The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/18406/2013**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On November 10, 2014	**On November 11, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MISS NL M
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Dr Mynott (Legal Representative)
For the Respondent: Mr McVeety (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born April 23, 2001 is a citizen of Zimbabwe. She applied for entry clearance as a dependant child. As her mother only has limited leave to remain the respondent refused her application under the Immigration Rules on August 30, 2013.

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on September 25, 2013 although Section 84(1) (c) of the 2002 Act limited her rights of appeal to human rights grounds.

3. The respondent reviewed the decision on December 20, 2013. On June 9, 2014 Judge of the First Tier Tribunal Birrell (hereinafter referred to as the "FtTJ") heard her appeal and refused it in determination promulgated on June 17, 2014.

4. The appellant lodged grounds of appeal on June 23, 2014 and on August 1, 2014 Judge of the First-tier Tribunal Plumptre granted permission to appeal finding it arguable the FtTJ had possibly erred by making inconsistent findings and by raising a new issue in her determination without affording the parties an opportunity to address her on it.

5. The respondent filed a Rule 24 response dated August 11, 2014 in which she opposed the appeal and submitted the FtTJ had made findings open to her.

6. The matter was listed on the above date and the appellant's mother and stepfather were both in attendance.

SUBMISSIONS

7. Dr Mynott submitted the determination was flawed because of the finding made at paragraph [26] of the FtTJ's determination. He argued:

   a. That finding (on the child's wishes) was made firstly without having regard to other evidence that was before her and secondly without raising the issue with the witnesses in court.

   b. Although it was accepted the appellant's mother had submitted the application, signed it and completed appendix 2 nevertheless the child had had to attend at the Embassy for biometric reasons and her views were contained within the witness statements of both her mother and stepfather.

   c. The FtTJ should have regard to the decision of Zoumbas [2013] UKSC 74 and in particular paragraph [13] where the Courts stated-

> "13. We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is

> made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, *per* Lord Bingham at para 12. Secondly, as Lord Mance pointed out in *H(H)* (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of *H(H)* shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children. In that case an Italian prosecutor issued a European arrest warrant seeking the surrender of a person who had earlier broken his bail conditions by leaving Italy and ultimately seeking safe haven in the United Kingdom and had been convicted of very serious crimes. This court held that the treaty obligations of the United Kingdom to extradite him prevailed over his children's best interests. The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in *H(H)* (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents."

Dr Mynott submitted the FtTJ had not followed this approach.

d. The FtTJ had acted unfairly by not raising the issue about the child's wishes. The Tribunal in MM (unfairness E and R) Sudan [2014] UKUT 105 (IAC) at paragraph [15] stated-

> "The law reports and texts are replete with formulations and manifestations of this right. For present purposes, and bearing in mind the doctrine of precedent, we focus upon two of the leading decisions of the superior courts. The first of these is R – v – Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344. It may be observed that, in both the reported cases and the leading text books, this decision has not received the prominence it plainly merits. This might be attributable to its appearance in one of the minority series of law reports. Having said that, Cotton has been recently quoted with approval and applied by Moses LJ in McCarthy v Visitors to Inns of Court and

> Bar Standards Board [2013] EWHC 3253 (Admin) and by Underhill J in R (Hill) v Institute of Chartered Accountants [2013] EWCA Civ 555. In Cotton, the issue, in a nutshell, was whether the decision of the Chief Constable to dismiss a police officer was vitiated by procedural unfairness on account of inadequate disclosure to the officer of the case against him. We distill the following principles from Cotton:
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> (i) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the **merits** of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.
>
> (ii) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.
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> (iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety, which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.
>
> (iv) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred."

e. By refusing the appeal on an issue not raised either in the refusal letter or at the hearing the FtTJ had acted unfairly and failed to have regard to the UN Convention on the Rights of a Child.
f. The FtTJ also failed to consider in her proportionality assessment that the stepfather was a refugee and her siblings were British citizens.

8. Mr McVeety acknowledged that the main reason given by the FtTJ for rejecting the decision was not a matter raised in the refusal letter or at the hearing but submitted that as the FtTJ made a finding that possibly was open to her but he accepted there was an argument that she should have raised it at the hearing or brought the case back if the issue troubled her so much.

MY FINDINGS ON ERROR IN LAW

9. This was an appeal outside of the Immigration Rules. For the reasons properly set out by the FtTJ in her determination the appellant only had a limited right of appeal. At paragraph [18] of her determination she took the correct decision to deal with this appeal outside of the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules and from paragraph [19] onwards of her determination she considered the evidence and carried out the article 8 "Razgar" approach.

10. The FtTJ was unable to find it was disproportionate to refuse entry because there was no statement from the appellant and in her opinion this was necessary in light of the fact she was thirteen years of age at the date of hearing albeit she was twelve years of age when she submitted her application.

11. A review of the hearing notes (the FtTJ and respondent's file) suggests it was an extremely short hearing in which the witness was not asked any questions and the representatives relied on brief submissions only. At no time prior to the issuing of the determination had the respondent suggested the child did not wish to live with her mother and stepfather and siblings in the United Kingdom or that this was a potential trafficking scenario.

12. This application was refused for the reason contained in paragraph [26] of the determination namely because the FtTJ did not feel able to assume the views expressed in the witness statements were actually those of the appellant herself.

13. I am satisfied that if she had raised this at the hearing or it was an argument being relied on by the respondent then this is something that could have been addressed in the evidence or at the hearing itself. The respondent had never suggested this was anything but a genuine application. The challenge had been simply that the Immigration Rules did not cover her because her mother only had limited leave to remain at the date of application.

14. The appellant was not on notice that this was to be an issue and consequently there had been no need for a statement to be obtained from her.

15. Whilst the Tribunal has to be conscious of trafficking risks there was no suggestion that this was such a case. If the respondent had any such concerns or had been of the opinion the appellant did not genuinely want to come and live here then the time for

such a submission was either in the refusal letter, review letter or at the hearing.

16. In the absence of any evidence that this was raised or discussed at the hearing I am satisfied that there has been some unfairness and an error in law based on the fact is established as neither the appellant nor the respondent were given an opportunity to address her concern.

17. I therefore set aside the decision and I will proceed to remake it.

PRELIMINARY ISSUES

18. Mr McVeety did not object to two further statements from the appellant and the legal representative. The appellant's statement reiterated her wish to live with her mother in the United Kingdom and the legal representative's letter confirmed the process by which the statement had been obtained.

FINDINGS AND REASONS

19. The FtTJ's only concern was the lack of a statement of intent from the appellant.

20. The appellant in her recent statement made clear

    a. She wanted to join her family in the United Kingdom.
    b. She wanted to get to know her siblings better.
    c. She loved seeing her mother, stepfather and siblings on a recent visit and it was very hard for her when they left her behind.
    d. She wanted the refusal decision to be altered to give her the chance to be with her family.

21. The recent statement confirms her wish to live with her mother and in light of the FtTJ's other positive findings in paragraphs [25] to [29] I am satisfied that the FtTJ would have allowed this appeal if this statement had been before her because in paragraph [29] she stated-

> "… Whilst I accept that the Appellant's mother and stepfather want her to come to the United Kingdom in determining what is in the best interests of the Appellant and indeed whether refusal would have unjustifiably harsh consequences I find that I am unable to conclude that there would be such consequences and the decision would be

> disproportionate in the complete absence of direct evidence from the Appellant that this is something she wants and it is not a decision being imposed on her."

22. I agree with the FtTJ's approach that this decision should be dealt with outside of the Rules and I follow the approach set out in paragraphs [19] to [22] of the FtTJ's determination.

23. I am satisfied that refusing her entry would be disproportionate. In reaching this decision I have had regard to:

    a. The decision of Zoumbas.
    b. The age of the child.
    c. The appellant's mother is settled in the United Kingdom with limited leave and likely to be entitled to indefinite leave shortly.
    d. Her stepfather has indefinite leave to remain as a result of an asylum application) and cannot return to Zimbabwe.
    e. She has two siblings who are classed as British.
    f. The appellant's stated wishes.

24. I allow the appeal under article 8 ECHR.

DECISION

25. There was a material error of law. The original decision is set aside and I allow the appeal under article 8 ECHR.

26. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier Tribunal as the FtTJ indicated the appellant was a non-vulnerable adult. Clearly this is incorrect because the appellant is thirteen years of age and I therefore make an order prohibiting the disclosure of any information that would make it likely that the public would be able to identify the appellant.

Signed: Dated: **November 10, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

No fee award request was made and I do not make one in those circumstances.

Signed: Dated: **November 10, 2014**

Deputy Upper Tribunal Judge Alis