Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/05709/2013
OA/06094/2013
OA/06096/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 May 2014	**On 27th May 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MISS NYASHA KAMBARI (FIRST APPELLANT)
MR MARSHALL MUZANENHAMO MUBAIWA (SECOND APPELLANT)
MISS MEMORY KAMBARI (THIRD APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellants: Ms S Hall, Counsel
For the Respondent: Mr C Avery, HOPO

DETERMINATION AND REASONS

1. The appellants are citizens of Zimbabwe. The first appellant, Miss Nyasha Kambari, was born on 29 June 1993. The second appellant, Mr Marshall Muzanenhamo Mubaiwa was born on 17 March 1995. The third appellant, Miss Memory Kambari was born on 15 February 1999. The mother of the appellants died on 18 June 2000 in Zimbabwe. On 22 May 2012, their

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sponsoring guardian Mrs Nyasha Gwatidzo obtained a Certificate of Guardianship from the High Court in Zimbabwe making her responsible for the appellants. Mrs Gwatidzo has been described as the aunt of the appellants. At the time she obtained the Certificate of Guardianship, the first appellant was not a minor. She was over 18. Although the sponsor has been described as an aunt she is a cousin to the mother of the appellants.

2. On 4 October 2012 the appellants applied for entry clearance to settle in the UK with the aunt and guardian. The first appellant's application was considered and refused under paragraph 317 of the Immigration Rules because the ECO was not satisfied that the first appellant was wholly or mainly financially dependent on the sponsor or that she was living in the most exceptional compassionate circumstances in Zimbabwe. The applications of the second and third appellants were considered and refused under paragraph 297 because the ECO was not satisfied that one parent was present and settled in the UK and the other parent was dead and that there were serious and compelling circumstances which made the exclusion of the appellants from the UK undesirable.

3. The appeals of the appellants were dismissed by First-tier Tribunal Judge Beach.

4. The judge heard oral evidence from the appellant's sponsor Ms Nyasha Gwatidzo. She found the sponsor a credible witness and accepted all of her evidence. The sponsor's position was that the appellants were left in the care of her mother who was capable of looking after them at that stage but her mother's health has deteriorated and she believed that it was in the best interests of the appellant to be with her in the UK. She accepted that she did not formalise the guardianship until sometime after she had taken on responsibility for the appellants. She also accepted that the appellants have family in Zimbabwe and live in comfortable circumstances.

5. The judge noted that the respondent accepted that the sponsor had provided some money transfer receipts but stated that these were addressed to her mother and it was impossible to state what proportion of these money transfers were for the first appellant. The judge accepted that the sponsor took on the guardianship of the appellants when her cousin died in 2000. There was evidence of money transfers to the sponsor's mother with whom the first appellant lives and she found that it is more likely than not that the first appellant also benefited from these money transfers and that she was at least mainly financially dependent on the sponsor.

6. The judge however found that the difficulty for the first appellant was that she could not fulfil the Immigration Rules because she is the niece of the sponsor and this is not covered by paragraph 317. Secondly the judge found that the first appellant could not show that she is living in the most

exceptional compassionate circumstances in Zimbabwe. She is living in a substantial property with her sponsor's brother and sponsor's mother. The sponsor stated that her brother was living there temporarily but she also accepted that he would feel compelled culturally to look after the first appellant if required and said that her brother provides emotional support to the first appellant. The first appellant is currently retaking O levels and it is hoped that she will continue to college which the sponsor will finance. The letter from the sponsor's mother's GP only states that it is not advisable for her to look after small children. The judge found that the first appellant is not a small child. She would be able to continue to live in Zimbabwe at the sponsor's mother's house with emotional support from her family in Zimbabwe, with visits from the sponsor as well as communication by phone and email and continued financial support from the sponsor. In the circumstances the judge found that it cannot be said that the first appellant lives alone in the most exceptional compassionate circumstances.

7. With regard to the second and third appellants, the judge noted that they were both under 18 and so could potentially, fit within paragraph 297 of the Immigration Rules albeit they are not the birth children of the sponsor. She had already found that the sponsor took responsibility for the appellants when her cousin died and that she provided financially for them. The first appellant when interviewed did not mention having any contact with her father and the judge found that the appellants' father was not involved in their lives. This was also consistent with the sponsor's evidence and there was no suggestion that the appellant's father had been involved in the applications or in applying for a passport which one would expect to see if he were involved in their lives.

8. The judge said she must therefore consider whether there are serious and compelling family or other considerations which make it undesirable for the second and third appellants to be excluded from the UK.

9. The judge found that the second and third appellants live with their sister (first appellant), the sponsor's mother and the sponsor's brother. The sponsor was open in stating that her family in Zimbabwe would not leave the appellants to care for themselves on their own and was also open in stating that her brother provided emotional support to the appellants. The appellants are all studying. The second and third appellants were 17 and 13 at the time of the applications. There was nothing to suggest that they could not continue to live in Zimbabwe with the financial support provided by their sponsor and the emotional support of the family in Zimbabwe as well as visits from the sponsor. The sponsor may prefer the appellants to be in the UK but this is not enough to show that there are serious and compelling family considerations which make the appellants' exclusion from the UK undesirable. The second and third appellants live in comfortable circumstances and receive income and support from their sponsor. There was no suggestion that this support would stop if the appellants did not come to the UK. There was a suggestion that the

sponsor's business was suffering as a result of frequent visits to Zimbabwe but there was no evidence to support this contention and the sponsor has her mother in Zimbabwe in any event and so would still be likely to visit. The letter from the sponsor's mother's GP does not suggest that she is incapable of providing support to teenagers but states simply that it is not advisable for her to have the care of small children. Taking all the circumstances into account, the judge found that there was insufficient evidence to show that there are serious and compelling family or other considerations which mean the exclusion of the second and third appellants from the UK was undesirable.

10. The grant of permission stated that it is arguable that the judge made an error of law in treating Miss Nyasha Kambari only as the niece of the sponsor for the purpose of paragraph 317 of the Immigration Rules, when the judge found that the sponsor had assumed guardianship of the appellants in 2000. It is also arguable that after finding that the sponsor was the guardian of the appellants and their financial support, the judge failed to make any decision in regard to human rights (in particular in regard to Article 8 of the ECHR, although the judge has stated that Article 8 was relevant to the appeals).

11. After hearing submissions from both parties, I found in respect of the appeals under the Immigration Rules that the judge did not err in law for the reasons given below. I shall come to the Article 8 issue later.

12. Counsel conceded that as the niece of the sponsor, the first appellant could not bring herself within the Immigration Rules. However, the nature of the relationship between the fist appellant and her sponsor is changed as a result of the Certificate of Guardianship and which brings her within the Immigration Rules as an adult child of the sponsor. Counsel submitted that as such all three appellant are the children of the sponsor as was found by the judge. I combed through the determination but could not find a specific finding by the judge that the appellants are the children of the sponsor. I find that whilst the Certificate of Guardianship gives the sponsor full legal powers over the three appellants, she is not their natural mother. The first appellant is not the daughter of the sponsor and consequently cannot bring herself within paragraph 317(f) of the Immigration Rules. I accept that the second and third appellants come within the Immigration Rules under paragraph 297(i)(f) as relatives of the sponsor who were under the age of 18 at the date of application. As the first appellant's application could not be considered under the Immigration Rules, her only option was for her application to be considered under Article 8 of the ECHR. In this regard the judge failed to make any Article 8 findings in respect of all three appellants, which was an error of law.

13. With regard to the second and third appellants, I do not find that the judge erred in law in finding that there are no serious and compelling family or other considerations which make their exclusion undesirable. The judge

considered all the evidence before her and made findings which were sustainable and open to her.

14. I find that in respect of the Immigration Rules that the judge's findings disclose no arguable error of law and her decision dismissing all three appeals shall stand.

15. With regard to Article 8 ECHR, it was accepted by Mr Avery that the judge did not consider or make any findings on this issue. His argument was that Article 8 was not raised in the original grounds against the ECO's decision. He was right. However, the judge herself said at paragraph 4 that Article 8 was also of relevance. At paragraph 19 the judge recorded Mr Chisthi's brief submissions, which were that if the younger appellants were granted entry clearance then the first appellant would be left alone and this would be a breach of Article 8. He also said that the first appellant had a good relationship with the sponsor and had not formed any independent life in Zimbabwe. Mr Avery submitted that these brief submissions if considered, would not have made a material difference to the judge's decision. Whilst I find that might be the case, the judge nevertheless erred in law in failing to consider Article 8 at all when she herself had said that it was of relevance. I therefore held that the judge erred in law in failing to consider Article 8.

16. I heard oral evidence from the sponsor in order to determine the Article 8 appeals of the appellants.

17. The sponsor relied on her updated statement dated 10 April 2014. She said the first appellant is repeating her O levels. In November/December she took her exams and passed two subjects. She needs to resit five more. She was disturbed by the judge's decision. The decision has affected all the appellants academically. They keep hoping they would join her in the UK.

18. She said that Marshall is 19 years old and is sitting his O levels in November. Memory is now 15 and has just started her O level options. All three appellants go the local school which is within walking distance. Their grandmother supports them with their homework. She used to attend sports days and open evenings but is no longer able to do so because her knees are deteriorating. Their grandmother went into hospital yesterday for tests on her heart and hearing. The children are living alone whilst their grandmother is in hospital, but they can look after themselves. They can cook. Their uncle is no longer living in the house with them. She said that the appellants are concerned about their grandmother who has aged considerably in the last six months. The children are now looking after their grandmother. They help her to walk and accompany her to church.

19. The sponsor said that she returned only recently from Zimbabwe after a three to four week visit. She runs an independent fostering agency. It is her own business. She employs lots of administrators and social workers.

She started the business eighteen years ago. The business is dependent on her. She has not been going to work much in the last year and works as little as she can from home because she suffers from arthritis. She has three children of her own who are aged 26, 20 and 18. The 20 year old is at Sussex University. The 18 year old is about to start his A levels. The 26 year old is studying law. She has a son who is 5 years old and therefore the appellant as the child's grandmother looks after him a lot especially at weekends.

20. Mr Avery submitted that the sponsor is not the parent of the children. She is their guardian. They are her nieces and nephew. These facts do not establish a protected Article 8 right. The children live with their grandmother and the sponsor visits them. The first appellant is no longer a minor. The sponsor provides them with financial support. The decision of the ECO does not interfere with or break the established family life they have. The decision only breaks the continuity of the family life they would like to establish in the UK. The children have a degree of independence and can cope with limited support. Maintaining the ECO's decision is the right course of action.

21. Counsel submitted that the children have established a family unit with the sponsor. Although the sponsor does not reside with the appellant she has maintained emotional and financial support for these children. She has also maintained regular communication with them. Despite the sponsor's ill health, she has visited the appellants on a regular basis in order to reassure them of her support. The sponsor's mother is ailing and is not able to support the children in light of her current medical condition. The children would benefit by being with the sponsor in the UK.

22. I find that whilst the sponsor does not live with the appellants, she has maintained some sort of family life with the appellants. She supports them financially and emotionally and has made regular visits to Zimbabwe to see them. They are nieces and nephew and she is their guardian. I accept Mr. Avery's submission that these facts do not establish a protected article 8 right. The appellants are now 20, 19 and 15. The first two appellants are no longer children or minors. The third appellant is still a minor but, it appears that even though their grandmother is currently in hospital, the three appellants are able to cope on their own. They can cook and look after themselves. Indeed from what the sponsor was saying the children are in a position to even offer help to their grandmother who is in poor health. They live in comfortable circumstances. I am not persuaded that the limited family life they have with the sponsor would be interfered with as a result of the respondent's decision. Other than a desire to be with the sponsor in the UK, there appears to be no urgent need for the appellants to discontinue the family and private life they have in Zimbabwe.

23. In terms of proportionality, I accept that their grandmother is in poor health. The sponsor herself is also not well and has not been working for a

while because she has arthritis. While she offers the appellants emotional and financial support, that evidence is not sufficient to show that the ECO's decision would be a disproportionate interference in the limited family life they have with the sponsor.

24. Accordingly the Article 8 appeals of the appellants are dismissed.

Signed Date

Upper Tribunal Judge Eshun