Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/08960/2017
HU/08412/2017

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
16 April 2019	**On 25 April 2019**

Before

THE HON. MR JUSTICE ANDREW BAKER
(sitting as an Upper Tribunal Judge)

UPPER TRIBUNAL JUDGE PITT

Between

SINDISO [M]
DANZEL [M]
(No Anonymity Order Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Garrod, instructed by Tann Law Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Lawyer

DECISION AND REASONS

Introduction

1. The appellants ('Sindiso' and 'Danzel') are Zimbabwean half-siblings, having the same father but different mothers. They were both born in 1999, Danzel on 19 March and Sindiso on 22 September. Danzel's

© CROWN COPYRIGHT 2019

mother died in June 2006; Sindiso's mother, Lindiwe [M] ('Mrs [M]'), is married to the appellants' father, Mr Pearson [M] ('Mr [M]'). Mr and Mrs [M] have been in the UK since 2002. They both sought, but were not granted, asylum. However, they now have two further children, born in the UK, and at the time of the Decision that we were asked to consider, Mr and Mrs [M] were lawfully resident in the UK under limited leave to remain that was set to expire in January 2019. (We were told at the hearing that they have a pending application for the renewal or extension of that leave.)

2. When Mr and Mrs [M] came to the UK in 2002, they left the appellants in Zimbabwe to be cared for and brought up by Mr [M]'s parents, who lived in Kadoma, some 140 km or so south of Harare. The grandparents moved to Harare in 2004 when their health was deteriorating, taking the appellants with them, and Mr [M]'s sister, Florence [M] ('Florence'), moved to Harare to support them, and to bring up the appellants with them. The grandparents died in 2008 and Florence thereafter raised the appellants on her own. Mr [M] went back to Zimbabwe for a visit in 2004. That was the last contact either of Mr or Mrs [M] had with Sindiso or Danzel in person.

3. The evidence before the First-tier Tribunal did, however, include some evidence of ongoing contact over the years, and evidence of financial support throughout (i.e. support from Mr and Mrs [M] to the grandparents and thereafter to Florence, to help them in looking after the appellants).

4. The appellants made entry clearance applications, with a view to seeking indefinite leave to enter and remain in order to join Mr and Mrs [M] here for settlement. The applications were made on 24 February 2017 when the appellants were still minors, although in Danzel's case only just. The applications asserted that the appellants were the children of a parent (Mr [M]) who was present and settled in the UK for the purpose of paragraph 297 of the Immigration Rules.

5. There was never any basis for supposing that paragraph 297 might apply, however. Mr [M] was not settled but had only discretionary leave to remain, expiring in January 2019, as we have already mentioned. Nonetheless, since the appellants were Mr [M]'s children (and in Sindiso's case, also Mrs [M]'s child) seeking to join him, plainly consideration had to be given to Article 8 ECHR and/or s.55 of the Borders, Citizenship and Immigration Act 2009.

6. Entry clearance was refused by decisions made by an Entry Clearance Officer in July 2017, upon the basis that Mr [M] was not settled so his circumstances did not fall within the Rules, and without considering Article 8 or s.55. Separate appeal reviews by (different) Entry Clearance Managers in January 2018 upheld both those decisions, and consideration was given to Article 8 and s.55 in those reviews.

7. Following a hearing on 21 June 2018, and by a Decision promulgated on 29 June 2018, First-tier Tribunal Judge A K Hussain dismissed the appellants' appeals.

8. Permission to appeal was granted by First-tier Tribunal Judge E M Simpson on 14 August 2018, on the papers. She concluded that it was arguable that:

   i. the Decision gave the appearance of a closed mind and partiality; and

   ii. the proportionality assessment under Article 8 was flawed, (a) because of (i) above, and (b) because of reliance on the time-limited nature of Mr and Mrs [M]'s then extant leave to remain and/or a failure to consider the interests of the two further children, the appellants' British-born siblings (full siblings to Sindiso, half-siblings to Danzel).

9. The matter came before us to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

10. For the appellants, it was submitted in their Grounds of Appeal, firstly, that FtTJ Hussain wrongfully treated the case as one of "*a tactical application to secure an appeal before [Danzel] reached his majority after which any opportunity of obtaining entry clearance as a dependent child vanished*", in which "*The Tribunal was unashamedly being used to circumvent the [Immigration] Rules*" (quoting, in each case, from the Decision at [4]). It was submitted that the 'tactical application' finding was both erroneous in itself, and something that should not have played any part in the Judge's consideration of the case.

11. Secondly, the appellants submitted that the 'tactical application' finding had materially infected the Article 8 proportionality assessment, because the Judge, it was said, "*carries out the proportionality exercise … on the basis that these appellants are seeking to circumvent immigration rules by pursuing a human rights appeal*".

12. Thirdly, the appellants submitted that the Judge failed to undertake his own assessment of proportionality under Article 8, but merely conducted a review of the underlying decision-making.

13. Fourthly, and finally, the appellants contended that the Judge wrongly had regard to the fact that Mr and Mrs [M] had leave to remain only until 21 January 2019 and wrongly speculated that they would then have to return to Zimbabwe. They did not take the point raised by FtTJ Simpson as to failure to consider the interests of the British siblings; nor was there any suggestion in the First-tier Tribunal that a consideration of the siblings' interests would or might lead to a different outcome.

14. At the hearing, Mr Garrod advanced brief oral arguments in support of all Grounds (and also adopted the suggested criticism that the British siblings' interests had not been taken into account).

15. For the Secretary of State, Mr Jarvis conceded that FtTJ Hussain's opening remarks (about the timing of and motive for the immigration applications) were unwarranted and, if they had infected the substantive decision-making, could be capable of creating an appearance of pre-judgment on the part of the Judge. He submitted, however, that in fact the Decision was unaffected by those comments and disclosed no error of law. Findings of primary fact were made that were open to the Judge on the evidence, a proper assessment was made, in the light of those findings, of whether there were exceptional circumstances justifying the grant of leave outside the Rules, and a fair and careful assessment was made of whether there was a disproportionate interference with family/private life in refusing the appellants leave to join their parents.

Conclusions – Error of Law

16. FtTJ Hussain's opening comments about the appellants' immigration applications were intemperate, unfounded and (therefore) inappropriate. It is no abuse of immigration procedures generally, or of the First-tier Tribunal in particular, to make an application where the only real basis for it (if any) will be the possibility of leave being granted outside the Immigration Rules on Article 8 grounds. Of course, any such application faces the difficulty that if it does not come within an Article 8 compliant set of Rules, that is to say a set of Rules adherence to which generally will not infringe Article 8, the applicant may legitimately be required to show that the case presents exceptional circumstances. But that does not make it improper to make the application.

17. To that extent, we agree with the first submission in support of the appeal. However, turning to the second submission and reading the Decision as a whole, in our judgment the Judge's opening comments were preliminary remarks only that did not play any material part in his decision-making as to whether there were exceptional circumstances and/or a disproportionate interference with family/ private life. This appeal must succeed, if at all, by showing that decision-making to be flawed on its own terms, not by reference to the Judge's unfortunate opening comments.

18. The third submission in support of the appeal, the contention that the First-tier Tribunal Judge failed to conduct his own assessment under Article 8 ECHR, is not arguable in our view. In the Decision, at [16]-[29], the Judge plainly did conduct his own, full assessment of proportionality, reaching the conclusion that, "*The decision not to admit [the appellants] is proportionate. Consideration of their best interests does not yield a different result.*" The fourth and final submission in

support of the appeal raises the question whether the Judge's assessment was flawed; but it was without doubt the Judge's own assessment, on the merits, of the proportionality of refusing entry to the appellants, as an interference with private and family life under Article 8, and not merely a review for error of the Entry Clearance Managers' conclusions.

19. The Judge, firstly, made primary findings of fact on a central aspect of the appeal as presented to him, which was the appellants' claim, through the witness evidence of Mr and Mrs [M] (but particularly that of Mr [M]), that there had been tensions and discord between the appellants and Florence since 2013 such that the appellants had suffered or might suffer harm. The Judge reviewed the evidence in some detail, including evidence from a social worker in Zimbabwe, and after giving it a fair and balanced evaluation, held that the difficulties had been exaggerated and (at [14]) that "*there are no good reasons why the appellants cannot continue to live as they have done with the sponsor's sister*".

20. Having reached that conclusion, the Judge was properly entitled to assess whether the refusal of entry infringed Article 8 ECHR on the basis that the appellants were safe as they were in Zimbabwe. He concluded that it would not have been in the appellants' best interests to uproot them from Zimbabwe and their family life there with Florence, just as they were completing their education and becoming adults, to unite them in a fledgling family life in the UK with their parents. Thus, at [21]: "*… it would not be in their best interests either for that education to be curtailed or to remove them from an environment where they have, through their education, equipped themselves for employment in Zimbabwe and to instead supplant them into another country*".

21. The Judge reminded himself of the strong public interest in maintaining an effective immigration system by normally requiring applicants to satisfy the Immigration Rules before being given entry clearance.

22. In finally striking a balance, the Judge did make reference to the fact that, as things then stood, Mr and Mrs [M]'s leave to remain expired in January 2019 and it is right that he should not have assumed (if he did) that their leave would not be extended, or speculate about that at all. In our judgment, however, that did not materially impact the assessment the Judge finally made, which was as follows (at [28]):

> "*The appellants' circumstances show, whether assessed when they were minors or after they became adults, that it is in their best interests to remain in Zimbabwe. They have spent their entire life there and have grown up in the cultural and social norms of that society with their aunt who has raised them from when they were babies. They have equipped themselves for life in Zimbabwe with their education. Whilst they have a family life with [Mr [M]], I am*

> *satisfied they have a stronger family life with their aunt who has raised them. Their parents have made little or no effort to visit them … . With regards to [Mr [M]], inevitably, over the lengthy periods of separation, they have grown used to living apart. Taking everything into account, the evidence does not suggest that it would be in the appellants' best interests to move to the United Kingdom. I have seen nothing serious and compelling about their circumstances that suggests that they need to be brought to the United Kingdom to be reunited with their parents.*"

23. In our judgment, the conclusion in the light of that evaluation of the facts of the case that the decision not to admit the appellants was proportionate, and indeed was a decision in their best interests, was justified, if not inevitable; and that evaluation of the facts was an evaluation that was supported by evidence and open to the Judge. It is true that no separate reference is made to the position or interests of the appellants' young siblings here; but in our judgment there is no serious basis for suggesting that separate consideration of their position could affect the outcome. From their perspective, their Zimbabwean older siblings were staying in Zimbabwe where they had always lived, never having been part of the UK family household with them. In short, their family relationship would simply remain as it had always been.

Decision:

1. The decision of the First-tier Tribunal dismissing the appellants' appeals did not involve any error on a point of law. The remarks in the Decision at [4] should not have been made, but they do not affect the soundness in law of the decision to dismiss the appellants' appeals.

2. We therefore affirm that decision and dismiss this further appeal.

Signed: **Andrew Baker** Date: 17 April 2019
The Hon. Mr Justice Andrew Baker