**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-000363**
**UI-2023-000364**
**UI-2023-000365**
**First-tier Tribunal No:**
**HU/56647/2021**
**HU/56648/2021**
**HU/56650/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 04 April 2024**

**Before**

**Deputy Upper Tribunal Judge MANUELL**

**Between**

**(1) MR NATHAN KASONSO**
**(2) MS LASHIWE CHILUMBO**
**(3) MR LYSON RODNEY CHILUMBO**
**(NO ANONYMITY DIRECTION)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr E Nicholson, Counsel
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

**Heard at Field House on 24 March 2024**

**DECISION AND REASONS**

1. Permission to appeal was granted by Upper Tribunal Judge Reeds on 11 April 2023 against the decision to

dismiss the Appellants' linked human rights appeals made by First-tier Tribunal Judges L K Gibbs and K Leonard Johnson, sitting as a panel, in a decision and reasons dated 20 December 2023. Permission to appeal had been refused by First-tier Tribunal Judge Rodger on 20 December 2022.

2. The Appellants are nationals of Zambia, respectively born on 10 January 2003, 28 March 2003 and 30 January 2019. The Third Appellant is the son of the Second Appellant. They had applied for entry clearance to join the aunt of the First Appellant and Second Appellant who had adopted them in Zambia in 2017. Their applications were refused by the Entry Clearance Officer in decisions dated 21 September 2021. Their adoptions were not recognised under the Adoption (Recognition of Overseas Adoptions) Order 2013 (see paragraph 310(vi) of the Immigration Rules) nor did they meet the criteria for *de facto* adoptions pursuant to paragraph 309A of the Immigration Rules. The First Appellant and the Second Appellant were over 18 years of age and did not meet paragraph 316A(ii) of the Immigration Rules. Nor had the Appellants shown that adequate maintenance would be available. Further, the Entry Clearance Officer was not satisfied that the First Appellant's and the Second Appellant's parents were not involved in their lives as no death certificates had been produced. The current care arrangements could continue and there were no exceptional circumstances.

3. It was conceded on the Appellants' behalf that they could not meet the Immigration Rules identified by the Entry Clearance Officer. It was however contended that the Appellants met paragraph 297(1)(f) of the Immigration Rules and that the appeals should be allowed under Article 8 ECHR family life, outside the Immigration Rules.

4. Judge L K Gibbs and Judge K Leonard Johnson found that First Appellant and Second Appellant could not be considered under paragraph 297(1)(f) of the Immigration Rules because both were over the age of 18 at the date their entry clearance applications were made. The Third Appellant's best interests were to

remain with his mother, which meant that his claim under paragraph 297(1)(f) could not succeed. The appeals therefore could only be considered under Article 8 ECHR.

5. The judges found that the documents produced on behalf of the Appellants were unsatisfactory in a number of material respects. Although there was evidence that their sponsor sent money to Zambia, this was for numerous family members. The judges were not satisfied that the First Appellant and Second Appellant were in fact orphans. In any event, the current arrangements in Zambia could continue and contact between the Appellants and their sponsor could continue by modern means of communication. There were no exceptional circumstances and proportionality under Article 8 ECHR favoured immigration control.

6. Permission to appeal was granted by Upper Tribunal Judge Reeds because it was considered arguable that the First-tier Tribunal Judges had erred as to the dates of the entry clearance applications of the First Appellant and the Second Appellant, and so had failed to give proper consideration to paragraph 297(1)(f) of the Immigration Rules. It was also arguable that there might have been procedural unfairness in that the judges' had not put their concerns about the reliability of the Appellants' documents to their sponsor. No other ground advanced on the Appellants' behalf was considered arguable.

7. here was no rule 24 notice from the Respondent.

8. Mr Nicholson for the Appellant relied on the grounds of appeal and the limited grant. Counsel submitted that there was a clear error of fact giving rise to a material error of law in that the judges had stated the date of the Appellants' entry clearance applications incorrectly. That was material because it was a long-standing provision of the Immigration Rules that the appellants' ages were taken as at the date their entry clearance applications were made. As a result the judges had not given proper consideration to paragraph 297(1)(f) of the Immigration Rules.

9. All three entry clearance applications had been made on 7 January 2021. There had been a problem with the biometrics of the First Appellant, who had been asked to resubmit his application. This was why the reasons for refusal letter had referred to his application as having been made on 21 June 2021. No point was taken about that in the Respondent's review. The mistake by the judges was clear.

10. As to the second ground on which permission to appeal had been granted, there had been procedural unfairness, in that the judges had failed to give the Appellants' sponsor the opportunity to respond to their concerns about the reliability of the documents submitted. That was another long-standing requirement of fairness. The relevant law had been recently reviewed by the Court of Appeal in Abdi v Entry Clearance Officer [2023] EWCA Civ 1455. The judges had acted unfairly. Their decision should be set aside and reheard by another judge.

11. Ms Gilmour for the Respondent submitted that there was no material error of law and that the judges had been entitled to dismiss all three linked appeals. The circumstances of each individual appellant had been considered. The fact was that each of the First Appellant and the Second Appellant was either almost 18 and/or was leading an independent life at the time their entry clearance applications were made. Even so, as the judges had pointed out at [20] of their decision, there is no "bright line" between adolescence and adulthood. It had been conceded that none of the Appellants met paragraph 309A of the Immigration Rules. It was plain that paragraph 297(1)(f) of the Immigration Rules had been considered at [9] and [10] of the decision.

12. As to the procedural unfairness point, Tanveer Ahmed [2002] UKAIT 439 applied. It was for the Appellants to demonstrate that their documents were reliable on the balance of probabilities. The judges had been entitled to find that they had not demonstrated reliability. There was no material error of law. The appeals should be dismissed.

13. Mr Nicholson in reply reiterated the points he had already made. The error of fact was undoubted, material and amounted to an error of law. There had been procedural unfairness and the decision could not stand.

14. At the conclusion of submissions the Tribunal reserved its decision, which now follows. The Tribunal finds that there was no material error of law. The judges stated the date of births of each of the Appellants correctly: see [1] of their decision. The appeal was an Article 8 ECHR appeal only and so the facts had to be considered as at the date of the decision, not at the date of the entry clearance applications. The date of the entry clearance applications of course remained relevant for Article 8 ECHR purposes, as indicating the states' margin of appreciation under the Immigration Rules.

15. According to the skeleton argument submitted at the First-tier Tribunal hearing "It was explained that initially Nathan [the First Appellant] submitted an application for entry clearance while he was under 18 years of age on 7 January 2021, Application Ref: GWF060394927,1212-0001-1350-1347/00 (copy of form was provided confirming the details), however due to a delay in being able to book his biometrics appointment through "TLScontact", due to Covid-19 restrictions at the time, Mr Nathan Kasonso was required to resubmit the application which was competed later on 21st June 2021. It was requested that Mr Kasonso's application is considered on the basis of his initially submitted application dated 7 January 2021, given the exceptional circumstances beyond his control. It is unclear what the Respondent's position in regard to this are given they have also given that they continue to consider the merit of his claim as a child in the decision letter, despite concluding that he still does not meet the requirements."

16. Despite that argument, the reasons for refusal letter for the First Appellant states the date the entry clearance application was made as 21 June 2021, i.e., the date when all the necessary information had been provided. That is also the date shown on his entry clearance

application form. The application for the Second Appellant is recorded as 7 January 2021 and that of the Third Appellant as 8 January 2021. The point about the application date (which relates to paragraph 297(1)(f)) was not conceded in the Respondent's pre-hearing review dated 20 June 2022.

17. Thus while the judges were correct to state that the First Appellant was over 18 as at the date of his application, it was incorrect to state that the Second Appellant was over 18 as at the date of her entry clearance application. On 7 January 2021 the Second Appellant was 17 years and 10 months old. Like the application of the First Appellant, the application had been made at the last moment. She was however already plainly leading an independent life as she was herself a mother. Nothing therefore turns on the error by the judges.

18. The judges recorded that it was expressly conceded that none of the Appellants met the provisions of paragraph 309A of the Immigration Rules. Their adoptions were not recognised in English law. There was thus no recognised legal relationship between the First Appellant and Second Appellant and their sponsor. The First Appellant and Second Appellant were not therefore entitled to be treated as relatives of their sponsor for the purposes of paragraph 297(1)(f) of the Immigration Rules.

19. Nevertheless, the principles underlying paragraph 297(1)(f), "serious and compelling family or other considerations which make exclusion of the child undesirable" are plainly capable of amounting to exceptional circumstances for the application of Article 8 ECHR outside the Immigration Rules. That is exactly the consideration which the judges gave, as can be seen from [9] to [10] of their decision. There was no suggestion that any of the factual background concerning the Appellant's circumstances was erroneously stated. The error by the judges about the date of the Second Appellant's entry clearance application was thus immaterial.

20. As to the alleged procedural unfairness complaint, Abdi (above) states no new principle. The fairness will depend on the individual circumstances of the particular case. Here the judges were entitled to assess the reliability of the documents presented for themselves. The various discrepancies and errors on the face of the documents were numerous and significant. There were missing documents which it was reasonable to have expected would have been provided. These were not obscure points but very obvious ones which the sponsor could have addressed in her witness statement or oral evidence. The Appellants' sponsor had been given sufficient opportunity to do so. The judges gave adequate reasons for their findings, none of which can be considered surprising.

21. In conclusion, the judges gave clear and sustainable reasons for all findings reached, including that there were no exceptional circumstances. Their decision was succinct and addressed all of the issues and the supporting evidence. There is thus no basis for interfering with the judges' decision and reasons. The onwards appeals are dismissed.

**DECISION**

The appeals to the Upper Tribunal are dismissed

The original decision stands unchanged

**Signed** **R J Manuell** **Dated** 25 March 2024

**Deputy Upper Tribunal Judge Manuell**