Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/00640/2015
HU/00638/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd May 2017	**On 12th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) [T J]
(2) [M J]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Charles Mannam (Counsel)
For the Respondent: Mr Peter Armstrong (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Boylan-Kemp, promulgated on 20th October 2016, following a hearing at Birmingham Sheldon Court on 20th September 2016. In the determination, the judge dismissed the appeals of the Appellants, whereupon they

subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are both nationals of Zimbabwe. The first Appellant was born on [ ] 2002 and the second Appellant was born on [ ] 2009. Both Appellants are siblings. They were both born in the UK but returned to live in Zimbabwe, and the present appeal arose on account of their application for entry clearance to join their UK based parents, which application was refused on 5th May 2015 on the basis of paragraph 305 (v) of HC 395. On 3rd November 2015, the ECM upheld the decision.

The Judge's Decision

3. The judge recounted the facts (at paragraph 7) and noted how the first Appellant, [TJ], was born in the UK in 2002 and then moved to live permanently in Zimbabwe with his maternal grandparents in 2006, due to the financial circumstances of his parents in the UK. The second Appellant, [MJ], was born in 2009, and also left to live permanently in Zimbabwe with his maternal grandparents, after the birth of his sponsoring parents' youngest child, [Z], in 2011, especially since [Z] was born with complicated health issues.

4. In what is undoubtedly a careful, sensitive and comprehensive determination, the judge considered the basis of the decision by the ECO, namely, the application of paragraph 305 of HC 395 (see his paragraph 11), and observed that although the Appellants could substantially satisfy the requirements of these Rules they had been away from the UK for more than two years, and therefore could not now return to join their parents in the UK.

5. The Appellants were represented on that occasion by Mr Madanhi, and he appears to have emphasised the fact that the Appellants had a family life with their parents and siblings in the UK, which is demonstrated by the financial support and the regular visits to Zimbabwe made by the Appellants' mother and, therefore,

> "Mr Madanhi submitted that therefore the Appellants should be granted entry clearance to join their parents in the UK as the Sponsors have lived lawfully for over fifteen years in the UK; the father has a good job which will allow him to both financially and emotionally support the children in the UK; the process of the mother visiting the Appellants regularly in Zimbabwe is expensive and disruptive to the family; and, that the youngest child's medical conditions are complicated and cannot be adequately dealt with in Zimbabwe" (paragraph 14).

6. The judge noted that the Appellants' father had a secure job in that he was a school teacher and that "he is contributing both financially and morally

to the development of the country as a result" (paragraph 15). However, this alone was not enough to make the circumstances of the Appellants "exceptional" such that would warrant the grant of entry clearance outside of the Immigration Rules (see paragraph 15).

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge failed to take into account the circumstances of the Appellants' return to live in Zimbabwe and erred in placing insufficient weight to the best interests of the children, having regard to the Appellants and their younger brother.

9. On 23rd March 2017, however, permission to appeal was granted by the First-tier Tribunal on the basis that there was in this appeal a "**Robinson** obvious" point, and this was that the appeal ought to have been considered under paragraph 297 in the first instance because that was an easy Rule to satisfy.

10. On 26th April 2017, a Rule 24 response was entered by the Respondent Secretary of State to the effect that, even if paragraph 297 had been considered there was no indication that there was a realistic possibility that the Appellants would be able to meet the provisions of this Rule. The Appellants had the benefit of legal representation and at no point was the possibility that the Appellants could meet those requirements raised.

Submissions

11. At the hearing before me on 23rd May 2017, Mr Mannam, appearing on behalf of the Appellant, drew my attention to the skeleton argument before the Tribunal below. This appears in the Appellants' bundle. It was, submitted Mr Mannam, difficult to have overlooked because the index at the outset of the bundle makes it quite clear that the second document in the bundle (at pages 2 to 6) is the Appellants' skeleton argument. When one turns to the skeleton argument then, it is stated at the outset (at paragraph 2) that, "the relevant Rules are set out in paragraph 297 of HC 395".

12. Second, although this was a case where in the appeal before IJ Boylan-Kemp, there was no representation from the Respondent Home Office, such that Mr Madanhi may well have overlooked having to emphasise the contents of the skeleton argument in those circumstances, the judge ought to have dealt with this provision. Instead, what he does (at paragraph 11) is to focus exclusively on paragraph 305, and then to say (at paragraph 12) that the Appellants satisfy sub-paragraphs (i) to (iv), but not (v).

13. Third, the three main issues before the judge were, accommodation, maintenance, and the Appellant children not living an independent life, yet

the judge made no express findings on these matters, and certainly did not make an express finding on accommodation.

14. For his part, Mr Armstrong submitted that he would rely upon the Rule 24 response. There was, he suggested, no witness statement today from Mr Madanhi, to explain why he did not raise paragraph 297, if it was such an important part of the argument before the Tribunal. It was not enough to say that there was a skeleton argument in the Appellants' bundle, especially when the Home Office Presenting Officer was not in attendance, because it fell upon the Appellants' representative to draw the Tribunal's attention to the bundle, and to specifically say that the appeal was to be determined under paragraph 297, and not paragraph 305.

15. In reply, Mr Mannam submitted that if, in the absence of a Presenting Officer, the judge was bound to look carefully at the documentary material presented by the Respondent Home Office, then he was equally duty bound to look at the documentary evidence presented on the side of the Appellant, and this he had obviously failed to do, because he did not pick up the reference to paragraph 297.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. My reasons are as follows.

17. First, one is bound to say, that in circumstances where the Appellant was represented, the failure to bring to the judge's attention the precise provision in the Immigration Rules upon which reliance was placed, must first and foremost count as a failing on the part of those that set out to represent these Appellant children. The failings are considerable. The Grounds of Appeal are entirely factual and make no reference to the applicable Immigration Rules. This is a significant omission because the ECO's decision had already highlighted the fact that the refusal was being made under paragraph 305 (and not paragraph 297), so that it behoved the drafter of the Grounds of Appeal to make it clear that paragraph 297 needed consideration. Thereafter, although there is a skeleton argument, it is poorly drafted. It draws attention to paragraph 297 early on, but it then goes on to refer to how there is a refusal under paragraph 305(3) and paragraph 6 of the skeleton argument, without ever at any stage, either making it clear why this is the wrong provision, or why the appeal should be allowed under paragraph 297. It is a skeleton argument that does not serve the purpose that it is designed to serve. Thereafter, at the hearing before Judge Boylan-Kemp, although there was a representative (who one would have thought would have faced no opposition in his attempt to raise the appropriate provision in the Immigration Rules if he had been minded to do so), no reference was made to paragraph 297. The emphasis was on the appeal being allowed outside the Immigration Rules on Article 8 grounds.

18. Second, and be that as it may, the fact remains that paragraph 297 was mentioned in the skeleton argument, and the reference in these Rules to "sole responsibility" and "exclusion being undesirable" (see sub-paragraphs (e) and (f)), was something that needed consideration. In this sense, the matter was not just "**Robinson** obvious" but was something that had specifically been raised in the skeleton argument. It is accordingly not correct for the Rule 24 response to end with the statement that, "at no point was the possibility that the Appellants could meet those requirements raised" in relation to paragraph 297, because although this may not have been raised at the hearing, it was raised in the skeleton argument. If it was not raised at the hearing this may well have been because there was no Home Office Presenting Officer in attendance, although that is not to excuse the failing in this regard. All in all, therefore, the decision below must be set aside so that paragraph 297 can be properly considered on the evidence by the First-tier Tribunal.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Boylan-Kemp, under paragraph 7.2 of the practice statement so that clear findings can be made in relation to accommodation, maintenance, and whether or not the Appellants are living an independent life.

20. The appeal is allowed.

21. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 10th June 2017