Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Chirairo) v Secretary of State for the Home Department IJR [2015] UKUT 00411 (IAC)

on an application for JUDICIAL REVIEW

At **Field House** Decision signed: **17.11.2014**
on **14.11.2014** Handed down: **18.11.2014**

Before

Upper Tribunal Judge
John FREEMAN

Between

The Queen on the application of Joshua Tinashe CHIRAIRO

Applicant

and

Secretary of State for the Home Department

Respondent

Counsel for the applicant: Michael Biggs
Counsel for the respondent: Zane Malik

JUDGMENT

1. This is an application for judicial review of the decision of the respondent on 7 August 2013, to refuse an application for discretionary leave to remain by a citizen of Zimbabwe, born 20 June 1987. Permission was granted on the basis that the decision in this applicant's case was inconsistent with that in his sister's, for reasons which had not been properly explained.

2. The applicant's father arrived on a student visa in June 2001, joined by his mother that October, and his sister Shumirai, born 12 January 1990, in August 2004, and the applicant himself on 5 March 2005, all of them with visas as the father's dependants. The applicant's visa ran out on 31 October that year, and on the 21st they all applied for leave to remain,

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the applicant's mother and sister again as dependants, but the applicant separately. Their applications were refused on 30 January 2006. Their appeals were allowed by Judge Oscar del Fabbro on 20 April 2006: the judge was well aware that the applicant had already been over 18 when he made his application.

3. However Judge del Fabbro accepted that all the applications had been sent together, and should have been considered together: he went on to say this:

> On the basis that [the applicant's] position, other than his age, is no different to [his sister's] a dependent child, I would allow his appeal too. He was under 18 years of age when his original application to be admitted as a child of [his father] was granted. The fact that he has since turned 18 years of age does not debar him from being granted leave to remain in the same capacity which I find remains unaltered.

4. Right or wrong, so far as this applicant was concerned, that was a judicial decision which the Secretary of State needed either to appeal, or to recognize: this was done by granting the whole family further leave to remain on 15 June 2006, valid till 7 November that year. On 30 September the applicant's father applied for leave to remain as a work permit holder, with the others as his dependants. The applicant's father, mother and sister were all granted leave; but he was refused it on 10 November. On the 24th the applicant made a fresh application; but that was not refused till 16 January 2008; following that, no further action was taken against him, till he made another, on 29 May 2012, refused in the decision under challenge.

5. Meanwhile the applicant's solicitors had made further representations to the Home Office, father and mother had each been granted indefinite leave to remain, in 2011 and 6 January 2012 respectively. On 9 January his sister had been granted a further three years' discretionary leave to remain, till 2015. The original decision letter for this applicant did not refer to what had happened to the rest of his family: his relationship with his parents was only mentioned as the basis for his application, which was refused as not recognized, in the case of a grown-up, under appendix FM of the 'new Rules' (in force from 9 July 2012).

6. The applicant's first ground of challenge was that this decision, dealing only with the 'new Rules' on an application made when the old ones were still in force, was contrary to *Edgehill & another* [2014] EWCA Civ 402. However, I accept Mr Malik's argument that this applicant's position at the time would have been in line with that of the unsuccessful applicant 'HB' in *Edgehill* : like HB, his individual article 8 case, even under the 'old Rules', would have been a weak one.

7. Following the grant of permission on 27 September 2014, the Secretary of State tried to rationalise her position by means of further decision letters: the relevant and last one came as lately as 10 November, only four days before the application came before me. Possibly interesting arguments were raised about the legitimacy of considering this application on the basis of such a late letter; but those will be for another day in another case, as, for the reasons I am about to give, I do not think the letter made any difference to the main question before me, set out in the grant of permission.

8. The 10 November letter sets out some of the history of the Secretary of State's dealings with the applicant and his family, as already outlined: it notes that the applicant did not

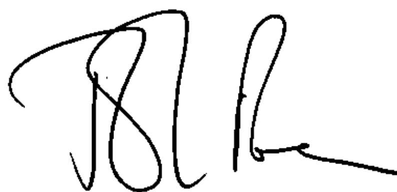
appeal against the 2008 refusal, which is a valid point. However, while it mentions the 2006 grant of leave to remain to the applicant's sister, and, by implication, draws the distinction between them, also valid at that point, that he was already over 18 (which she was not), it fails either to mention or explain the 2012 grant to her, at a time when she was already nearly 22.

9. Mr Malik asked me to infer that the reason why the applicant's sister was given leave then, but he was not, is that she had been here with leave as their father's dependant all along. While that is perfectly possible, the explanation is not so obvious that it can be assumed. Though the applicant had not had leave since November 2006, in April that year Judge del Fabbro had said the Secretary of State should give him some form of leave, as his father's dependant, although he was by then over 18. That decision may have been questionable at best; but the Secretary of State chose not to appeal it, but to give him a short period of less than six months' leave, in line with his father and mother and sister.

10. So far, so good; but when they were all granted further leave to remain later that year, the applicant was refused. Following that refusal, no further action was taken against him, and his fresh application was not considered till 2008, while the further representations made in response to that year's decision were not considered till 2012. Meanwhile the applicant did not simply stay on, trying to remain under the Home Office radar, but pursued his case with them through his MP. As usual in those days, the Home Office showed what can most kindly be described as complete nonchalance towards the public interest in enforcing immigration decisions. Certainly the applicant and his then solicitors were themselves to blame for not appealing or otherwise challenging the 2006 refusal at the time; but he had won one appeal, and they may not unreasonably have thought that result should continue to tell in his favour.

11. In 2012, the applicant's latest application drew the decisions made in favour of his family, and in particular his sister, who had again been given discretionary leave to remain, though she was by now over 18 too, to the attention of the Secretary of State. That resulted in the decision under challenge; but this did not explain, even in its final (10 November 2014) form why the distinction had been made between the applicant's sister, who had been given leave to remain all along, and the applicant himself, who Judge del Fabbro had said should have it. This decision was only explicable on the basis that the Home Office had chosen, rather than following or appealing the judge's decision, to side-step it by granting a short period of leave, and then disregarding it. That amounted to a clear disregard of the statutory appellate procedure, and the decision must be set aside.

Application granted
Decision under challenge set aside



(a judge of the Upper Tribunal)