Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17296/2019 (V)**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 9 April 2021	**On : 15 April 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AKEKELWA MWALA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Shaw, instructed by IHRC Legal
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zambia, born on 6 July 2001. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his human rights appeal.

2. The appellant applied, on 1 July 2019, for entry clearance to the UK under Appendix FM of the immigration rules as the child of his mother, Irene Mukatimui Muhongo, the sponsor, who was settled in the UK. The respondent refused the application on 23 September 2019 on the grounds that it was not accepted that the appellant and sponsor were related as claimed and it was

not accepted that the sponsor had sole responsibility for the appellant's upbringing, or that there were serious or compelling circumstances which made his exclusion from the UK undesirable. The respondent also considered that were no exceptional circumstances leading to unjustifiably harsh consequences for the appellant for the purposes of Article 8.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Sweet on 9 October 2020, by which time the respondent had conceded that the appellant and the sponsor were related as claimed. The sponsor gave oral evidence before the judge. Her evidence was that she had left Zambia in October 2003 and had been granted indefinite leave to remain on 15 June 2010. She had made various visits to Zambia, the last one being from February to April 2019. Her daughter, the appellant's older sister, remained in Zambia and was studying at university. The appellant had had mental health problems, in particular schizo-affective disorder, since April 2016 and had dropped out of school in 2019. He had been living with different family members and family friends and was admitted to hospital in April 2019. He was currently living with a family friend, Iven, since July 2020, after his previous carer Brian, an uncle, left, but the current arrangement was temporary. The appellant's father had played little part in his life since he was two years of age. The sponsor had attempted to bring the appellant to the UK in 2013 but his application was refused and his appeal against the decision was dismissed in March 2014.

4. The judge, having regard to the determination of the appellant's previous appeal in 2014, noted that there had been two changes since that time, namely the appellant's mental health and the acceptance of the relationship between the appellant and the sponsor. However he did not consider that the weight of the evidence supported a finding of sole responsibility or of serious and compelling circumstances which made the appellant's exclusion from the UK undesirable. The judge considered that the appellant took his medication himself and made his own decisions about his daily life and that it was his uncle Brian who took him to hospital in April 2019. The judge did not accept that the sponsor had had continuous control of the appellant's upbringing and he accordingly dismissed the appeal.

5. The appellant sought permission to appeal the decision on the following grounds: that the judge had failed to consider the numerous other reasons presented for departing from the previous determination; that the judge failed to engage with relevant evidence and relied on irrelevant matters when assessing whether sole responsibility had been demonstrated; that the judge failed to place weight on relevant factors; that the judge made findings based upon erroneous submissions from the respondent; that the judge failed to consider the best interests test under section 55 of the Borders, Citizenship and Immigration Act 2009; and that the judge failed to provide reasons for dismissing the appeal under paragraph 297(i)(f) and to consider the appellant's mental illness in that respect.

6. Permission was granted in the First-tier Tribunal on 1 December 2020 and the matter then came before me for a remote hearing.

7. Having heard submissions from the parties I have to agree with Ms Shaw that Judge Sweet's decision is materially lacking in its reasoning and assessment of all the evidence. Mr Whitwell made a valiant attempt to support the judge's decision, submitting that the determination addressed all relevant matters when read as a whole and that the judge had referred to the relevant immigration rules, set out the evidence and made findings under paragraph 297(e) and (f). However, he properly left it to me to decide if that was in itself adequate and I have to conclude that it is not.

8. Whilst Judge Sweet properly took the earlier determination of the FTT as his starting point, further to the principles in Devaseelan, I am entirely in agreement with Ms Shaw that he erred by relying upon that earlier decision to the extent that he did and without giving full and proper consideration to the limitations of the decision and the availability of supporting evidence and changes in the appellant's circumstances since that time. As the grounds properly assert the judge, when referring to only two changes since the previous decision in 2014, namely the appellant's mental health and the fact that the appellant's relationship with his mother was accepted, failed to consider various other factors, in particular the fact that the decision of 27 March 2014 was made without the benefit of any oral evidence and the fact that the appeal failed at that time largely on the basis of an absence of supporting evidence as is apparent at [10] of that decision.

9. Whilst there was a lack of supporting evidence before the FTT at the appeal in March 2014, Judge Sweet had before him a 51-page bundle of evidence as well as the oral evidence of the sponsor. Although the judge referred to parts of the evidence, there is merit in the assertion in the third ground of appeal, that relevant parts of the evidence were either not considered or were not accorded any weight, such as evidence from the school the appellant previously attended and evidence of his mental illness which the judge merely referred to in passing. Indeed, it seems to me that the 'findings' at [31] are largely observations about the evidence without any proper analysis and without any reasons given as to why it did not demonstrate sole responsibility. The judge simply expressed the view that "*the weight of evidence (both new and previous) does not support a finding of sole responsibility or serious and compelling family or other considerations*" but it is difficult to understand from a reading of the decision overall how that conclusion was reached, other than by reference to the earlier unsuccessful appeal.

10. Likewise, whilst the judge referred to TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 at [31], there was an absence of any proper analysis of the test and a lack of reasoning as to why he considered that the test was not met. Indeed, the fact that the judge found against the appellant and sponsor on the issue of sole responsibility on the basis that it was the appellant's uncle Brian who took him to hospital suggests a

misunderstanding by the judge of the test, as the grounds assert, with some merit, at [10(iii)] and [17(b)].

11. For all of these reasons it seems to me that the judge's decision is materially flawed and that it simply cannot stand. Accordingly, I set the decision aside. In view of the lack of analysis of the evidence and the absence of properly reasoned findings of fact, the appropriate course is for the case to be remitted to the First-tier Tribunal to be heard *de novo*.

DECISION

12. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Sweet.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 12 April 2021