IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeals Numbered: OA/03114/2013
OA/03115/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21st October 2014	**On 4th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

NOKUTHABA CHANTEL SIBANDA (FIRST APPELLANT)
LORRAINE CHIRWA (SECOND APPELLANT)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – PRETORIA

Respondent

Representation:

For the Appellants: Mr T Nyawanza of Genesis Law Associates
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Zimbabwe born respectively on 21st July 1999 and 15th November 1994. Both sought entry clearance to come to the United Kingdom for

settlement to join their mother Nancy Chirwa and in the case of the First Appellant also to join her father. The decisions under appeal were made on 4th December 2012.

2. Appeals against those refusals by both Appellants were dismissed in a decision promulgated on 16th January 2014 following a hearing at the First-tier Tribunal before First-tier Tribunal Judge Parkes. The Appellants appealed with permission to this Tribunal. On 24th June 2014 those appeals came before Deputy Upper Tribunal Judge McCarthy who made a decision of the same date that the determination of Judge Parkes contained errors on a point of law and the decisions in respect of both Appellants were set aside. A copy of Judge McCarthy's decision is annexed to this determination. It will be seen from that notice of decision that Judge McCarthy gave specific directions with regard to the resumed hearing which was to take place in the Upper Tribunal. He intended that the appeals should be heard before him but due to temporary unavailability on 29th July 2014 Upper Tribunal Judge Allen directed that the appeal be transferred to a different judge and on this basis it came before me.

3. Judge McCarthy helpfully set out the principal points to be decided at the resumed hearing as part of his decision. I repeat those points here:

   (1) The issue that has to be addressed in relation to the First Appellant is: were both her parents settled in the UK at the date of decision.

   (2) The issue that has to be addressed in relation to the Second Appellant is: did her mother have sole responsibility for her at the date of decision?

   (3) The issues that have to be addressed in relation to both Appellants are:

      (i) was adequate maintenance and accommodation available to them at the date of decision without recourse to public funds? and

      (ii) if they cannot succeed under the Immigration Rules does Article 8 apply directly?

   I will address those issues in the course of this determination.

4. At the commencement of the hearing it was confirmed that both representatives (who were the same representatives as at the hearing of 24th June 2014) had the notice of decision on error of law. Mr Smart for his part accepted that both of the parents of the First Appellant did have indefinite leave to remain as at the date of decision. The remaining issues in respect of that Appellant were whether the maintenance and accommodation requirements of paragraph 297 of the Immigration Rules were met as at the date of decision and in default whether the Appellant could succeed under Article 8. In respect of the Second Appellant (whose father appears to be in South Africa) the issues were whether as at the date of decision the Sponsor, Nancy Chirwa, had sole responsibility for the child's upbringing as required by paragraph 297(i)(e) of the Rules, whether there was adequate maintenance and accommodation and if not whether she could succeed under Article 8.

5. The documents before me consisted of the Respondent's core bundle in respect of each Appellant and a bundle filed on behalf of the Appellants by their representatives comprising 126 pages. Mr Nyawanza also produced a fuller copy of the Sponsor's tenancy agreement. The full copy had not been produced earlier. Mr Smart read this in detail and did not object to it being admitted at this late stage. I accordingly allowed it to be adduced. I heard oral evidence from the Sponsor and from her husband (father of the First Appellant) Matambanashe Sibanda, both of whom spoke in English. At the end of the hearing I reserved my decision.

6. At this point I will summarise the refusal notices of 4th December 2012. In respect of the First Appellant the ECO did not address the point under paragraph 297(i)(a) of the Rules as to whether her parents were settled in this country but focused on paragraph 297(i)(e) asserting that it had not been shown that the Sponsor had sole responsibility. The ECO was of the view that it had been her guardian rather than the sponsoring parent who had taken the important decisions in her life. She had a carer and was living in a stable environment and suffered no medical condition requiring treatment. There were no serious and compelling considerations. Both maintenance and accommodation were also put in issue. With regard to the Second Appellant it was again said that it was not accepted that the Sponsor had shown sole responsibility for her upbringing and it had not been demonstrated that she had taken decisions with regard to the Appellant's education or health. She had been cared for by her uncle since her grandmother had died. She was in full-time education and in a stable and relatively comfortable environment. It was not accepted that there were any serious and compelling family or other considerations making her exclusion undesirable. Maintenance and accommodation were again in issue.

7. In her evidence the Sponsor adopted her brief statement in which she set out that both Appellants were her daughters. With regard to the Second Appellant, Lorraine, her father had never been involved with her upbringing and had denied paternity. When the Sponsor left Zimbabwe for the United Kingdom in August 2002 she was left in the care of the Sponsor's parents but both had now died. A family friend Butholezwi Sibanda who lived in the flats opposite watched over them but he travelled frequently to South Africa. With regard to the First Appellant, Nokuthaba, the Sponsor and her customary law husband Matambanashe Sibanda were the biological parents and both had indefinite leave to remain in the United Kingdom. She had exercised sole responsibility for both Appellants, sending money for food and education and deciding which schools they attended and paying the fees. She decided which church they attended as well as the doctor who looked after them. The Sponsor went on to give details of her income as a support worker and her outgoings, further details of which were later agreed and are set out subsequently in this determination. She and her husband lived in a two bedroomed house which had a lounge and there would be sufficient room for the Appellants. Her husband had recently finished a course in auto mechanics and was looking for work. The First Appellant was still in education although the Second Appellant had just finished hers. She wished for her daughters to live with her and felt it was not desirable as teenagers for them to be living alone with no parent in Zimbabwe.

8. She continued giving further details of her income and how it was received. At the date of decision her husband had been a student and she therefore had paid only half rate council tax, at the rate of £46 per month. The couple now had a son who had been born on 30th January 2011.

9. It was put to her that in a letter her husband had indicated that they were separated. She replied that they had separated for a short time of about three weeks but he had returned. During his absence he had stayed with a friend but she was not sure with whom. They had stayed in touch during this period. She said he was back home by the date of decision, 4th December 2012.

10. Butholezwi Sibanda was referred to as the uncle of the Appellants, the Sponsor said, but that was only an honorary title, in fact he was just a friend. The decisions he made had always been at the direction of the Sponsor. Money had been sent to the older Appellant but had always been handed over to Mr Sibanda for payment because he was an adult. No money was received from Lorraine's father and she had no idea where he was.

11. Matambanashe Sibanda in his evidence also adopted his brief statement in which he confirmed that he had indefinite leave to remain. He was the biological father of Lorraine. He and the Sponsor had been married for about seventeen years. When they had met the Sponsor already had Lorraine who was about 3. Her biological father had denied her paternity and had never been involved with her upbringing. They had always made the key decisions. The children were very close to each other.

12. He continued in his oral evidence stating that he was currently still looking for work. When it put to him that a letter indicated that he and his wife had separated he accepted that he had written the letter but said that the meaning was different and he had not in fact moved out, even for a short period, although he and his wife had had some problems and on reflection he said that he had lived for a short time with a friend in Coventry. The issue had been between him and his wife and did not concern the children. At the date of decision he had been a student without income.

13. After the oral evidence the representatives requested a little time to consider the figures in the hope of being able to agree some items of the finances and I agreed to that suggestion and adjourned for a short period.

14. When the hearing resumed the representatives addressed me and confirmed that various figures had been agreed between them. Mr Smart stated that it was accepted that the Appellant at the relevant time earned £1,000 per month net which was equivalent to £230.76 per week. She received working tax credit of £346.38 every four weeks which was equivalent to £86.59 per week and child tax credit of £60.71 per week. Mr Nyawanza confirmed that these figures were agreed. Mr Smart said that he considered that child benefit (which the Sponsor received at a rate of £20.50 per week in respect of her son) should not be included. On his calculations the total income (leaving aside child benefit) was £377.96 per week.

15. He then went on to set out the relevant benefit levels as at the date of decision, following the guidance in **KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065**, as subsequently approved by the Court of Appeal. The income support level for a couple at the relevant time was £111.45 per week, for each child £64.99 per week added to which was a family premium of £17.40. He pointed out that as at the date of decision there would have been three children in the family as the son had been born the previous January. The total on that basis was £323.82 per week. Mr Nyawanza confirmed that this figure also was agreed.

16. With regard to accommodation the weekly sum for rent amounted to £80.76 per week. There was no evidence with regard to council tax but the Sponsor had stated in her own evidence that at the relevant time she had been paying £46 a month which appeared to be a reasonable figure as half of the relevant sum and Mr Smart said he was prepared to accept that. That (calculated on payments being made over a ten month period per annum) equated to £8.84 per week resulting in a total for accommodation of £89.60 per week. That too was not in dispute. If child benefit were to be taken into account then he said it was only right that that should also be added on to the income support level and the figures would cancel each other out.

17. With regard to sole responsibility for the Second Appellant Lorraine he submitted that the witness's evidence was tainted by the credibility issue. The husband in his letter had stated they were separated and the Sponsor had accepted that that was the case for a short period but he had initially denied that in his evidence. He submitted that the ECO had come to the correct conclusion with regard to Lorraine under the Rules. It had not been shown that the Sponsor held sole responsibility. Both Appellants failed on the maintenance requirements.

18. With regard to Article 8 the situation had been engineered by the parents who had decided to come to this country. They had not been required to travel here. They had chosen to continue family life as it currently existed at the date of decision. He did not dispute that there was family life. Into the proportionality assessment should be factored the credibility issue. He accepted that there was family life as between the sisters for Article 8 purposes.

19. In response Mr Nyawanza submitted that account should be taken of child benefit and he referred to the reported determination of **Ahmed (benefits: proof of receipt; evidence) [2013] UKUT 00084 (IAC)**. He submitted it was necessary to take account of the number of children. Adding child benefit of £20.50 for the first child and £13.40 for each of the other children would result in a sum of £47.10 which would increase the Sponsor's income to £420.06, which would be over the threshold.

20. With regard to sole responsibility in respect of Lorraine she should succeed. He accepted that there had been a discrepancy in the evidence as to whether the Sponsor and her husband had separated for a period but he said that was not a material issue and appeared to have arisen as a result of embarrassment. With regard to Article 8 the credibility of the witnesses was relevant. If the income requirements were not

met he said it would be a question of proportionality. I enquired whether an anonymity order was sought and he confirmed that it was not.

21. In considering the merits of these appeals I bear in mind that the burden of proof is upon the Appellants and the standard of proof the balance of probabilities. The relevant date for consideration of merits is the date of decision, 4th December 2012. It was accepted that with regard to the First Appellant, Nokuthaba, both of her parents had indefinite leave to remain in the United Kingdom as at the date of decision. So far as the Rules are concerned the issue in her case is one of maintenance and accommodation only.

22. With regard to Lorraine I have to decide whether as at the date of decision the Sponsor had sole responsibility for her care. It is well-established that sole responsibility does not necessarily involve day-to-day contact with a child on a personal basis but turns on whether the parent retained continuing control and direction over the child's upbringing, including making all the important decisions – see **TD (297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**. There were produced to me numerous receipts for substantial payments earlier in the year 2012 sent to Lorraine by the Sponsor via Western Union. There were also telephone cards which although not conclusive in themselves may be an indication of continuing contact by telephone. Significantly there was a letter from a pastor V Gumbo of Bulawayo stating that he was the pastor of a church there and had been in touch with Lorraine's mother on a regular basis. It was Lorraine's mother who had decided that she should attend that particular church and so far as he was aware it was the Sponsor who was solely responsible for Lorraine and Nokuthaba. Lorraine had become a member of the church in 2012. There was also a letter from a Dr Leonid Ndlovu stating that he had been the GP for both Appellants since they were infants. He regularly spoke to the Sponsor in the United Kingdom and it was she who had decided that he should continue looking after the girls' medical attention when she left for the UK. She also paid the bills which he charged when the girls needed treatment. He was not aware of anyone else he should consult concerning the girls since the death of the grandparents. There were also in the bundle various photographs of the Sponsor with both Appellants showing them in what appeared to be a close family relationship.

23. It is the case that there was a conflict of evidence between the Sponsor and her husband as to whether the couple had for a period separated, as was clearly indicated by the husband's letter to the ECO. I prefer the mother's evidence to the effect that the husband was away for a relatively short period during a family dispute. The husband acknowledged this after it was put to him and I come to the view that it was the result of embarrassment that led him to give what was undoubtedly misleading evidence. I do not find however that this goes to the core of the case as to whether the Sponsor held sole responsibility for Lorraine. At interview it was said that it was the guardian, their "uncle" Butholezwi Sibanda who had chosen their school but I find that he is likely to have done so following consultation with the Sponsor, who I acept was meeting the cost of the fees. Taking the evidence together I accept that it has been established on the balance of probabilities that as at

the date of decision the Sponsor exercised sole responsibility for the upbringing of Lorraine, albeit in part through the agency of others. The Appellants therefore meet the requirements of paragraph 297(i)(a) and 297(i)(e) respectively of the Rules.

24. I turn now to maintenance and accommodation. In doing so I bear in mind that there are two appeals before me but both applications were made at the same time, on the basis that both Appellants would travel together and arrive in this country at the same time. I therefore deal with the figures in a composite manner. The representatives had most helpfully discussed the figures between themselves and come to what I regard as entirely appropriate conclusions with regard to the figures which were agreed. These are set out above at the section in which I recited the submissions. In summary the cost of accommodation was £89.60 per week and the Sponsor's income from her earnings, from working tax credit and from child tax credit amounted to £377.96 per week, leaving a net balance of weekly income of £288.36. There was an issue as to whether or not the child benefit which the Sponsor received in respect of her young son should come into account. It was also agreed that the benefit level for a couple with three children, including family premium was £323.82. On this basis the Appellants clearly fall short of the required figure. Mr Nyawanza suggested that child benefit in respect not only of the Sponsor's son in the UK but also of the two Appellants should be added to the figures, in the combined sum of £47.10. To do so would give a total projected income of £335.46, some £12 over the benefit threshold. Mr Smart for his part argued that child benefit should not be taken into account at all.

25. These are not easy matters as has been well set out in **Ahmed** amongst other cases. I do not see that child benefit for the two Appellants on their arrival in this country can properly be taken into account, as child benefit is one of the benefits classified as "public funds" at paragraph 6 of the Immigration Rules. I appreciate that I am only concerned with additional recourse to public funds but were child benefit for the two Appellants to be added to the income level for the Sponsor then that would amount to additional recourse to public funds and is not permissible. I find that the situation is different with regard to the child benefit which the Sponsor currently receives in respect of her son, in the sum of £20.50 per week. That is income which is currently payable and the arrival of the Appellants would not result in any increase in this sum. It is income in the hands of the Sponsor. In **Ahmed** it was treated as part of the Sponsor's income (see paragraph 16) and I can see no reason to discount it. However taking this sum into account still leaves a shortfall of £14.96 per week. Although that is significant it is not a great sum. It is not however so modest that it can be regarded as *de minimis*. It is arguably not even a "near miss" but it is well-established that cannot avail the Appellants – see **Miah and Others v SSHD [2012] EWCA Civ 261 and Hayat v SSHD [2012] EWCA Civ 1054.** The appeals therefore fail under the Immigration Rules.

26. Both Appellants also relied on Article 8 ECHR. They do not come within any of the provisions relating to Article 8 contained in the Immigration Rules as at the date of decision. The guidance in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640** and **Nagre v SSHD [2013] EWHC 720 (Admin)** indicate that if an

Appellant does not meet the requirements of the Rules there need to be good grounds shown for going beyond the Rules to consider issues under Article 8 and only if there are compelling circumstances or the result would be unjustifiably harsh consequences should the appeal be allowed on that basis. That approach has been approved by the Court of Appeal in **Haleemudeen v SSHD [2014] EWCA Civ 558**.

27. In order to ascertain whether the Appellants have potentially a good arguable case under Article 8 which might entail unjustifiably harsh consequences as a result of the decision I have had regard to the approach approved by the House of Lords in **Razgar v SSHD [2004] UKHL 27** and in particular the series of steps suggested by Lord Bingham at paragraph 17.

28. The applications which led to the decisions under appeal were made on 5th November 2012. As at that date the First Appellant was aged 13 and the Second Appellant was 17 but would have been 18 within ten days. By the date of decision she had attained the age of 18. Although that would not potentially preclude her from succeeding under the Rules it is a factor to be borne in mind in considering Article 8, the date of decision being the relevant date as decided in **AS (Somalia) v SSHD [2009] UKHL 32**. I have accepted that the Sponsor has been responsible for directions as to the Appellants' education and has been responsible for their upkeep. Until a relatively short time before the applications this was dealt with via the Appellants' grandparents but since then has been handled by a friend of the family who lives close by. It was said that he was regularly in South Africa but there was no evidence from him to this effect. There was no indication that such trips were of any great duration. He is clearly a person whom the Sponsor trusts. As at the date of decision both Appellants were still in education and there was no indication that their material welfare was being neglected. The mother has visited. It is also the case that it was the decision of the mother and her husband to leave Zimbabwe and come to this country. They are not refugees.

29. The Appellants have grown up in the culture of Zimbabwe. There was no evidence to this effect but it would be surprising if they did not have circles of friends in that country. Although conventionally the best interests of children are to be with their parents in this case, as at the date of decision, the Second Appellant had just attained the age of majority and the First Appellant was living with her under the guardianship of Mr Sibanda. It was clear from the letters that the family have connections with a local church and have medical care. Given the disruption that a move at this stage would have been to their lives it is not made out that their best interests would lie in leaving a culture they knew and in which they were amply provided for to come to a new country and start afresh, leaving friends behind.

30. Turning to Lord Bingham's questions it was not in dispute that there was at the date of decision a family life between the Appellants and their mother in particular. That is a blood relationship which remains intact and is fostered by contact. The decisions under appeal would arguably be of sufficient gravity to interfere with that family life. The decisions are in accordance with the law being made under statute and in accordance with the Immigration Rules and in pursuit of a legitimate aim, the

maintenance of effective immigration controls which would come within the ambit of prevention of disorder or crime, the maintenance of the economic wellbeing of the country and potentially respect for the rights of others. It is now established by statute (Section 117B(1)) of the Nationality, Immigration and Asylum Act 2002 that the maintenance of effective immigration controls is in the public interest.

31. In considering proportionality I bear in mind the situation of the Appellants as at the date of decision. The First Appellant was living with her older sister who was by then just an adult. They were being properly provided for and had the guidance of a pastor, doctor and guardian. Albeit it not by a large margin they failed to meet the financial requirements of the Immigration Rules which indicates a likelihood that they would have become some charge on the public purse. Section 117B(3) of the 2002 Act now provides that it is in the public interest and in particular the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are financially independent.

32. Taking all of these factors together I have come to the view that the decisions under appeal are not disproportionate to the legitimate aims pursued and the Appellants have not shown that the consequences of refusal are of sufficient substance to outweigh the need to maintain immigration control. The appeals therefore do not succeed under Article 8.

Notice of Decisions

33. The original determination contained a material error on a point of law and has been set aside.

34. I have remade the decisions and for the reasons set out above these appeals are dismissed.

35. No anonymity direction is made.

Signed Date 03 November 2014

Deputy Upper Tribunal Judge French