Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04910/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6th August 2014	**On 18th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MISS EMILY RUMBIDZAI CHIMEURA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Ofei-Kwatia, Counsel instructed by Peters & Company Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe and her date of birth is 18 March 1999. On 12 June 2013 she made an application for indefinite leave to remain as the child of a settled person. She had arrived in the UK on 18 January 2013 as a visitor and she had been granted six months' leave. She wished to stay in the UK as a dependant of her father, Mr Anthony

Chimeura, a British citizen. The application was refused by the Secretary of State, in a decision of 16 December 2013, pursuant to paragraph 298 of the Immigration Rules and appendix FM (private and family life) and it was decided by the decision maker that there were no exceptional circumstances to grant leave outside the Rules.

2. It was noted by the Secretary of State that the appellant had stated that she was living with her aunt in Zimbabwe but that her aunt had moved to South Africa and that she now wished to remain in the UK with her father. She had asserted that her biological mother was in South Africa and does not play a part in her life. The decision-maker noted that in the appellant's application form for a visit visa it was stated that her guardian in Zimbabwe was her sister but that this had later changed to her aunt. Although the appellant's father asserted that he had sole responsibility for the appellant in Zimbabwe, the decision-maker noted that there was evidence of money transfers to an individual called Perpetua Chimeura.

3. The appellant appealed against the decision of the Secretary of State and her appeal was determined on the papers by Judge of the First-tier Tribunal Ferguson and dismissed in a determination that was promulgated on 2 May 2014. The matter was determined on the papers at the request of the appellant. The appellant was granted permission to appeal by Judge of the First-tier Tribunal E M Simpson on 18 June 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

4. Judge Ferguson made findings at paragraphs 5 to 11 of the determination:

> "5. The documentary evidence provided with the appeal included a letter dated 26th March 2012 from Christwish Dongo stating that she was 'sister to Emily's aunt' and saying that Emily wished to visit the United Kingdom for the duration of the School holidays in April. There was a letter in connection with an HSBC bank account in the name of Mr and Mrs Chimeura and a certificate of incorporation dated 26th July 2010 and various other documents in connection with a company registered in Zimbabwe called Forway Enterprises Ltd.
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> 6. Miss Chimeura requested that her appeal be determined on the basis of the documentary evidence provided, without an oral hearing. The burden of proof is on the appellant to show that the decision was not in accordance with the immigration rules or the law. The standard of proof is the balance of probabilities.
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> 7. A copy of the determination of the visit visa was not provided for this appeal by either party. If the extracts set out in the grounds of appeal are accurate, there must have been some credible

evidence to show that it was more likely than not that Emily would return to Zimbabwe, despite her father living in the United Kingdom and sending money to support her. The grounds of appeal maintain that at the time she entered the United Kingdom it remained her intention to return.

8. If that is accurate (and the previous Judge must have accepted that it was) then there must have been a significant change of circumstances in Zimbabwe within a short time of Emily arriving in the United Kingdom. It is established that Christwish Dongo is Emily's mother's sister, not Emily's sister, but there is no evidence from this aunt who is said to have moved to South Africa so unexpectedly to establish that she did and could no longer look after her. Ms Dongo provided a letter of support with the original application but there was no evidence about her current circumstances to support the letter from Emily's father. If the situation did change in the way described then it would have been appropriate for an application for further leave to remain to have been submitted soon after the expiry of the original planned visit of three weeks. Instead, the family waited until 12th June, close to the end of the validity of the six month visit visa before bringing the change of circumstances to the attention of the immigration authorities. The appellant has failed to establish that this version of events is truthful.

9. If Mr Chimeura was exercising sole responsibility for his daughter and could, as he said, maintain and accommodate her in the United Kingdom, then it is very strange that he did not make an application for her to come to the United Kingdom for settlement as his dependant, rather than apply for a 3 week visitor visa with the intention that she return. This is particularly surprising when he says that the situation in Zimbabwe is 'very bad'. While it may have been accepted that he sent money for the use of his daughter it has never been accepted that he exercised sole responsibility and the evidence provided for this appeal does not establish that as being more likely than not.

10. The appellant has failed to discharge the burden on her to show that the decision of the respondent was not in accordance with the immigration rules.

11. As for Article 8, Emily arrived in the United Kingdom as a visitor intending to visit for three weeks and then return to her private and family life in Zimbabwe where she had lived all of her life. There is insufficient evidence about her current circumstances to show that her removal would be a disproportionate breach of her Article 8 rights, in particular that there are compelling circumstances which would outweigh immigration control for someone who entered as a visitor with the intention of remaining

for only a few weeks. Emily is a national of Zimbabwe and there is insufficient evidence in the documents provided to establish that her best interests under s55 are met by anything other than following her original intention to return to her family and private life in the country of her nationality."

The Grounds Seeking Leave to Appeal

5. The grounds seeking leave to appeal argue that the Judge failed to take into account the best interests of the appellant and that he did not make an assessment under Article 8. It is arguable that the appellant shares her family life with her parents in the UK and her two siblings. She is settled in school here and it is no longer reasonable for her to return to Zimbabwe because her guardian has relocated to South Africa.

6. Ms Ofei-Kwatia made oral submissions and argued that the Judge should have directed an oral hearing and requested better evidence. In the light of the fact that there was no dispute that the appellant's biological mother was no longer in the picture, and in the light of the fact that the appellant was a child, it was incumbent on the Judge to request further evidence and his failure to do so amounted to a material error of law. Ms Ofei-Kwatia referred me to the 2002 Act where she submitted there is a provision which conferred such an obligation on the Judge.

7. Mr Tufan made submissions in the context of the Rule 24 response. The respondent opposed the appeal. The appellant had failed to provide evidence to substantiate her case and it is unlikely that the Tribunal would find in the appellant's favour under Article 8. In response to Ms Ofei-Kwatia's submissions Mr Tufan argued that the evidential burden was on the appellant and that there was no error of law.

8. Before the First-tier Tribunal there was a letter from the appellant's father of 14 January 2014. His evidence was that he did not intend for his daughter to stay in the UK in excess of three weeks. However, after she had come here he learnt that her guardian did not want to look after her anymore because her husband had been offered employment in South Africa. The family had moved to South Africa. He had never stated that the appellant's guardian was her sister. The appellant's guardian was the appellant's mother's sister (the appellant's aunt).

Evidence Before the First – tier Tribunal

9. Reference was made to previous decision of the Tribunal in relation to the appellant's application for a visit visa that had been allowed on appeal. Mr Chimeura asserted that the Judge had accepted that the appellant's aunt was her guardian and had been for eight years. His evidence was that she sent money to the appellant for school fees, food and general upkeep. The money was sent to his sister-in-law, Perpetua Chimeura because the

guardian did not live in a town and she did not drive. The sponsor submitted evidence relating to his financial circumstances. He asserted that the Judge in relation to the visit visa found that there was ample evidence to show that he paid the school fees for the appellant and that he made remittances for her support. Most of the appellant's relatives have left Zimbabwe. His mother is there but she is in poor health. There is no one who can safely look after the appellant there. The sponsor's brother and his wife have no accommodation available to her and they already look after an orphaned niece and nephews. Should the appellant be removed the family will be devastated including her two younger brothers. I note that there is an earlier letter from the appellant's father of 10 June 2013 in which he asserts that the appellant's mother left her when the appellant was aged 2. Before the First-tier Tribunal there was also a letter from Ms Dongo of 26 March 2012 asserting that she was the appellant's guardian and had been for eight years and that the appellant's mother was in South Africa.

Conclusions

10. Peters & Company Solicitors who now represent the appellant wrote to the Upper Tribunal on 29 July 2014 asking for an adjournment because the appellant's family were on holiday. There are copies of boarding passes indicating that the appellant's father, stepmother and two younger brothers would be travelling to Switzerland on 1 August 2014 and returning on 9 August 2014. The adjournment request was refused on the basis that the issue before the First-tier Tribunal was whether or not the Judge had made a material error of law and the letter from the solicitors did not explain why in the event that the First-tier Tribunal decision is set aside the absence of the appellant's parents would have any bearing on the matter. I note that the notice of the hearing before me was issued by the Tribunal on 27 June 2014. There was no renewal of the application before me.

11. I am certain that Ms Ofei-Kwatia meant to Rule 45 of the Asylum and Immigration (Procedure Rules) 2005 rather than a provision in the 2002 Act. However it is clear from the judgment in **NA (UT rule 45: Singh & Belgium) Iran [2014] UKUT 00205 (IAC)** that Rule 45 confers discretionary procedural case management powers. It does not require the First-tier Tribunal to undertake evidence gathering. The First-tier Tribunal should be alert to its duty of impartial and independent adjudication and the essentially procedural nature of Rule 45. I reject that there was any duty on the First-tier Tribunal Judge to direct an oral hearing or to direct the appellant to serve further evidence. It is the appellant who bears the burden of proof.

12. The Judge dismissed the appeal under Article 8 at paragraph 11 of the determination and found that there were no compelling circumstances to grant leave outside the Rules. It was not necessary for the Judge to carry out a full assessment in accordance with **R (on the application of**

Razgar) v SSHD [2004] UKHL 27 but, in any event, the Judge went on to consider proportionality. His assessment of proportionality is brief but adequate. It is obvious that the appellant has a family life here and within the context of Article 8, the first four questions of Lord Bingham's guidance would be answered in the affirmative and the Judge in my view did not err in moving straight to the issue of proportionality. The Judge did not accept the evidence in relation to sole responsibility or the evidence that the guardian had moved from Zimbabwe to South Africa. The reasons for this are that the Judge found that the application and appeal lacked credibility. The findings are sound and lawful. There was very scant evidence from the appellant and the Judge did not have the benefit of hearing oral evidence, but the Judge adequately identified the salient issues and gave clear reasons for his findings.

13. The Judge should have considered the best interests of the appellant as a primary consideration in accordance with **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC**) and **Zoumbas v SSHD [2013] UKSC 74** and from the determination (see [11]) there is no substance in the assertion that he did not do so. The appellant is now in the UK with her father and brothers and the decision would entail the appellant being separated from them. The starting point is that the best interests of a child are served by being with his or her parents. This is an unusual case and there are in my view very strong contraindication because the appellant has not lived with her father prior to coming to the UK. In addition it is not accepted that he had sole responsibility for her upbringing. According to her evidence she had lived with her aunt since the age of two. The Judge did not accept that the appellant's aunt was no longer living in Zimbabwe. The appellant has spent the vast majority of her life to date living with her aunt who has raised her and she is a citizen of Zimbabwe. It was open to the Judge to find that it is in her best interests to return to Zimbabwe.

14. The Judge dismissed the appeal under paragraph 298(1)(c) of the Immigration Rules because that was the basis of the application, namely that the appellant's father had had sole responsibility for her upbringing. The evidence would also suggest that the appellant relied on paragraph 298(1)(d) but on the Judge's findings it is clear that there were no serious and compelling family or other considerations that make exclusion of the appellant undesirable.

15. The decision-maker did not consider the application under Appendix FM with reference to the requirements for leave to remain as a child under R-LTR-C. This was not an issue raised by Ms Ofei-Kwatia, but it is clear to me that the decision-maker considered the wrong Rule under Appendix FM which relates to an application made by a partner and not a child. The Judge should have considered the appeal under the correct Rule. However, had he done so, it would not have made any difference to the outcome of the appeal. On the evidence before the Judge the appellant could not satisfy the substantive maintenance requirements or the

evidential requirements of the Rules. The error that the Judge made was not in dismissing the appellant under Section 86(5) of the Nationality, Immigration and Asylum Act 2002 but in not allowing it in part under Section 86(3) of the 2002 Act to a limited and inconsequential extent because the wrong Rule had been considered by the respondent but this is not a material error.

16. At the hearing before me Ms Ofei-Kwatia referred to further evidence that had been submitted by those representing the appellant. There was no bundle that had been received by the Upper Tribunal. At the hearing Ms Ofei-Kwatia had a quantity of original unpaginated documents. These had not been served in accordance with the directions of the Tribunal and in any event were not material to the issue of whether the Judge had made a material error of law. Ms Ofei-Kwatia later in the morning provided me with a paginated bundle. I note that the documents may assist the appellant in making a further application but in relation to the issue before me they did not take the matter any further. The decision of the Judge to dismiss the appeal is lawful and stands.

Signed Joanna McWilliam Date 18 August 2014

Deputy Upper Tribunal Judge McWilliam