Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2023-003500**

First-Tier Tribunal

No: HU/01952/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 6 October 2023	20th October 2023

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr JOSEPH MUSEKIWA
(ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms M Owoyihfa, Authorised Representative (Victory Legal Services)

DECISION AND REASONS

1. Permission to appeal was granted to Secretary of State by First-tier Tribunal Judge Boyes on 3 July 2023 against the decision to allow the Respondent's appeal made by First-tier Tribunal Judge Broe in a decision and reasons promulgated on 24 April 2023.

2. The Respondent is a national of Zimbabwe, born on 19 June 2003. His application made on 16 June 2021 for entry clearance to join his sponsor, his aunt, as her dependent child, was refused on 10 September 202. The Entry Clearance Officer was not satisfied that the Respondent met the requirements of paragraph 319X of the Immigration Rules.

3. Judge Broe adjourned the appeal when it first came before him to enable the Entry Clearance Officer to consider making a decision under paragraph 297 of the Immigration Rules, which was on its face the applicable Immigration Rule. Paragraph 319 related to sponsors with refugee or humanitarian protection which was not the case with the Respondent's aunt. The Entry Clearance Officer declined to consider application under paragraph 297. The Respondent had paid the fee applicable to paragraph 319X and the decision had been made. It was not accepted that the Respondent was related to his sponsor as claimed. His birth certificate was not issued until 24 April 2019. The sponsor had Indefinite Leave to Remain in the United Kingdom, i.e., was not a refugee. Article 8 ECHR was not engaged.

4. The Respondent accepted before Judge Broe that he was not able to meet paragraph 319X. Judge Broe found that the Respondent had applied under paragraph 319X in error, as was apparent from the application form which stated (accurately) that the sponsor held Indefinite Leave to Remain in the United Kingdom. The appeal was a human rights appeal only. It was appropriate to consider whether the Respondent satisfied the requirements of paragraph 297 at the date of his application. That would not necessarily have been determinative but would be a weighty factor in assessing the proportionality of the decision.

5. The judge set out paragraph 297 in full and found that the sponsor was the Respondent's relative and had also been appointed his guardian by order of the High Court of Zimbabwe. He found the sponsor credible and accepted that her sister, the Respondent's mother, had died. The sponsor was in a position to maintain and accommodate the Respondent. There were serious and compelling family or other considerations which made the exclusion of the Respondent undesirable. The judge also found that the sponsor had sole responsibility for the Respondent's upbringing, accepting that this was not the key test in the circumstances. The judge found that there was family life between the Respondent and his sponsor.

6. The judge further found, following further examination of the facts, that it was an unusual case and the circumstances were exceptional. He concluded that the refusal decision was a disproportionate interference with the Respondent's Article 8 ECHR rights. Thus the appeal was allowed.

7. Permission to appeal was granted by Judge Boyes because it was considered arguable that the First-tier Tribunal Judge had erred by proceeding to consider the case under paragraph 297 of the Immigration Rules. It was arguable that paragraph 297 was not before him and so was inapplicable.

8. Ms Isherwood for the Appellant relied on the grounds of appeal submitted and the grant of permission to appeal. The Respondent had applied only 4 days before his 18th birthday. It had been his choice to apply under paragraph 319X. The application could not be varied once it had been decided. The judge had considered that he was making a decision under the Immigration Rules when the only basis of appeal was human rights. The decision was mistaken in law as there was nothing exceptional about the

case. The appeal should have been to be dismissed.

9. Ms Owoyihfa for the Respondent submitted that there was no error of law and that the judge had been entitled to allow the appeal. The Respondent's application had been handled badly by the Entry Clearance Officer and there had been extensive delay. The Entry Clearance Officer's onwards appeal should be dismissed.

10. In reply Ms Isherwood reiterated that the Respondent had made a last minute application for entry clearance and the route he applied under was his choice.

11. The Tribunal's error of law decision was reserved and now follows. The Tribunal finds that there was no material error of law and that permission to appeal should not have been granted. The permission to appeal application was misconceived as well as ungrammatical, e.g., "And is not clear on why a finding would be made that a case is exceptional case for an adult need to join someone he doesn't know" (sic). It is frankly hard to believe that the drafter of the grounds read Judge Broe's decision with any attention.

12. Contrary to the Appellant's submissions, Judge Broe approached the appeal with great care. It was plain and obvious that the Appellant had made his entry clearance application under an inappropriate Immigration Rule, i.e., paragraph 319X. Yet this was not a situation where the Appellant had no entitlement under the Immigration Rules. Again, it was plain and obvious that he was at the date his entry clearance was made potentially entitled to entry under paragraph 297. It was of no relevance that the application was made immediately prior to his 18th birthday, which was in any event for the good reason that his grandmother was no longer able to care for him, as Judge Broe found on the evidence.

13. Judge Broe was well aware of the fact that the appeal before him was confined to human rights and stated that expressly and accurately at [6]. That, as the judge explained, required him to strike a balance between the public interest and the private interest. The state's margin of appreciation under Article 8 ECHR is indicated by the Immigration Rules. Again, as the judge explained, satisfying the Immigration Rules will normally be determinative of the proportionality issue.

14. It is invariably preferable for the Entry Clearance Officer to make a lawful and correctly based decision before any appeal to the tribunal is considered. The judge sensibly gave the Entry Clearance Officer that opportunity because it was clear that the Respondent had applied under an inappropriate rule. The fact that a decision had already been made under paragraph 319X and the wrong fee had been paid was immaterial. Home Office decisions are regularly recalled and amended. It is a simple matter for an additional fee to be paid. This was not a situation where a judge arrogated a decision to himself. The Entry Clearance Officer declined the opportunity to review the decision.

15. It was open to the judge to consider whether the Respondent satisfied any other avenue for entry clearance when examining proportionality. As has already been noted, the judge considered the Appellant's potential eligibility under paragraph 297 by analogy, to establish where the margin of appreciation lay. This was in the context of the human rights appeal before him.

16. The judge examined the evidence and satisfied himself that there was extant family life. This was far from a situation where the Respondent and his sponsor were not known to one another. They are close blood relatives. The sponsor has been supporting the Respondent financially for many years as the judge found and the judge also found that the sponsor had sole responsibility for him, based on the high degree of involvement shown by the evidence. The

judge gave clear and sustainable reasons for his findings, including his finding that there were exceptional circumstances.

17. The judge's statement that the Entry Clearance Officer's decision was not in accordance with the law and the applicable Immigration Rules was within the context of his finding that refusal decision was a disproportionate interference with the Respondent's Article 8 ECHR rights.

18. There is thus no basis for interfering with the judge's decision and reasons. The onwards appeal is dismissed.

DECISION

The Secretary of State's appeal to the Upper Tribunal is dismissed

The original decision stands unchanged

Signed **R J Manuell** **Dated** 12 October 2023

Deputy Upper Tribunal Judge Manuell