Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/16301/2012
OA/16302/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
on 19th August 2013	**on 20th August 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DISNEY TONDERAI MANGWANYA
DEAL RUWADZANO MANGWANYA

Appellants

and

ENTRY CLEARANCE OFFICER - (PRETORIA)

Respondent

Representation:

For the Appellant: Sponsor in person.
For the Respondent: Mr Spence – Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Mensah promulgated on 29th April 2013 in which she dismissed the appellants' appeals under the Immigration Rules and Article 8 ECHR against the refusal of an Entry Clearance Officer (ECO) to grant them leave to enter the United Kingdom for the purposes of settlement with their sponsor who is also their mother.

2. The first appellant was born on 17th February 1992 and the second appellant on 26th March 1996. Both are citizens of Zimbabwe. The first appellant applied under the provisions of paragraph 317 as he was over twenty years of age and the second appellant under the provisions of paragraph 297 as she is under eighteen years of age. Both applications were refused. The first appellant has made previous applications which were refused on the grounds of his not having proved their mother has sole responsibility. It is said he lives with an aunt and although he claim she is ill there was insufficient evidence of this and exceptional and/or compassionate circumstances. In relation to the second appellant her father was alive and divorce and custody arrangements did not mean sole responsibility. Evidence of money sent by her mother in October, November, December 2011, and January 2012 did not demonstrate sole responsibility and there were no exceptional and/or compassionate circumstances. The dates are both decisions are 3rd August 2012.

Discussion

3. Whilst I understand the sponsor may want very much to be reunited with her children I advised her at the hearing that I am not satisfied that the Grounds on which permission to appeal was sought establish any arguable legal error in the determination. I now give my reasons.

4. Judge Mensah clearly examined the evidence she was asked to consider with the degree of care required in an appeal of this nature. She identified the key element under paragraph 297 for the second appellant was whether her mother has sole responsibility for their upkeep, which was also relevant to the first appellant [4]. The sponsor claims that she has sole responsibility but in paragraph 7 of the determination the Judge refers to a considerable volume of evidence in which there is reference to an individual as "Dad". The Judge asked the sponsor about the communication and the reference to "Dad" but did not accept the claim by the sponsor that this is a reference to her sister's ex-husband who they call Dad and who has little involvement and only saw them once a month. Judge Mensa found "I absolutely and completely reject the explanations given by the sponsor and find the evidence plainly and clearly demonstrates the appellants not only have an ongoing relationship with their real father but he plays an active role in their lives and in making important decisions. I completely reject the sponsor's claim to have sole responsibility for her children. I accept she plays a role in their children's lives but it is clear their father also plays a significant role."[8].

5. Judge Mensa so considered there was no credible evidence the appellants' were living in exceptional and/or compassionate circumstances and it was not established they had no relatives to whom they could turn to in their home country.

6. The Grounds seeking permission to appeal allege at paragraph 3 that the Judge failed to reach a decision on grounds of appeal properly before him and fully argued. This fails to identify what the alleged legal error is and is, in reality, no more than a disagreement with the findings made by the Judge.

7. Paragraph 4 challenges the Judges' reliance on the printouts and refers again to the explanation provided by the sponsor that the children called her sister's ex-husband's 'Dad' and that this is a reference to him and not their biological father. I find this is an appeal in which the Judge considered the evidence with the degree of care required and gave adequate reasons for the findings made. The Judge did not find the appellants' had proved that what the sponsor was saying with regard to this individual is true. The sponsor confirmed today that there was no other evidence to support this claim. Having read all the evidence the Judge had available to the Judge her finding relating to this individual is within the range of findings open to her on the evidence. The Judge identifies a number of occasions when such a reference is made. In light of the nature of the evidence a finding that this is a reference to their biological father cannot be said to be either perverse or irrational. The Ground is a disagreement with a finding the Judge was entitled to make and no more.

8. I reject the claim the Judge failed to take into account evidence that was submitted as clearly all relevant evidence was considered. Paragraph 6 of the Grounds is a weight challenge but weight is a matter for the Judge - see SS (Sri Lanka) [2012] EWCA Civ 155. No legal error is proved.

9. The Grounds also allege that no proper consideration was given to Article 8 and that the determination lacks any proper consideration or reasons. I find this Ground has no merit either. It was found that the sponsor in the United Kingdom did not have sole responsibility. It was also found that the appellants' are not living in the most exceptional compassionate circumstances. The children live in the environment in which they have always lived and it has not been shown to be in their best interests to change the status quo. In paragraph 12 of the determination the Judge accepts the sponsor's strong and natural desire to have her children living with her, but they have lived separately from each other for many years with their father's involvement.

10. The grant of permission to appeal refers to the case of T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKLUT 000483 (IAC). In this case the Tribunal held that (i) Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom. (ii) Where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the "exclusion undesirable" provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken into account by the ECO at first instance and the judge on appeal. (iii) When the interests of the child

are under consideration in an entry clearance case, it may be necessary to make investigations, and where appropriate having regard to age, the child herself may need to be interviewed.

11. As stated, the Judge found that the children were being cared for in Zimbabwe and did not find there was any reason to warrant their being permitted entry to the United Kingdom. There is no evidence that their welfare is being jeopardised by their exclusion or any reason why the ECO should have investigated this matter further.

12. I have also had regard to the more recent decision of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC) (Blake J) in which the Tribunal held that (i) the exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require; (ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration"; (iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.

13. It is only the second appellant who was under eighteen at the date of decision as the first appellant is an adult. The case refers to the "exclusion undesirable" provisions but do I not find that any relevant considerations were not looked at either by the Judge or the ECO in this appeal. I do not find it proved that the Judge should have found the decision to be unlawful by reference to section 55 or related guidance based upon the authorities above. The facts of this case do not warrant such a finding.

14. I accept that Article 8 ECHR imposes a positive obligation to facilitate the development of family life but case law establishes that even in such circumstances, when assessing the proportionality of the decision, the test is exactly the same as it is for other Article 8 cases. It has not been proved that this additional element makes a difference to this decision or allows me to find any legal error in the Judge's conclusions.

15. The findings under both the Rules and Article 8 ECHR are within the range of findings are Judge was entitled to make on the evidence. No legal error is proved. If the circumstances warrant it, a fresh application will have to be made.

Decision

16. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as no application for anonymity was made and the facts do not established the need for such an order.

Signed…….
Upper Tribunal Judge Hanson

Dated the 19th August 2013