



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002154
HU/59509/2023
LH/02600/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st October 2024

Before

UPPER TRIBUNAL JUDGE LANE

Between

REFILWE MAKONI
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Gilmour, Senior Presenting Officer

For the Respondent: Mr Siwela

Heard at Field House on 16 October 2024

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and to the respondent as the 'appellant' as they respectively appeared before the First-tier Tribunal. The appellant was born on 6 May 2005 is a citizen of Zimbabwe. She appealed against the Entry Clearance Officer's decision dated 18 July 2023 to refuse her application, dated 4 June 2023 for entry clearance to join her aunt, Ms Caroline Zimano, a British citizen ('the sponsor'), under paragraph 297 of the Immigration Rules. The First-tier Tribunal allowed her appeal. The Entry Clearance Officer now appeals to the Upper Tribunal.

2. The judge at the First-tier Tribunal hearing proceeded in the absence of any representative for the Entry Clearance Officer. At [6], the judge wrote:

The Home Office Presenting Officer assigned to this appeal was unable to attend the hearing because of illness. There was no application to adjourn the hearing as a consequence. I considered it to be in the interests of justice to hear the appeal in the absence of the Home Office Presenting Officer.

3. At the initial hearing, Ms Gilmour for the Entry Clearance Officer submitted that the judge failed to ensure that a fair hearing of the appeal. The judge has given no reasons for proceeding with the hearing in the absence of a presenting officer. This was not a case where the hearing would in any event have proceeded because the respondent had chosen not to provide a presenting officer; a presenting officer had been assigned to the hearing but had failed to attend because of illness.
4. There is force in Ms Gilmour's submission even though an examination of the grounds of appeal shows that her argument was not pleaded in those terms. However, notwithstanding that omission, I consider that it remains the duty of the Tribunal to ensure delivery of a fair hearing. The judge has treated the absence of a presenting officer as if he had been notified that no presenting officer could be assigned to cover the hearing, which was not the case. Had the appellant's representative notified that Tribunal that their counsel could not have attended because of sickness, then I consider it likely that the judge would have hesitated to proceed with the appellant and sponsor unrepresented at court. At the very least, the judge should, in my opinion, have given his reasons for proceeding in the knowledge of the reason for the presenting officer's absence. His failure to do so led to unfairness and failure to treat both parties in an even-handed manner.
5. There is no merit in the assertion in the grounds that the judge erred by stating at [8] that the parties 'agreed' the issues in the appeal when there was no presenting officer at court to make such an agreement. The judge's use of words is clumsy but it is clear that he sought only to record (accurately as it turns out) that the only issue before the Tribunal was that of sole responsibility.
6. The appellant submitted a bundle of documents following the Entry Clearance Officer's decision and before the First-tier Tribunal hearing. Mr Siwela, for the appellant, submitted that the documents in this bundle addressed the concerns of the Entry Clearance Officer as articulated in the refusal letter. I briefly adjourned the initial hearing to enable Ms

Gilmour to consider the documents, which she kindly did. However, she submitted that the matters raised in the refusal remained outstanding and asked that I direct that the appeal be returned to the First-tier Tribunal in the event that I found an error of law.

7. The final ground of challenge concerns the alleged failure of the judge to make a categorical finding as regards the appellant's mother and the appellant's claim that she has lost touch with her. It remains the respondent's case that the appellant has failed to prove that the mother has lost contact with her such that she has abdicated responsibility for the appellant. I accept that such a finding is necessary as part of the required analysis of the issue of sole responsibility but, whilst the judge deals with the mother's criminal activities in Zimbabwe, he has not made any or any sufficiently clear finding that contact between the mother and the appellant has ceased and the decision-making role of the mother in the appellant's life has come to an end or has been replaced by the sponsor. Accordingly, the judge erred in this part of his analysis also.
8. Whilst I am aware of the ongoing cost and delay caused to the appellant and the United Kingdom sponsor, the decision of the First-tier Tribunal should be set aside and the appeal returned to the First-tier Tribunal for that Tribunal to remake the decision. It may be that the respondent will take a fresh view of the later bundle of documents provided by the appellant but that is a matter for him/her.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing *de novo*.

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 16 October 2024