



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003810

First-tier Tribunal No: HU/50054/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th December 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Lwandle Jubane
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Ms L Brakaj of Iris Law Firm

For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard remotely at Field House on 6 December 2023

DECISION AND REASONS

1. By the decision of the First-tier Tribunal dated 6.9.23, the appellant, a minor and citizen of Zimbabwe, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Fox) dismissing his appeal against the respondent's decision of 9.12.22 to refuse his application made on 11.10.21 for Entry Clearance to join his mother in the UK, as the child of a parent with Limited Leave to Remain (LTR).
2. The application was refused on the basis that (i) the respondent was not satisfied that the appellant was related to the sponsor as claimed; (ii) that even if related the sponsor did not have sole responsibility; and (iii) there were no exceptional circumstances to justify admission outside the Rules. By the date of the appeal hearing, however, the only remaining issue was that of sole responsibility.
3. The grounds as drafted are somewhat difficult to follow. However, in summary, they argue that the First-tier Tribunal (i) erred in stating that there was no

evidence of the intention of the parties when leaving Zimbabwe, reference being made to the application form submitted to the First-tier Tribunal; (ii) failed to consider other significant evidence, such as the grandfather's age; (iii) ignored or misstated material evidence, failed to consider the evidence in the round, and failed to make findings on witness credibility; and (iv) misunderstood the intention of the Rules and made a material misdirection in law when stating that a claim to sole responsibility would be difficult to justify where there is such a long geographical distance between the parties.

4. Although not referenced in the grounds, in granting permission the First-tier Tribunal Judge considered it arguable that the First-tier Tribunal failed to apply the principles TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT. It was also considered arguable that the First-tier Tribunal (ii) attached weight to immaterial matters; (iii) failed to have regard to available evidence; and (iv) failed to provide "adequate reasons on a number of material matters."
5. The headnote of TD states, "'Sole responsibility' is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".
6. Unusually, the decision of the First-tier Tribunal is not paragraph-numbered but it can be seen from the discussion between the 4th and 8th pages of the decision that there was considerable discussion on the issue of both sole responsibility and serious and compelling considerations. However, there are real problems with the findings and the supporting reasoning. For example, the judge noted that when the mother came to the UK in 2018, she left the appellant with his grandfather. She claimed in oral evidence that it was always her intention to bring her son eventually to the UK and said that (in the meantime) the grandfather would deal with the child's parental needs and supervision, such as schooling or health issues, on a day-to-day basis and tell her of the decision he had made at a later stage. The judge stated that there was no evidence of such intention having been declared, stating, "nothing has been produced for the hearing." That was incorrect. As Ms Rixom agreed, this intention had been clearly expressed in both the sponsor's original application form and subsequent application, both of which had been uploaded to CCD electronically and were available to the First-tier Tribunal for the appeal hearing. It appears that the judge overlooked this evidence with the result that the findings on this issue are unsafe.
7. More significantly, the findings and reasoning of the First-tier Tribunal also appear to ignore the possibility that day-to-day decision making can be left to another in-country without a parent abandoning sole responsibility. For example, the findings as to contact from the school at page 4 of the decision suggest that the judge required there to be evidence of direct contact between mother and the school, rather than through the grandfather. The statement that "there is a lack of evidence demonstrating any preferred direct contact by any institution with the sponsor," suggests the imposition of a requirement beyond the scope of TD and amounts to a misdirection in law.
8. Similarly, the judge's statement between pages 5 and 6, in relation to the grandfather taking the appellant for medical treatment, that, "She further confirms that she only learns about these events afterwards. This is not responsibility, let alone sole responsibility. She does not have a direct input. She

appears as a notice party,” is unsustainable and not consistent with the principles to be applied in sole responsibility cases. There is no requirement for direct contact with the sponsoring mother before medical treatment is sought; in fact, it is difficult to see how matters could be dealt with differently. Other comments, such as that at page 7, “There are no formal legal guardianship documents in place appointing the grandfather as guardian of the appellant. The sponsor’s evidence is that this was done by word of mouth. That would indicate an informal passing-off of her responsibility to the grandfather,” also demonstrate inappropriate and irrelevant considerations in the reasoning of the First-tier Tribunal.

9. At page 8, the judge accepted that the delay between 2018 and 2021 in making an application for the appellant to join her in the UK was reasonable in light of the financial thresholds that had to be met before such an application could be successful but then continued, “It does not however excuse or offset the failure to make application initially for her son to come to the UK with her in 2018. This appears more of an after-thought. It also strengthens that view that she does not have responsibility.” This reasoning is unsustainable and fails to appreciate the nature of applications made possible under paragraph 297. I agree with Ms Brakaj’s submission that the underlying impression one gleans from the judge’s approach throughout the decision is to the effect that the sponsor ought to have applied for the appellant to join her at the same time as she left for the UK.
10. Other than the conclusion that the appellant failed to demonstrate that he met the requirements of paragraph 297, it is rather difficult to discern from the decision what the actual findings were as to sole responsibility. Some parts recite the evidence without making findings on that evidence. Some of the discussion in the decision is in the form of suggested further evidence that needed to be produced or could be produced in a further application. Other parts of the discussion amount to unanswered rhetorical questions.
11. More significantly however, at the bottom of the 6th page the judge stated, “The sponsor claims that she is responsible solely for the appellant. That is a difficult claim to justify when there is such a long geographical distance between her and the appellant.” The appellant is justified in criticising the use of this phrase which suggests a misunderstanding of the law in relation to ‘sole responsibility,’ not to mention the Immigration Rules, which specifically allow for the possibility of a child joining a parent in the UK, either based on sole responsibility or where there are serious and compelling family circumstances. Long geographical distance may well be typical of the circumstances of many such applications and is not directly relevant to the issue in paragraph 297. This clear error of reasoning undermines the reliability of the other findings and overall conclusion of the First-tier Tribunal on the appeal.
12. As Ms Rixom was forced to accept, some of the findings are confused and the decision jumps back and forth between considerations of sole responsibility and serious and compelling circumstances making it difficult to understand the decision. For example, on the 6th page the judge states that “there is no evidence of any serious or compelling circumstances that could commend his removal to the United Kingdom,” before returning once again to the issue of sole responsibility. Ms Rixom referred in her submissions to the judge’s ‘musings’ and one might describe the style as one of a stream of consciousness dictation. Unfortunately, the overall impression one is left with on reading the decision is of a poorly organised document that does not proceed in any logical fashion and fails to make clear findings supported by cogent reasoning. In the circumstances,

I accept the complaint that it is difficult for the appellant to discern from the decision any sustainable reasons why the appeal was dismissed.

13. In all the circumstances, and for the reasons outlined above, I am satisfied that the decision of the First-tier Tribunal is flawed for material error of law and cannot stand but must be remade in its entirety.
14. Given that the entire fact-finding exercise must be undertaken afresh, this is a case which falls squarely within 7.2 of the Practice Statement and appropriate for remittal to the First-tier Tribunal, which both representatives suggested, particularly given the likelihood of oral evidence from two witnesses and up-to-date evidence as to the appellant's circumstances.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside for error of law.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be remade *de novo* with no findings preserved.

I make no order as to costs.

DMW Pickup

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Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 December 2023