Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12763/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 April 2019	**On 30 April 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

TAONGA TRISH MANHOVO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER (PRY1576973)

Respondent

Representation:
For the Appellant: Miss Benfield of Counsel instructed by Wimbledon Solicitors (Merton Road)
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe born on 27 February 2000. She applied in June 2017 to join the sponsor, her mother, in the United Kingdom. Her father also resides in the UK but is separated from her mother. The application was refused by the Entry Clearance Officer under Appendix FM of the Immigration Rules.

2. At the hearing before the First-tier Judge on 8 June 2018 the appellant's then representative submitted that the matter should have been

considered under paragraph 297 of HC 395 rather than Appendix FM. The First-tier Judge stated, somewhat confusingly, that "it appears to me that a decision under either is within the both provisions." He appears to have opted for paragraph 297 and refers to paragraph 297(i)(e) which raises the issue of sole responsibility. The judge did not find that the appellant came within that sub-paragraph or sub-paragraph (f).

3. The judge dismissed the appeal. In the application for permission to appeal among other points it was argued that the judge had determined the appeal under the wrong sub-paragraph. The application should have been determined under paragraph 297(1)(a) on the basis that "both parents are present and settled in the United Kingdom…". It was submitted that the right sub-Section had been brought to the attention of the First-tier Judge in the skeleton argument.

4. The judge it was further submitted had misunderstood the way in which the appeal was brought and had made no reference to 297(i)(a) at all. He had misunderstood the footing of the appeal before him and had failed to apply the correct part of the Rules. Further complaints were made in relation to Article 8 and in relation to the judge's approach to the evidence generally giving rise to the perception of unfairness.

5. Permission was granted by the Upper Tribunal on 13 March 2019. It is common ground that the reference in the grant of permission to the failure to consider paragraph 271(i)(a) should be taken to be a reference to paragraph 297(i)(a).

6. Counsel relied on the grounds and submitted that the First-tier Judge had made a fundamental error in his approach.

7. It was accepted by both sides that the Entry Clearance Officer had erred in considering the matter under Appendix FM. The appellant was a child at the material time and the matter was correctly determined under paragraph 297. Both the appellant's parents were settled in the United Kingdom and the appropriate paragraph was paragraph 297(i)(a) as the appellant had contended. It was submitted that it was clear that the application had been made by reference to both parents being in the UK.

8. Mr Tarlow helpfully accepted that the First-tier Judge had erred in considering the appeal under the wrong sub-paragraph. Counsel requested that the matter be remitted to the First-tier Tribunal for a fresh hearing. Mr Tarlow agreed with that approach.

9. I have come to the conclusion that there is no alternative to the course proposed by the parties. The First-tier Judge's approach was flawed from the start and the factual assessment was based on that flawed appreciation of what was involved. Among the other points made was that the judge had raised matters which were not in issue in relation to the credibility of the witnesses. There were question marks about his

approach to the issue of family life given that the appellant was at the relevant time a child and numerous other concerns including the conflation of issues under the Rules with Article 8 outside the Rules. Realistically nothing can be saved from this determination and accordingly, given the extent of fact-finding required, a remittal of this appeal to be heard afresh by a different First-tier Judge is the only reasonable outcome.

10. This appeal is allowed by agreement for the matter to be reheard afresh before the First-tier Tribunal.

11. The appeal is allowed to the extent indicated.

Anonymity Direction

12. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

13. The First-tier Judge made no fee award and as the matter has yet to be finally determined it would be premature to consider the matter. I make no fee award

Signed Date: 25 April 2019

G Warr, Judge of the Upper Tribunal