Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/05570/2013
VA/03252/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 August 2014	**On 29 August 2014**

Before

Upper Tribunal Judge Southern

Between

TANATSWA INNOCENT MATSIKA (1)
FAINA FAUSTINA CHINHARA (2)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the First Appellant: Mr P. Tapfumaneyi, of PT Law & Associates
For the Second Appellant: None
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In 2005 the mother of the first appellant, who is a child born on 27 April 2001, left Zimbabwe and came to the United Kingdom where she has now been granted discretionary leave to remain. She has not since then returned to Zimbabwe and her son, the first appellant, has since then lived with his grandmother, who is the second appellant.

2. In late 2012, although not apparently on the same date, the appellants both made applications for entry clearance to come to the United

Kingdom. The first appellant applied for settlement, to join his mother. The second appellant applied for entry clearance as a family visitor, saying that she wished to stay for 6 months for the purpose of a family visit to her daughter and others. They had both previously made similar applications and had been unsuccessful in their appeals against refusal.

3. It is of significance that, on this occasion, the applications were made quite separately and there was no mention in the second appellant's application for a six month visit visa that her grandson was, at the same time, renewing his application for settlement.

4. The two applications were considered separately and both were refused. Both appealed against refusal to the First-tier Tribunal. The second appellant's appeal came before Judge PJM Hollingworth on 11 November 2013. Having received oral evidence from the second appellant's daughter, who is identified as sponsor in both applications, he became aware of the pending appeal of the first appellant and so adjourned the hearing so that both appeals came before him on 16 April 2014.

5. By a determination promulgated on 21 May 2014 the judge dismissed both appeals. There were separate applications for permission to appeal. On 23 June 2014 the first appellant was granted permission to appeal by First-tier Tribunal Judge Davies, mainly on the basis that although the grounds of appeal raised a claim under Article 8 of the ECHR the judge did not deal with that at all. Two days later, on 25 June 2014 the second appellant was granted permission to appeal by Designated Judge McClure, the judge observing that the two appeals needed to be considered together.

6. At the hearing before the Upper Tribunal Mr Tapfumaneyi appeared for the first appellant only, although the second appellant's daughter attended and was invited to respond to the issues raised in respect of her mother's appeal.

7. Dealing first with the appeal if the second appellant, the judge made a clear finding of fact that:

> "I find that the reality of the position is that this appellant planned to visit the United Kingdom to bring the child Tanatswa Innocent Matsika with her"

The judge noted submissions advanced by the respondent that

> "At questions 4.19 and 4.20 of her application form she indicated that neither her children nor any other children would be travelling to the United Kingdom with her. At question 8.2 she confirmed that she would not be travelling with anyone. At question 8.6… she provided details of the other family members who would be staying at the proposed address during her visit but did not mention Tanatswa Matsika."

and said:

> "I accept the respondent's arguments in relation to paragraph 320(7A) and dismiss the appeal of Faina Chinhara on this basis."

8. Paragraph 320(7A) provides, so far as is relevant, as follows:

> Grounds upon which entry clearance or leave to enter the United Kingdom is to be refused
>
> (7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application and whether or not to the applicant's knowledge), or material facts have not been disclosed in relation to the application…

9. Given the clear finding of fact made by the judge that the second appellant intended to travel with the first appellant so as to bring him to the United Kingdom to join his mother, taken together with the fact that these were renewed applications after an earlier attempt had failed, it was plainly open to the judge to conclude that the application of the second appellant was one that fell to be refused on the basis of paragraph 320(A), now that the true facts had emerged, so that on that basis alone the appeal to the Upper Tribunal must be dismissed.

10. In granting permission, Judge Mclure identified two grounds that were being pursued by the second appellant in challenging the determination. First, her appeal should not have been linked with that of her grandson and second, as she had not seen her daughter since she left Zimbabwe to travel to the United Kingdom, the appeal should be allowed because of rights protected by article 8 of the ECHR.

11. Neither of those grounds is remotely arguable. There was nothing at all to indicate a viable article 8 claim arising from the second appellant's relationship with her adult daughter who had chosen to relocate to the United Kingdom years ago. The judge was clearly entitled to hear the two appeals together. Rule 20 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 provides:

> "Hearing one or more appeals together
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> 20. Where two or more appeals are pending at the same time, the Tribunal may direct them to be heard together if it appears that-
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> (a) some common question of law or fact arises in each of them;
> (b) they relate to decisions or actions taken in respect of persons who are members of the same family; or
> (c) for some other reason it is desirable for the appeals to be heard together."

12. Addressing next the appeal of the first appellant, Mr Walker accepted, quite properly, that the judge had simply failed to engage with two grounds that were specifically pleaded before him. The first of those grounds was that there had been no consideration of rights protected by article 8 of the ECHR, as were engaged between this child and his mother and second that the application should have succeeded under paragraph

301(i)(c) of HC395 because one of the first appellant's parents had limited leave to remain in the United Kingdom and there were serious and compelling considerations that made exclusion of the child undesirable and suitable arrangements have been made for the child's care.

13. S.86(2) of the Nationality, Immigration and Asylum Act 2002 required the judge to determine any matter raised as a ground of appeal and his failure to do so was an error of law. It was a material error given that it cannot be said that the ground was simply unarguable. Plainly, careful findings of fact need to be made in respect of those grounds, particularly in the light of the other detailed reasons given by the Entry Clearance Officer, in refusing the second appellant's application, for finding that there were concerns about the sponsor's financial circumstances.

14. The grounds challenged also the finding of the judge that the sponsor did not have the sole responsibility for the first appellant's upbringing demanded by paragraph 301(i)(b) of HC395. Having heard submissions from both parties it is clear that if the first appellant is to meet that requirement it will have to be demonstrated that the Certificate of Guardianship issued by the Juvenile Court of Harare that certified that the second appellant had been appointed as the first appellant's guardian "with full legal powers "over the child was not inconsistent with the assertion that the sponsor, nonetheless, has sole responsibility for him. However, the judge made no specific finding of fact in that regard and, in the light of the need for the other ground to be addressed, it was agreed between the parties that it would not be appropriate to seek to preserve any part of this determination insofar as it relates to the first appellant.

15. For these reasons, the appeal of the first appellant to the Upper Tribunal will be allowed to the extent that the decision of the judge to dismiss his appeal will be set aside and the appeal will be remitted to the First-tier Tribunal for determination afresh by a different judge of that Tribunal. The determination will stand only as a record of what was said at the hearing.

Summary of Decision:

16. The appeal of the first appellant is allowed to the extent that the decision of the judge to dismiss his appeal will be set aside and the appellant will be remitted to the First-tier Tribunal to be determined afresh on all grounds.

17. The appeal of the second appellant is dismissed and in that regard only the determination of the First-tier Tribunal shall stand

Signed Date 27 August 2014

Upper Tribunal Judge Southern