



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/20332/2013

THE IMMIGRATION ACTS

Heard at Field House
On 9 October 2014

Decision & Reasons promulgated
On 22 May 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Wane Lubosi Imbuwa
(Anonymity order not made)

Appellant

and

Entry Clearance Officer,
Pretoria

Respondent

Representation

For the Appellant:

Mr D Coleman of Counsel instructed by Irvine Thanvi
Natas Solicitors.

For the Respondent:

Ms K Pal, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge M A Khan promulgated on 10 July 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 31 October 2013 to refuse entry clearance as a the dependent child of a parent with limited leave to remain in the UK.

Background

2. The Appellant is a national of Zambia born on 4 July 2009. He is the child of Edna Chirwa, also a national of Zambia, born on 16 September 1975,

(hereafter 'the sponsor'). The sponsor had been studying in the UK: she pursued an undergraduate degree in Business Management at the University of East London and at the date of the Respondent's decision had achieved a 2.1 and was due officially to graduate on 19 November 2013. She had applied to do an MBA at the same institution commencing in September 2014. However, for the next year she was planning to work as a full-time sabbatical officer of the university's Student Union: this was an elected position (elections having taken place in March 2013), and was full-time with a salary of £21,000. The sponsor, who had left the Appellant in the care of her parents when she had come to study, now wanted him to join her during the period that she undertook her work and duties as a sabbatical officer. The sponsor had leave as a Tier 4 (General) Student.

3. On 2 October 2013 an application was made on the Appellant's behalf for entry clearance to join his mother in the UK. The Appellant's application was refused for reasons set out in a Notice of Immigration Decision dated 31 October 2013, with particular reference to paragraph 319H of the Immigration Rules. Essentially the Respondent was not satisfied that the sponsor was studying at a level that would entitle her to be joined by a dependent child. The Respondent otherwise expressed himself not to be satisfied that the sponsor had shown that she had been solely responsible for the Appellant, or that there were any serious compelling aspects to the case to warrant the grant of leave.
4. The Appellant appealed to the IAC.
5. The First-tier Tribunal Judge dismissed the appeal for reasons set out in his determination.
6. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge McCarthy on 29 July 2014.
7. The Respondent has filed a Rule 24 response dated 13 August 2014 resisting the challenge to the outcome before the First-tier Tribunal

Consideration

8. It is contended on behalf of the Appellant that the First-tier Tribunal Judge made two errors of fact.

9. I accept paragraph 25 of the Judge's decision bears no resemblance to the facts of the case. This was not an application by the Appellant "*to join his adoptive father who also happens to be his maternal uncle*". It seems to me most likely that such a paragraph appears through some word-processing slip and lack of thorough proof reading. However, in circumstances where the Judge has clearly otherwise identified the nature of the application and addressed the issues in the appeal I find such a slip not to be material to the outcome, or otherwise indicative of a lack of attention to the real issues in the appeal. The error in this regard is not accompanied by other errors, and is not of similar moment to those identified in ML (Nigeria) [2013] EWCA Civ 844.
10. Further I note it is alleged in the grounds in support of the application for permission to appeal that the Judge has proceeded upon a factual misconception in stating that the sponsor "*has not made any application to the Home Office to change her status*" (paragraph 26). It is submitted that this disregards the sponsor's application to extend her Tier 4 visa as a sabbatical officer following completion of her undergraduate degree.
11. Whilst it may well be that the underlying basis upon which the visa was granted altered, the nature of the visa did not: the sponsor continued with the same immigration status as a Tier 4 student. Indeed, contrary to the way in which the case is put in the grounds, in my judgement the references therein to the Secretary of State's policy guidance in respect of student union sabbatical officers, whilst necessarily and inevitably recognising a factual distinction between being a student in full-time study and being a student sabbatical officer in a full-time salaried elected executive union position, do not make any distinction as regards the type of visa issued to such persons.
12. Indeed it is the contention that the sponsor as an employed sabbatical officer is to be treated differently from a student in full-time education for the purposes of her child's entry clearance application that was at the core of the submissions before the First-tier Tribunal and in the grounds submitted to the Upper Tribunal.
13. It seems to me plain beyond any doubt whatsoever that whilst studying and being employed as a full time sabbatical officer are clearly different factual scenarios, for immigration purposes the Immigration Rules do not confer different statuses. A student who interrupts his or her studies for the purpose of taking a sabbatical year as a student union officer does not cease

to be a student visa holder and is not entitled to apply for, and does not become, any sort of visa holder more normally associated with full-time employment. Once this position – inevitable and plain under the Rules – is recognised, the basis of the Appellant’s claim to be treated differently under the Rules from the child of any other Tier 4 Student is groundless. In this context it is to be noted that it has never been disputed that the sponsor was a holder of anything other than a Tier 4 student visa. Nor has it ever been disputed that she has not yet studied at the requisite level. Indeed, albeit somewhat reluctantly, Mr Coleman recognised the difficulty presented to the Appellant’s case in such circumstances.

14. As a dependent, the Appellant’s immigration status potentially derives from his mother’s immigration status: it does not derive from his mother’s activities pursuant to her immigration status.
15. In reality the Appellant’s case in this regard is based on an argument that the Rules *should* make a distinction between a student and a sabbatical officer. That is in effect a dispute with the way in which the Rules are drafted. Interesting though a debate on such a topic might be, it does not fall within the ambit of the Tribunal’s jurisdiction to reach a conclusion as to whether the Rules ought to be drafted differently in this regard. Be that as it may, any such dispute with the way in which the Rules have been drafted falls well short of establishing that the Respondent’s decision was not in accordance with the Rules or was otherwise not in accordance with the law.
16. In all such circumstances, whilst perhaps in part inelegantly expressed, the Judge’s reasoning at paragraph 26 is essentially sound. The sponsor’s leave was indeed as a student - for the purposes of the Rules as a Tier 4 student; she did not have leave in any other capacity relevant to employment; her last course of study was indeed at NQF level 6, which was below the level at which a Tier 4 student was entitled to be joined in the UK by a dependent child; she had not commenced any higher level of study.
17. The grounds in support of the application for permission to appeal also argue that the Judge erred in failing to have regard to certain documents submitted in support of the appeal. Those documents are listed at paragraph 3 of the grounds.
18. However, it seems perfectly plain that the Judge did have regard to such documents: see determination at paragraph 27. In any event these documents do not have any bearing on the immigration status of the

sponsor, and therefore do not have any bearing on the decision taken under paragraph 319H. Their only potential relevance was in the context of the issue of 'sole responsibility', which is acknowledged in the grounds (paragraph 4), and by Mr Coleman before me, not to have been a necessary consideration for the purposes of paragraph 319H if the application in any event failed because of the level of study of the sponsor.

19. In the circumstances I reject the Appellant's challenge in respect of the decision under the Immigration Rules as pleaded in the grounds in support of the application for permission to appeal.
20. In recognition of the difficulty faced by the Appellant under the Rules, Mr Coleman sought to put the case on a different basis from that pleaded, with particular reference to Article 8 of the ECHR (which was raised only in very general terms in the grounds). He submitted that the First-tier Tribunal Judge had erred in his evaluation of the issue of 'sole responsibility', and that such an error meant that the Article 8 consideration was misconceived in its premises.
21. In the grounds in support of the application for permission to appeal, apart from suggesting that it was unnecessary to consider the issue of sole responsibility if the Judge was upholding the Respondent's decision premised on the sponsor's status and her level of study (and unsustainably arguing that the fact that the Judge nonetheless did so was indicative of him having concluded in the Appellant's favour on such matters), the only challenge to the substance of the Judge's conclusions in respect of sole responsibility was based on the supposed failure to have regard to supporting documents. For the reasons already given that basis of challenge is unfounded.
22. In my judgement Mr Coleman's alternative submission inevitably encounters the same problem. With good reason therefore - and indeed with merit - Mr Coleman seeks to raise a quite different challenge to the Judge's findings in respect of sole responsibility.
23. Mr Coleman argues that although the Judge sets out at paragraph 28 the relevant test in accordance with the decision in **TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**, he does not apply it or otherwise provide adequate reasons for the conclusion that he was not satisfied "*that the sponsor has the sole responsibility for the appellant*" (paragraph 29).

24. In this context the following matters are to be noted in particular:

(i) The Judge's conclusion ran contrary to the sponsor's assertion, and necessarily therefore involved a rejection of her evidence of primary facts. However, nowhere does the Judge make an adverse credibility finding in respect of the sponsor, or otherwise offer any reason as to why her testimony was to be treated as unreliable or not credible.

(ii) The Judge identifies no adequate reason for rejecting as self-serving the assertion in the Appellant's father's letter that he has not been involved in the Appellant's day-to-day life (paragraph 27). The fact that the letter does not state in terms that he was never married to the sponsor does not sustain such a conclusion.

(iii) The acknowledged fact that the sponsor's parents had been looking after the Appellant in her absence, and the Judge's finding that there was no evidence to demonstrate that such an arrangement could not continue (paragraph 29), were in no way inconsistent with the notion that the sponsor had sole responsibility for her son's upbringing within the meaning of the Immigration Rules. Such circumstances were not determinative of the issue.

(iv) Accordingly the Judge's reliance upon "*the above-mentioned reasons*" (paragraph 29) - necessarily being a reference to what had been said concerning the Appellant's father, and the immediately preceding references to the viability of the continuation of the arrangements whereby the Appellant's grandparents cared for him in the absence of his mother - did not sustainably support the adverse conclusion on sole responsibility.

25. Ms Pal acknowledged that the Judge's reasoning in this regard appeared inadequate. She was also prepared to acknowledge that this might have had a potential impact on the assessment under Article 8 of the ECHR. Further, whilst section 55 of the Borders, Citizenship and Immigration Act 2009 did not have any direct application to a child outside the UK, it was accepted that there was an analogous duty in respect of applications for entry clearance: **T (s.55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483 (IAC)**. The Judge had not made any express reference to the best interests of the Appellant.

26. In such circumstances I find that there was an error of law in the approach taken by the First-tier Tribunal to the issue of Article 8 of the ECHR such that the decision in this regard requires to be set aside and remade. For the

avoidance of any doubt, the decision under the Rules is not set aside and stands.

Remaking the Decision

27. Both parties agreed that it was possible to remake the decision in the appeal in respect of Article 8 before the Upper Tribunal and without adjourning for a further hearing. To this end I heard brief oral evidence from the sponsor, who provided an update as to her present circumstances: she was now undertaking a second period as a sabbatical officer. (In this regard I have not lost sight of the fact that as this is an entry clearance case I am required to evaluate matters as they were at the date of the Respondent's decision – even in respect of ECHR grounds; although it is permissible to take into account post-decision evidence and facts these are only relevant in so far as they appertain to circumstances at the date of the Respondent's decision.)

28. As regards the issue of 'sole responsibility', I accept that the nature of the relationship between the sponsor and the Appellant is inevitably a matter for consideration in the context of Article 8: in considering the first, second, and fifth **Razgar** questions an evaluation of the nature and quality of any family life is required.

29. The sponsor has provided a narrative account of her relationship with the Appellant's father and his consequent lack of involvement with the Appellant (witness statement paragraph 5, Appellant's bundle pages 1-2). I do not accept that the appearance of the father on the birth certificate is evidence of any continuing involvement in the Appellant's life. Supporting evidence is provided by way of, amongst other things, a letter from the hospital where the Appellant was born confirming the lack of involvement of the father pre-, during, and post- delivery; a letter from the sponsor's church in Lusaka wherein the family pastor refers to having not met the Appellant's father and that to the church's knowledge the sponsor is a single mother with full responsibility for the Appellant; correspondence from the Appellant's kindergarten stating that they have only ever seen and dealt with the sponsor as a parent, and in her absence the maternal grandmother.

30. In the circumstances I find on a balance of probabilities that the sponsor has been the only parent taking an active role in the Appellant's life since birth. I find that the sponsor has had sole responsibility for the Appellant from this time. Although the day-to-day practicalities of care have been undertaken by the maternal grandparents whilst the sponsor has come to

the UK to pursue studies, I do not find that such an arrangement amounted to a surrender of the sponsor's parental responsibilities: I find that the important decisions in the Appellant's life continue to be made by his mother - albeit that the immediate practicalities of care are undertaken by the grandparents.

31. I take forward into an evaluation of the quality of the family life enjoyed between the Appellant and the sponsor my conclusion in respect of sole responsibility.
32. As regards family life I note that Ms Pal accepts that a family life exists between the sponsor and the Appellant as mother and child. However, Ms Pal emphasises that they have lived apart since 2011, maintaining family life through visits and telephone communication.
33. I accept that the Respondent's decision does not materially interfere with the family circumstances that the sponsor voluntarily arranged in order to facilitate her choice of pursuing studies in the UK.
34. I note that the sponsor in her witness statement has indicated that she had always hoped that once she had established herself in her studies in the UK she could arrange for the Appellant to join her - and she acknowledges in this regard that the plan was so to do once she entered postgraduate study. (In this context it is to be recalled that the Rules would not permit entry of the Appellant whilst the sponsor was studying at NQF level 6, but would at level 7.) In so far as that original plan has been frustrated, I find it has been so by reason of the Appellant's decision to serve as a sabbatical officer prior to commencing a level 7 postgraduate course.
35. Although the sponsor has told me that she thought the difficulty in being joined by her son was because of the issue of sole responsibility rather than because she was not studying at the appropriate level - and indeed she offered this explanation for pursuing a second year as a sabbatical officer (and thereby preventing the Appellant from meeting the requirements of the Rules for a further year) - this is to misunderstand the Rules.
36. It seems to me that I must proceed at least on the basis that the sponsor had constructive knowledge of the Rules: she certainly could have accessed them through the Home Office website or otherwise sought advice. In any event I do not consider that ignorance of the Rules should sound in a

sponsor's or applicant's favour in a proportionality balance outside the Rules. In other words, if the Appellant asserts in effect that she did not realise taking a position as a sabbatical officer would prevent her being joined by her son in the UK in circumstances where if she had proceeded to commence her postgraduate course the Appellant would likely have been granted entry clearance, I do not consider that such a mistake should in any way be given weight in considering whether the Rules should in effect be disregarded and entry clearance be granted notwithstanding a failure to meet the requirements of the Rules.

37. As regards the situation of the Appellant, I note that there is a letter dated 25 June 2014 from the maternal grandmother expressing a weariness, and a sense of frustration in her grandson not being able to join his mother, the practical difficulties of having to communicate with the sponsor in respect of any decisions that may need to be taken, the expense of calls, and the unsettling nature of the sponsor's arrivals and departures when visiting the Appellant. I also note an earlier email (Appellant's bundle page 32) which refers to the sponsor's mother having put her retirement plans of "*moving to the farm*" on hold. However, and whilst acknowledging what is said in the letter of 25 June 2014 about difficulties in waking early enough every morning to prepare the Appellant for school, I do not find that there is anything revealed in this letter or otherwise in the evidence that suggests that the arrangement for caring for the Appellant at the date of the Respondent's decision could not have continued at least for the period of the sponsor's first year of office with the student union - being one year from 1 July 2013. Indeed the viability of continuing the arrangements are underscored by the fact that the sponsor has now chosen to take on a second year in office notwithstanding the unresolved nature of the Appellant's case: I infer from such a circumstance that the sponsor was content that the interim arrangements were sufficient to protect her son's welfare notwithstanding her own absence.
38. For essentially the same reasons I find that there is nothing in the evidence that is indicative of unusual, particularly compassionate, or otherwise exceptional circumstances as regards either the sponsor or the Appellant, or in respect of their mutual family life, that would warrant departure from the Immigration Rules.
39. I entirely recognise and understand the additional possible benefits to the sponsor in terms of the acquisition of skills and the enhancement of her curriculum vitae and profile - as well as the element of responsibility and service - inherent in undertaking the duties of a sabbatical officer. However, ultimately, the choice between so doing and having the company of her son

is a choice for the sponsor. Her election to pursue the sabbatical officer option in circumstances where the Rules would not thereby permit her to be joined by her son does not in itself warrant a relaxation of the requirements of immigration control. Moreover, in the context of proportionality, where it may be said the circumstances that have resulted in separation and in continuing separation of mother and child are essentially matters of personal choice and personal decision-making - which in itself speaks to the nature and quality of family life enjoyed between the sponsor and the Appellant - I find nothing of a compelling or exceptional nature that renders the Respondent's decision as disproportionate.

40. If there were any doubt in this regard - and I emphasise that I do not have any such doubt - the matter would in any event be underscored by the fact that the sponsor has elected to take a second term (i.e. a further year) out of her studies to continue in her role as a student union officer.
41. Accordingly, whilst I find nothing controversial in answering the first two **Razgar** questions in the Appellant's favour, and there being no issue between the parties in respect of the third and fourth **Razgar** questions, I have no hesitation in concluding that the fifth question - proportionality - is not to be answered in the Appellant's favour.
42. For the avoidance of any doubt, in reaching my conclusion I have had regard to the 'public interest considerations' applicable pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002. I note that no such specified consideration is in and of itself determinative of the issue of proportionality one way or the other, and that the listed considerations are not exhaustive of the matters that are to be taken into account when considering Article 8. I note that there is nothing to indicate that the Appellant is anything other than able to speak English (117B(2)), and the Respondent took no issue in respect of the financial requirements of the Rules which is indicative of the sponsor's ability to support the Appellant without recourse to public funds and therefore without being a burden on taxpayers (117B(3)). (In this context I observe that the Appellant would likely enter free education paid for by the state in circumstances where the sponsor's income tax payments from her salary as a student union officer are likely to be low. However, where a sponsoring parent is in postgraduate study - and quite possibly not earning anything - the Rules would not deny entry clearance to a dependent child because he might enter state education in the UK. Accordingly, in all the circumstances, I do not attach any weight to this factor.) Sections 117B(4)-(6) are not applicable.

43. Section 117B(1) - the maintenance of effective immigration control being in the public interest - is applicable. Indeed, for the reasons given above, in my judgement it is this particular public interest of maintaining effective immigration control through the consistent and fair application of a known set of published rules, that proportionately justifies the refusal of the Appellant's application for entry clearance in circumstances where he does not meet the requirements of the Rules, any interference with the family life between him and his mother is essentially a result of the mother's choices rather than the Respondent's decision *per se*, and that otherwise no exceptional circumstances have been demonstrated.
44. Accordingly in all the circumstances I dismiss the appeal under Article 8 of the ECHR. The Respondent's decision was not in breach of the Appellant's or the sponsor's or anybody else's human rights.

Notice of Decision

45. The decision of the First-tier Tribunal contained no material error of law in respect of the Immigration Rules, accordingly the decision stands in this regard. The Appellant's appeal remains dismissed under the Rules.
46. The decision of the First-tier Tribunal contained a material error of law in respect of Article 8 of the ECHR, and accordingly the decision is set aside in this regard.
47. I remake the decision in respect of Article 8: the Appellant's appeal on human rights grounds is dismissed.
48. No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 20 May 2015