Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22018/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 16 January 2020

Decision & Reasons Promulgated
On 5 February 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

K M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER, PRETORIA

Respondent

Representation:

For the Appellant: The Sponsor
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

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Introduction

2. The appellant is a citizen of Zimbabwe who was born on 20 August 2000.

3. On 20 January 2008, the appellant made an application for entry clearance to the UK under para 297 of the Immigration Rules (HC 395 as amended). The application was for settlement with the sponsor (his uncle) who is settled in the UK.

4. On 20 September 2018, the Entry Clearance Officer ("ECO") refused the appellant's application for entry clearance. The ECO was not satisfied that the sponsor had "sole responsibility" for the appellant (para 297(i)(e)) or that there were "serious and compelling family or other considerations which make exclusion of [the appellant] undesirable" (para 297(i)(f)).

5. Finally, the ECO concluded that the decision to refuse entry clearance was not a breach of Art 8 of the ECHR.

6. The ECO's decision was reviewed and upheld by the Entry Clearance Manager on 27 January 2019.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. In a determination sent on 13 June 2019, Judge G Wilson dismissed the appellant's appeal.

8. Although the appeal was limited to human rights grounds, in effect Art 8 of the ECHR, the judge approached the issue of whether the refusal of entry clearance breached Art 8 by first considering whether the appellant could succeed under para 297. The judge found that he could not. Like the ECO, he concluded that the appellant had not established that his sponsor had "sole responsibility" for him or that there were "serious and compelling family or other considerations" that made his exclusion undesirable. Finally, having concluded that the appellant could not succeed under para 297, the judge found that the appellant's exclusion was a proportionate interference with his private and family life under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal on the basis of a number of grounds prepared by the sponsor.

10. On 25 September 2019, the First-tier Tribunal (Judge E M Simpson) granted the appellant permission to appeal.

11. Thus, the appeal came before me.

The Judge's Decision

12. The grounds, and the submissions before me, focused on the judge's reasons for finding first, at [27] – [34] that the appellant had not established that his uncle had

"sole responsibility" for him; and secondly, his reasons at [35] – [41] for finding that there were not "serious and compelling family or other considerations".

13. The background to the claim is that the appellant's father and mother died when he was 3 and 7 years of age respectively. After his father's death, the appellant's mother looked after him until her death in December 2007. In 2008, he went to live with an uncle in Zimbabwe. He looked after the appellant for about a year, until the sponsor decided that this was not suitable and he went to live with his aunt. That was in 2009. Thereafter, although the sponsor lived in Zimbabwe for 23 months with the appellant from September 2013 to September 2015, the appellant lived with his aunt who looked after him.

14. It appears to have been accepted before the judge that the sponsor and the appellant's aunt shared responsibility until 2016. At that time, the appellant's aunt became engaged to man in Zimbabwe and it was her intention to live with him in his family home elsewhere. At this point, the sponsor claimed that he took over "sole responsibility" for the appellant and the appellant's aunt was not in a position to continue looking after the appellant when she married and moved to live with her new husband as the appellant could not be accommodated there. It was on that basis that the sponsor, it is said, decided that the appellant should come to the UK to live with the sponsor and his wife. The appellant's aunt married her new husband in late 2018. Subsequently, the sponsor's evidence was that the appellant continued to live with his aunt on a "temporary basis" and she did not move to live with her new husband.

15. Before Judge Wilson, the sponsor provided written supporting evidence from himself and he gave oral evidence. He also relied upon a latter from the appellant's aunt dated 10 February 2018 and WhatsApp messages and two letters from the appellant's school in support of the contention that he (that is the sponsor) had "sole responsibility" for the appellant. He also relied upon an order appointing the sponsor as the appellant's guardian dated 24 October 2016.

16. In his determination, Judge Wilson correctly identified the approach to the issue of "sole responsibility" applying the well-known decision in <u>TD</u> (Para 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 namely, the principal issue is whether the sponsor had continuing control and direction over the appellant's upbringing including making all the important decisions in his life (see [18] of the determination).

17. In relation to the issue of "sole responsibility", the judge reached his adverse decision in paras [27] – [34] as follows:

> "27. It is undisputed by the Respondent that the Appellant has a relationship with the sponsor. In assessing the relationship, I have considered the transcripts of the WhatsApp messages. The authenticity of these messages was undisputed by the Respondent albeit that they are not screenshots of conversations but rather a transcript. I note that the messages are a mixture of English and Shona two of the languages of Zimbabwe. The messages have the feel of a general conversation. In

addition, their content is consistent with the written and oral evidence of the sponsor and the Western Union transfers, the conversations and deal with requests and receipts from money; the sponsor providing funds for day-to-day school essentials for the Appellant and conversations relating to the Appellant's immigration application Accordingly, whilst I have am concerns that the messages are transcripts I am willing for the purpose of this determination to take the evidence at its highest and find that these transcripts are a genuine and true reflection of conversations between the sponsor and the Appellant and the sponsor and the Appellant's aunt.

28. There are numerous documents evidencing money transfers from the sponsor to the Appellant via his aunt over a sustained period. There are numerous references in the WhatsApp conversations to money transfers and requests for financial support. On the evidence before me, I have no difficulty in finding that the sponsor financially supports the Appellant and that the Appellant is financially dependent upon the sponsor.

29. In terms of emotional dependency the WhatsApp conversation clearly show a close relationship between the Appellant and the sponsor. The Appellant discusses issues such as exam performance and his aspirations to open a business. Accordingly, I find that the Appellant is in part emotionally supported by the sponsor. However, the Appellant has lived in Zimbabwe under the care of his aunt for a significant number of years. I find that in these circumstances the Appellant cannot be solely dependent upon the sponsor for emotional support through limited WhatsApp messages and visits. I find that the emotional support will be given by both the Appellant's aunt and the sponsor.

30. The test of sole responsibility is whether the sponsor has control and direction over all of the important decisions within the Appellant's life. Taking the evidence as a whole and at its highest, I find that this test is not been satisfied. The sponsor and the Appellant accept that the Appellant's aunt provides care but maintain that all important decisions are made under the direction of the sponsor. This assertion is inconsistent with a letter dated 10 February 2018 from the Appellant's aunt. The Appellant's aunt states *'although I had the main responsibility of bringing up the Appellant my brother and wife have always been there to assist. The sponsor has been helping with decisions, school fees, clothing and food he has been a father figure and his wife is a mother figure. The Appellant regards them as parents because the mum and dad there were strong relationship and they normally come to Zimbabwe each year to be with him and always be with him when they come'*. The Appellant's aunt's letter does not suggest that she is merely a carer, it suggests that she has responsibility for the Appellant and the sponsor assists. The letter is not consistent with the level of control that the sponsor claims he exercises. The letter does not indicate that all decisions are retained by the sponsor made under his direction. At its highest the letter is indicative of shared responsibility.

31. The Appellant has been under the care of his aunt for a significant period of time. Even if I were to accept that the sponsor took sole responsibility in 2016, when the Appellant's aunt decided to marry then there is still a distinct lack of evidence as to directions given by the sponsor during this period. There is a letter dated the 20 December 2012 which states which school that the sponsor would like the Appellant to attend. There is then in excess of 50 pages of WhatsApp messages. The what SAP messages are a mixture of English and Shona. However, within 58 pages of WhatsApp messages covering a period from 2015 to 2019 the sponsor could only refer limited examples of entries which he asserted were directions. This involved that a suggestion that the Appellant did not go on holiday and a in April 2016 enquiries as to how the Appellant was getting on with his exams. This

entry is particularly interesting as the Appellant's aunt replies that there are no exams. The sponsor asks why and the Appellant's aunt states that the exams are next term. This entry does not suggest that the sponsor is in control of all important documents within the Appellant's life it suggests that he was unaware of the precise dates of important exams that the Appellant was about to take. It suggests that the Appellant's aunt is in control of the Appellant's education or at least some of those decisions rather than sponsor.

32. The Appellant has provided two letters which the Appellant are from his school. The letters are handwritten and are not on headed paper. The letters can be contrasted with the school report which includes a front page of the with the school insignia contact details and header. Against this background, I have concerns that official correspondence from the school would be delivered in such an informal manner. In any event the letters simply given update as to the Appellant's progress and state that the sponsor can support through financial contributions. The letter's do not corroborate the assertion that decisions in relation to the Appellant's education are made solely by the sponsor.

33. The Appellant has provided an Order appointing the sponsor as guardian the Order is dated 24 October 2016. However, by 2017 the sponsor had given power of attorney to the Appellant's aunt in respect of the Appellant. The sponsor asserts this was merely for the purposes of obtaining a passport. However, there is no evidence that the power of attorney has been revoked and in any event the grant of power of attorney, even if only to allow the aunt to obtain a passport for the Appellant, is indicative that the aunt was exercising some sort of decision-making for the Appellant.

34. Taking the evidence as a whole I am far from satisfied that the sponsor has sole responsibility for the Appellant. Even taking the evidence at its highest, I find that responsibility is shared between the sponsor and the Appellant's aunt."

18. As will be clear, the judge accepted that the sponsor financially supports the appellant. However, he did not accept that since 2016 (as appears to have been the sponsor's case) he had taken over "sole responsibility". The judge did not find the letter from the appellant's aunt supportive of such a finding; there were limited directly relevant WhatsApp messages and the school letters, even taken at their highest, simply updated the appellant's progress and that the sponsor supported him through financial contributions. Finally, and I will return to this later, the judge considered that the grant of a power of attorney by the sponsor to the appellant's aunt was indicative that the aunt was exercising some sort of decision making for the appellant, i.e. not all important decisions were being made by the sponsor.

19. Next, as regards "serious and compelling family or other considerations", the judge dealt with this in paras [35] – [41] as follows:

"35. The sponsors oral evidence corroborated by the letter provided by the Appellant's aunt is that the Appellant could not continue to live with his aunt. The Appellant's aunt's letter states that she is to be married and that her husband would not allow the Appellant to live with them. The Appellant's aunt is to move to her fiancé's hometown and his family did not want her to bring the Appellant albeit he appears to have a good relationship with the Appellant.

> 36. The sponsor asserted that the Appellant's aunt's fiancé has a large family and there would not be room for the Appellant.
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> 37. Under cross examination the sponsor confirmed that the Appellant's aunt is now married. The sponsor confirmed that the Appellant continues to live with his aunt.
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> 38. The Appellant's application was made on 27 July 2018. Despite this, almost a year later the Appellant continues to live with his aunt notwithstanding her marriage. The Appellant's continued residence with his aunt for a period of almost a year following her marriage is inconsistent with his claim that he would that he would be unable to live with his aunt who would be unwilling to accommodate him due to her impending marriage. This inconsistency undermines the credibility of this element of the Appellant's claim.
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> 39. It is also telling that throughout the WhatsApp conversations my attention has not been drawn to entries dealing with the difficulties that the Appellant's aunt's claim she will facing in continuing to accommodate the Appellant. It is inconsistent that the Appellant would potentially be rendered homeless due to his aunt circumstances and yet there is no mention of this within the numerous WhatsApp between the Appellant and sponsor and sponsor and the Appellant's aunt over a significant period of time.
>
> 40. In addition, the timing of the alleged marriage gives cause for concern. The Appellant's aunt has brought up the Appellant for a significant number of years. However, it is only as he is completing his education and reaching adulthood that she finds she is to be married and can no longer accommodate or care for the Appellant.
>
> 41. For all the reasons set out above, I find that the Appellant has demonstrated, to the appropriate standard of proof, that there are compelling family or other circumstances which make his exclusions undesirable in the manner that he describes or at all. I find that the Appellant has not demonstrated that the arrangements for his care are unsatisfactory or cannot continue within the current manner."

20. There, perhaps importantly, the judge regarded the continuation of the *status quo* of the appellant living with his aunt, despite her now being married, as being inconsistent with the evidence that his aunt would be unwilling to accommodate the appellant.

Discussion

21. I heard oral submissions both from the sponsor and Mr Howells who represented the ECO. The sponsor relied upon his own handwritten grounds drafted on behalf of the appellant.

22. It is fair to say, as Mr Howells submitted, that the sponsor has raised a number of new matters subsequent to the judge's decision. Principally, perhaps, he indicated that the evidence was now that as a result of the delay the relationship between the appellant and his aunt had broken down. That, of course, is not a matter which can be taken into account at this stage in determining whether the judge erred in law in reaching his decision. Its only relevance would arise if that decision is set aside and has to be remade.

23. The sponsor's submissions largely took issue with the judge's assessment of the evidence and, in that regard, were no more than disagreements with the approach of the judge. As I have already pointed out, the judge accepted that the sponsor financially supported the appellant such that the latter was financially dependent upon the sponsor. Likewise, he accepted that there was an emotional dependency between the appellant and sponsor. Those factors, however, in themselves do not establish that the sponsor had "sole responsibility" at least since 2016 as claimed.

24. Taking each of the relevant paragraphs in turn between paras 30 and 34, with one exception I accept Mr Howells' submission that the judge properly considered the evidence.

25. In para 30, having quoted a passage from the appellant's aunt, he concluded entirely reasonable that this did not support the sponsor's contention that the sponsor had <u>sole</u> responsibility since 2016. The judge was, no doubt, somewhat hampered by the fact that the photocopy of the aunt's letter in the file only consists of the first page. It is plain from that letter that this is incomplete but when I raised this matter with the sponsor at the hearing he indicated that the remainder of the letter had been lost and this was all that the judge had. The passage from the letter offers no support to the contention that the sponsor now has <u>sole</u> responsibility.

26. As regards para 31, the judge noted the WhatsApp messages running in excess of 50 pages, many of which (as I observed at the hearing by reading them), are not in English but in Shona. Whilst the judge recognised that there are some elements that support directions being given by the sponsor, the judge was entitled reasonably to conclude that in themselves they did not establish that the sponsor had sole responsibility for the appellant's upbringing.

27. The sponsor told me at the hearing that many of the directions were made in oral telephone conversations. There was, of course, no record of those conversations before the judge and, so far as I can tell, no detailed, if any, significant evidence of them in the oral evidence before him.

28. As regards para 32, the judge was entitled to note that the two school reports were not on headed paper by contrast to other documents. That said, however, both letters do have 'stamps' upon them. Nevertheless, as Mr Howells submitted and I accept, the contents of the letters adds little weight to the contention again that the sponsor is making all the important decisions in the appellant's life.

29. That then leaves para 33: the position here is different. Mr Howells accepted, when I raised the matter with him during his submissions, that the judge had been wrong to treat the grant of a power of attorney by the sponsor to the aunt as being inconsistent with the sponsor having sole responsibility. The evidence before the judge was clear. In order for the appellant to obtain a passport in Nigeria, there had to be a person present in Nigeria who could obtain it for him. The sponsor had no choice but to grant a power of attorney to someone, in this case the most obvious person namely his aunt with whom he lived, in order to obtain that passport to come to the UK. Far

from being indicative of not making an important decision in the appellant's life, the power of attorney (linked to the decision that the appellant required a passport to come to the UK) was an example of making an important decision consistent with the contention that it was the sponsor who made the important decisions in the appellant's life.

30. Mr Howells submitted that, nevertheless, the judge had given a number of other reasons why he was not satisfied that the sponsor had "sole responsibility" and so any error in para 33 was not material.

31. I do not agree. The judge's approach in para 33 is plainly in error and is expressed as a clear negative factor inconsistent the appellant's claim that the sponsor has sole responsibility. There was *some* evidence of decision making by the sponsor both in his own evidence and supported by the WhatsApp messages. He had guardianship of the appellant. Whilst the latter was not determinative of the issue of who in practice had "sole responsibility", it was a relevant factor. Taken together, I am not persuaded that had the judge not fallen into error in para 33 he would inevitably have reached the same factual finding.

32. In my judgment, his error was material to his finding that the appellant could not satisfy the requirement in para 297(i)(e).

33. Turning to the judge's finding in relation to para 297(i)(f) at [35] – [41], as I have already indicated the new matters raised by the sponsor which postdate the judge's decision are not relevant in determining whether the judge was legally entitled to reach the finding that he did. There is, however, a difficulty in the judge's reasoning. The evidence before the judge was that, on her marriage, the appellant's aunt could no longer accommodate the appellant because she would be moving to live with her husband and his family where the appellant could not be accommodated. The appellant's continued accommodation by his aunt (before she moved) was only temporary. Yet, in para 38 the judge interprets that temporary arrangement as being inconsistent with the claim that the appellant's aunt was unwilling (the judge's word) or unable to accommodate him as a result of her marriage. But, the present arrangement was only continuing because the appellant had not yet come to the UK. The evidence was that the appellant's aunt would move to live with her new husband as soon as she was able. The judge did not call into question any of this evidence. However, in para 38 he treated the appellant's temporary circumstances – which could not persist if it is accepted that the appellant's aunt would move to live with her husband – as circumstances which would continue in the future such that it could not be said there would be "serious and compelling family or other considerations" making the appellant's exclusion undesirable. In effect, he would not become homeless. That, however, ignores the reality of the situation and the temporary nature of his aunt's willingness and ability to continue to accommodate him. It was incumbent upon the judge, on the evidence, to determine whether the reality and practicality of the situation was that, given the dilemma faced by the appellant's aunt, he was at risk of being left without accommodation because eventually (if entry clearance was not granted) his aunt would move to live with her

husband and the appellant would be without accommodation. There was, contrary to what the judge stated in the final sentence of para 38, no inconsistency in the appellant's aunt continuing to temporarily accommodate the appellant (rather than leave him homeless) pending the resolution of the appeal which, no doubt, they all hoped would be resolved in the appellant's favour.

34. Consequently, the judge gave inadequate reasons in para 38 leading to his finding that there were not serious and compelling family or other considerations so that the requirements of para 297(i)(f) were not met.

35. Whether or not the appellant met the requirements of para 297 was central to the judge's determination of whether the decision to refuse the appellant entry clearance breached Art 8. As a consequence, his decision to dismiss the appeal under Art 8 is equally flawed by the legal errors in reaching his findings under para 297.

<u>Decision</u>

36. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 involved the making of an error of law. The decision is set aside.

37. Mr Howells accepted that if the judge's decision could not stand, the proper disposal of the appeal was to remit it to the First-tier Tribunal for a *de novo* rehearing given that the remaking of the decision would involve a consideration of both documentary and oral evidence, including evidence postdating the judge's decision.

38. I agree. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge G Wilson.

Signed

Andrew Grubb

A Grubb
Judge of the Upper Tribunal
30, January 2020