and also has employment. Particular regard must be had to the interests of those children*". That finding cannot be correct because the youngest child G is only 2 years of age. Added to this the Judge then carries on in paragraph 40, "*It would not be reasonable to expect the Appellants' mother and brother to relocate to Zimbabwe, and it is difficult to imagine their half-brother choosing to take that course of action*". What the Judge has failed to make clear is that T is now an adult and there was no evidence put forward of greater emotional ties between T and the Appellants.

10. Mr Steward concluded his submissions by asking me to note that the Judge has not properly evaluated the proportionality considerations and there is inadequate reasoning, when combined with factual error, to show why the refusal of the Entry Clearance Officer is disproportionate. He asked that I set aside the determination and remake the decision on the agreed facts before me.

11. Mrs K on behalf of the Appellants said that she is now earning a salary of around £23,000. No documentary evidence of this was put before me. She accepted that she had left the twins with their grandmother when she came to the United Kingdom eleven years ago and that they were very young at that time and that they have lived all their lives with their grandmother in Zimbabwe. She wished to emphasise that she has kept in touch with them by way of phone calls and has returned to Zimbabwe to see them. They are in education there. She said that she is a single parent and has responsibility to look after G. Her eldest son works now and pays towards his own keep.

12. At the end of submissions, neither party sought to adduce any further evidence. I informed the parties that as there was no real challenge to the facts found by Judge Turnock, then if I found an error of law I would be in a position to remake the decision.

13. Having considered matters I have concluded the determination of Judge Turnock contains a material error of law and should be set aside and the decision remade, for the reasons set out below.

14. In his determination, the Judge correctly identified that the Appellants could not meet the requirements of the Immigration Rules. He then went on to conduct an Article 8 assessment and concluded that the Entry Clearance Officer's decision to refuse the Appellants entry, was disproportionate under Article 8 ECHR. I am satisfied that the First-tier Tribunal Judge failed to make adequate and clear findings on the Appellants' ability to meet (or rather not meet) the requirements of the Immigration Rules at the date of decision. This failure meant that he did not properly take into account the public interest element when assessing proportionality under Article 8 ECHR. The starting point in these appeals is that they are out-of-country appeals. The relevant date, even for an Article 8 consideration is the date of decision which is 11th July 2012. What the Judge needed to focus on was the evidence of the situation of the parties at that time. Instead he has speculated, in paragraph 36 of the determination, because what he records is as follows, "*Mrs K is now in stable employment with the prospects of future enhancement of salary. It is clear that any additional burden which might fall on the State is not significant*".

15. Having taken into account post-decision evidence and speculating that any additional burden which might fall on the State is not significant, the Judge has erred when factoring those matters into the proportionality test under **Razgar**. Therefore the Judge's decision must be set aside for error and the decision remade.

Remaking the Decision

16. The facts found by Judge Turnock are in the main preserved. I note in particular that D and K, although minors are now 13 years and have spent all their lives in Zimbabwe. I note that although the Sponsor is their mother nevertheless the twins have spent the last ten years living with and being cared for by their grandmother. There is no suggestion that they are not settled in Zimbabwe. They are in good health. They go to school. There was no evidence before me or Judge Turnock that their grandmother is unwell or unable to care for them.

17. Their father, although apparently in the United Kingdom, does not feature in their lives. Apart from their mother, the Appellants have two siblings in the United Kingdom. Their older sibling T is now an adult. Their younger sibling G is two years of age. Therefore I bear in mind that although not a paramount consideration the best interests of a child are a primary consideration. This means that D and Ks interests together with those of their younger sibling G must be considered first but they can be outweighed by the cumulative effect of other considerations **SS (Nigeria) [2013]** following **ZH (Tanzania) [2012]**

18. Whilst I am satisfied that in this appeal Article 8 ECHR is engaged because there is some evidence of family life between the Appellants and their mother, the real focus in this case is that of proportionality under the **Razgar** test.

19. The Appellants have been cared for by their grandmother for the last ten years in Zimbabwe. They have lived there all their lives and the vast majority of their life has been spent with her. There was no evidence before me nor the First-tier Tribunal Judge that their day-to-day needs were not being met by their grandmother. However at the date of decision, a grant of entry clearance to the twins would have inevitably led to an increase in the amount of public funds needed to maintain the family unit. The Sponsor was in receipt of public funds at the date of decision. In addition she was in receipt of various grants because she was studying for a degree. There would therefore be an increased burden upon the tax payer, when there is nothing exceptional about the Appellants' situation in Zimbabwe.

20. I am strengthened in this view by a reference to **AAO [2011]** where it was stated *"Strasbourg and domestic jurisprudence has consistently emphasised that States are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens".*

21. For these reasons, weighing all the evidence as I must, there is nothing exceptional in these cases, to outweigh the public interest element of the immigration rules, when considering the proportionality test in Razgar. The Respondent's decision is therefore not a disproportionate interference with the Article 8 rights of the Appellants.

DECISION

22. The First-tier Tribunal erred in law. I set aside that decision. I remake the decision. These appeals are dismissed.

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

The appellants are granted anonymity throughout these proceedings, unless and until the Tribunal directs otherwise. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signature **Dated 17th December 2013**
Judge of the Upper Tribunal

Fee Award

I have dismissed the appeals and therefore there can be no fee award.

Signature **Dated 17th December 2013**