



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11037/2017

THE IMMIGRATION ACTS

**Heard at Field House
Heard on 22 January 2019**

**Decision & Reasons Promulgated
On 12 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MISS VINIA CHIKOSHA
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Ward, Solicitor

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Zimbabwe born on 14 July 1999. She appeals against a decision of Judge of the First-tier Tribunal Andonian sitting at Taylor House on 21 September 2018 in which he dismissed the Appellant's appeal against the decision of the Respondent dated 14 September 2017. That decision was to refuse to grant the Appellant entry clearance to join her aunt, [NC], born 18 September 1976 and naturalised as a British

citizen in 2008 (“the sponsor”) pursuant to paragraph 297 of the Immigration Rules.

2. The Respondent’s concerns were that there was no evidence to show the Appellant had ever lived with the sponsor. The Appellant had lived with her mother and since she died with her legal guardian. Although there was evidence of the sponsor’s personal and financial circumstances there was no other evidence of a relationship with the sponsor. The Respondent was not satisfied that the sponsor was taking important decisions about the Appellant’s upbringing and the Appellant could not therefore meet the requirements of paragraph 297 (i) (e) or (f).
3. The entry clearance manager reviewed the file following the Appellant’s appeal and accepted the family relationship between the Appellant and the sponsor noting that at the date of the ECM review the Appellant was 17 years of age and had lived apart from the sponsor the entirety of her life. The Appellant’s formative years had been spent in her country of origin which included family friends and schooling.

The Appellant’s Case

4. The Appellant’s grounds of appeal against the Respondent’s decision acknowledged that the Appellant could not succeed under the Immigration Rules save that there were serious family or other circumstances which made exclusion of the Appellant undesirable. The Appellant’s mother died on 22 February 2013 of AIDS. This was the worst thing that ever happened to the Appellant. After her mother died her paternal grandmother moved into the home to help look after the Appellant’s father. The sponsor arranged from the United Kingdom for nurses in Zimbabwe to go to the Appellant’s house and look after the Appellant’s father. She continued to give the family money.
5. On 16 August 2014 the Appellant’s father died in hospital and as a result of losing her parents the Appellant could not concentrate on her schoolwork and would not eat. The Appellant met the sponsor when the sponsor came to Zimbabwe in 2015 for the funeral of the Appellant’s grandmother, the sponsor’s mother. The sponsor arranged for a cousin of hers called Beauty and Beauty’s husband to move into the home. At first things were fine but slowly things went bad between the Appellant and Beauty. Beauty took the money which the sponsor was sending. Beauty told the Appellant that people were saying the Appellant was a lesbian and that this was what had caused the deaths in the family. The Appellant had never had a relationship with either a boy or a girl but to be a lesbian in Zimbabwe was a very bad thing. Some pupils in the school started to make the same allegation and others said the Appellant was involved in witchcraft. She had brought a curse on the family.
6. At present the Appellant is still in the family home and the sponsor has arranged for two couples to lodge with the Appellant there. These people are not close to the Appellant and she does not really trust anyone now.

There was no one in Zimbabwe who the Appellant could really rely on. The Appellant wanted to come to the United Kingdom and live here with her aunt, the sponsor.

The Decision at First Instance

7. At the hearing before the Judge the sponsor gave evidence and the Appellant relied on the report of a Zimbabwean clinical psychologist called Lazarus who dealt with the Appellant's relationship with the sponsor. The Appellant had been referred for forensic examination complaining of suicidal thoughts and feelings of worthlessness. By contrast the Appellant had not complained of suicidal thoughts in her statement and neither had the sponsor said the Appellant was suicidal. The Judge expressed himself bemused where this information had come from in the psychologist's report.
8. At [35] to [43] the Judge set out his conclusions. The Appellant had not said in her witness statement she was gay. The allegation had arisen because apparently someone had seen the Appellant holding hands with another girl. Although the people living in the Appellant's home were not close to her she did not complain about them as they did not harass or bully her. She felt secure with them. Beauty's husband remained on good terms with the Appellant and the Judge did not accept that the sponsor had had sole responsibility for the Appellant. This was to some extent agreed as could be seen from the grounds of appeal. The Appellant was cared for by her parents then by her father and then her grandmother and then her cousin Beauty and then she lived with friends and returned to the family home. She had two couples in the house and found them a source of security.
9. There had been no sole responsibility but at best such responsibility had been shared with other family members. The Appellant was continuing to study. The sponsor paid infrequent visits to Zimbabwe and had never made a special trip just to see the Appellant. There were no serious or compelling family or other considerations which made the Appellant's exclusion undesirable and the Judge dismissed the appeal.

The Onward Appeal

10. The Appellant appealed against this decision in lengthy grounds settled by counsel who had appeared at first instance. The grounds argued that the sponsor had made regular visits to see the Appellant, contrary to the Judge's findings. The grounds complained that the Judge had failed to make a finding on a material matter namely the accusation that the Appellant was gay. The Judge had not asked himself what the Appellant's best interest required and had conducted no balancing exercise between those interests and any other factors. In the light of the psychologist's report concerning the Appellant's poor mental health, the lack of any alternative care in Zimbabwe for the Appellant and the evidence of

contact between the Appellant and the sponsor, the Judge could have found it was in the Appellant's best interests to join her legal guardian.

11. The grounds also complained that the Judge was wrong to query where the information about the Appellant's suicidal feelings came from as the Appellant had said in her statement that "sometimes I just wanted to die." The sponsor had said that if the Appellant remained in Zimbabwe she could end her life. There was nothing in the Appellant's evidence approaching a claim that the Appellant felt secure with her lodgers. The psychologist had spent seven hours with the Appellant before preparing his report and there could be no reasonable requirement for an Appellant to repeat an exhaustive description of her symptoms (in a statement) when she had provided them in the context of the medico-legal report.
12. The Appellant's claim was not in relation to sole responsibility since both of the Appellant's parents were dead. The question was whether the sponsor had continuing control and direction over the child's upbringing including making all the important decisions in the child's life. The sponsor's evidence was that she had made every decision regarding the Appellant and directed others to carry out her wishes. She had chased the Appellant's lodgers to pay their rent and made decisions regarding the Appellant's schooling and even arranged for tradesmen to visit the Appellant's home. The Judge had failed to consider whether the continuing interference in the Appellant's and the sponsor's family and private life was proportionate.
13. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Povey on 22 November 2018. In granting permission to appeal he wrote that the Judge had arguably erred in his dismissal of the expert medical report. The conclusion that the expert assessment of the Appellant reporting numerous symptoms associated with anxiety and trauma was not reflected in the Appellant's or her aunt's witness statements was both factually inaccurate and arguably an insufficient basis to reject the expert report in its entirety. If the Judge had other reasons for placing no weight on the expert evidence, they were not disclosed. The assessment of the Appellant's mental well-being was material to the Judge's assessment that there were no compelling family or other considerations.

The Hearing Before Me

14. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal. If there was then the decision would be set aside and directions made for the rehearing of the appeal. If there was not the decision of the First-tier Tribunal would stand.
15. For the Appellant her solicitor relied on the grounds of appeal settled by counsel. The Appellant had never claim she was gay, but she had been accused by others and ostracised on that basis. The Judge had considered

the wrong Rule. The application was made under paragraph 297 (f) not (e). There was a human rights appeal outside the rules, but the Judge had not considered Article 8 and there had been no structured approach in accordance with the **Razgar** step-by-step approach and no consideration of proportionality.

16. For the Respondent it was submitted there was no material error of law in the decision. Paragraph 27 of the Immigration Rules applied when someone who was refused entry clearance had gone from being a child at that time to being an adult by the time of the hearing. By the hearing the Appellant was an adult, her age had changed during the process of the case. The refusal letter had considered sole responsibility and the circumstances of the Appellant. The statement of the Appellant and sponsor did not refer to the Appellant having thoughts of suicide. The Judge had recorded the sponsor's evidence at [22] that some family members had accused the Appellant of being gay, the point being that others had not. The Appellant had not been totally ostracised by her family. The Judge had spent some time in the determination considering the medical evidence. The grounds were a mere disagreement and there were no serious or compelling circumstances which required the Appellant's admission to the United Kingdom.
17. In conclusion the Appellant's solicitor emphasised the extract from the Appellant's witness statement that sometimes she just wanted to die. The Judge had wrongly rejected the psychologist report. The Appellant had never conceded that she could not satisfy the rules and the entry clearance manager was wrong to say there had been such a concession. The last paragraph of the grounds of appeal said: "whilst it is acknowledged that the Appellant cannot succeed on the Immigration rules alone, satisfying them is a matter which is relevant to the issue of proportionality". That was framed in that way because satisfying the rules was not enough to win a human rights only appeal.

Findings

18. The Appellant put forward her claim on several different bases. The first was that she would be suspected of being gay which had led to her ostracism by some family members in Zimbabwe. The Appellant and the sponsor both denied that the Appellant was gay and the grounds are wrong to suggest that the Judge did not give a definitive decision on this claim. At [29] the Judge pointed out there was no evidence that the Appellant was gay and he did not think it was right for the sponsor to try to make much of an incident which was just innocent handholding. Only some members of the family had jumped to the wrong conclusion about this incident others had evidently not. There was simply no basis for the Appellant to put forward a claim that she might be at risk because people would wrongly think that she was gay.
19. As the Appellant was out of the country the situation under Article 8 to be considered was at the date of decision not the date of hearing. Section 55

of the Borders, Citizenship and Immigration Act 2009 does not apply to children outside the United Kingdom and the Judge cannot therefore be criticised as the grounds seek to do for failing to make the best interests assessment for someone to whom the act does not apply. What **T Jamaica [2011] UKUT 483** says in its head note is:

“Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom. Where there are reasons to believe that a child’s welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the “exclusion undesirable” provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken into account by the ECO at first instance and the Judge on appeal.

20. The Judge analysed the Appellant’s living arrangements noting that a number of family members had shared care of the Appellant in the past which included the emotional and financial support from the sponsor. The argument had been made during the hearing recorded by the Judge at [34] that it was in the welfare of the Appellant that she comes to the United Kingdom. The primary consideration must be given in that regard to the welfare of the child under the rules. That was an incorrect statement of the law since the best interests of a child are a primary consideration but not the primary consideration. The Judge was evidently satisfied that the care for the Appellant while she was a minor was adequate, the Appellant was now an adult and did not therefore require any further parental care in that respect.
21. The Judge did not accept that the Appellant had had suicidal thoughts or flashbacks. The evidence cited was that the Appellant had been upset after the death of her parents and could not concentrate on her schoolwork and that sometimes she just wanted to die herself. There is no indication that the Appellant thought in terms of harming herself. It was a matter for the Judge to decide what the assessment of the evidence was and the difference between wanting to die and the contemplation of taking steps to carry this out. There was no evidence of the latter and the sponsor had not indicated there was.
22. The problem with the psychologist report was that he had somewhat embellished his report by attributing to the Appellant ideas that she had not expressed or intended to carry out. This inevitably undermined the weight that the Judge could place on that report. The sponsor suggested that if the Appellant remained in Zimbabwe she could end her life but if that was not supported by evidence from the Appellant it did not strengthen the psychologist’s report but tended to indicate that that was the source of the embellishment.
23. The Appellant complains that the main thrust of her argument in the appeal was not whether the sponsor had sole responsibility for her but whether there were serious and compelling family or other considerations

which made exclusion of the Appellant undesirable. That sits uneasily with paragraph 22 of the grounds of onward appeal which specifically argue that the Judge was wrong to say the sponsor did not have sole responsibility. The Judge did not consider that there were serious and compelling family or other considerations as he made clear at [42]. If the Appellant is not relying on sole responsibility (as she cannot) then paragraph 22 of the grounds largely falls away.

24. In any event the problem for the sponsor's claim of sole responsibility was that although she had visited Zimbabwe, she had other family members herself there who she could visit. As a result, the important point from the Judge's point of view was that the sponsor had never made a trip to Zimbabwe just to see the Appellant. The failure to do that undermined the sponsor's argument as to how involved she was in the care of the Appellant. The Judge's view was that a number of family members had taken part in the care of the Appellant not just the sponsor. Whilst that did go to rejecting the argument as to sole responsibility importantly it also went to reject the argument as to compelling circumstances since if there were people available to care for the Appellant there were not compelling family or other considerations which made the Appellant's exclusion undesirable.
25. It is also significant that it was the sponsor who claimed credit for putting the two couples to live with the Appellant. If that was a bad arrangement and made the Appellant miserable, then confidence in any arrangements the sponsor might make to look after the Appellant in the United Kingdom would be undermined and the Rules would not be met. On the other hand, if the sponsor is right and the arrangement has benefitted the Appellant, the criticism of the determination made in the grounds (that the Judge wrongly stated that the Appellant has some security in her current arrangements) is fatally undermined. The Judge was entitled to conclude that what was said to be the Appellant's fears were groundless, see [42] which indicates that the cousin's husband continues to keep an eye on the Appellant. Whilst the Judge's conclusion section is brief he does express clearly his views and gives his decision accordingly. There were no exceptional circumstances in this case and once the Appellant could not satisfy the Rules it became difficult to see how she could succeed outside the Rules under Article 8. The Judge was aware of the Article 8 claim, see [34] but evidently rejected it. I do not consider that there was any material error of law in the determination, the grounds of onward appeal were a mere disagreement with the decision of the Judge. I dismiss the Appellant's onward appeal against the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 6 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 6 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge