Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10255/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 6 November 2020	**On 11 November 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

BIBIAN NAMUDDU LUNKUSE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the appellant: Mr K Wood, legal representative, I A S (Manchester)
For the respondent: Mr S Walker, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

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Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Mark Davies promulgated on 17 February 2020 dismissing the appellant's appeal on human rights grounds ("the Decision"). The human rights claim is in the context of an application by the appellant to join her father, Mr Sembatya ("the sponsor") in the UK, which was refused by the Entry Clearance Officer ("respondent") on 3 May 2019.

2. The appellant is a national of Uganda. She is now an adult but, at the time of the application, was just under the age of eighteen. The sponsor asserted that he had sole responsibility for the appellant and/or that there were serious and compelling reasons why the appellant should be allowed to come to the UK.

3. The respondent considered the application under paragraph 297 of the immigration rules. To succeed under paragraph 297 the appellant had to show, so far as is material to the basis of her particular application, that she

> '(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> > …
> >
> > (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
> >
> > (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; …'

4. The respondent was not satisfied the sponsor had sole responsibility for the appellant or that there were serious and compelling reasons making her exclusion from the UK undesirable. The respondent acknowledged a letter written by the appellant's mother on 21 February 2019 indicating that the appellant would have a better education and a brighter future in the UK, but the appellant's mother did not claim to be unable to look after the appellant any longer. The respondent was not satisfied there was sufficient evidence that the sponsor had supported the appellant, who lived since birth with her mother, or that they had even met in person. The respondent concluded that the appellant's mother was the one who had made the important decisions about her care and upbringing and that the sponsor did not have sole responsibility. Further, as the appellant was nearly 18 years old there were said to be no serious and compelling family or other considerations making her exclusion from the UK undesirable. The appellant appealed the respondent's decision to the

First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

5. In the documents prepared for the appeal the appellant raised for the first time a claim that she had been subjected to domestic violence and that this constituted a serious and compelling consideration making her exclusion from the UK undesirable. A bundle of documents provided by the appellant included a statement from the sponsor signed and dated 15 January 2020 asserting that the appellant had been subjected to domestic violence by the partner of her mother and that reports had been made to police in Uganda by her mother and by the school authorities. In further support of this claim the appellant provided a document purportedly issued by the Uganda Police Force dated 2 January 2020 headed "Analysis of Lunkuse Bibiana Namuddu's domestic violence case" and referring to four occasions where reports of violence against the appellant had been made, one in 2017, two in 2018 and one in 2019. The allegations of domestic violence were said in each case to have been carried out by the appellant's paternal uncle.

6. The judge additionally heard oral evidence from the sponsor and submissions from the Presenting Officer and the sponsor. He reserved his decision.

7. The judge recorded the cross-examination of the sponsor at paragraphs 14 to 16 of his decision. Paragraph 15 of the judge's decision reads, in material part,

> "The Sponsor said that the first incident of violence against the Appellant took place in 2017 but she did not tell him about it. He 1st became aware of it at the end of 2018 but only raised this issue with the Respondent in his letter of 15 January 2020. He did not raise it because he knew that he would be asked for evidence and could not produce that evidence. Nobody had been charged as a result of the police investigation. When asked who was being charged he said the paternal uncle of his daughter. When asked if that was the Appellant's paternal uncle he said no. When asked who this person [*sic*] he did not answer the question and then said it was the Appellant's mother's partner who had used violence against her."

8. Paragraph 16 of the decision reads,

> "The Appellant was still living with her mother under a lot of difficulties. He confirmed that he had allowed the Appellant to remain with her mother since 2018 because he had nowhere for her to go. There were no Social Services in Uganda. Women are abducted and raped and there are lots of kids on the streets and he was worried that she would have to go on the streets or she might be raped so at the end of December 2018 it was decided she would apply to join him in the United Kingdom. After failing to

> answer a number of questions the Sponsor confirmed he had been told by the Appellant's school that violence had been used against her."

9. Having summarised the submissions from the parties, the judge rejected the claim that the sponsor has sole responsibility for the appellant. At [33] the judge found that the evidence indicated that the appellant had been cared for her whole life by her mother, with whom she still lives. Although the sponsor may have visited Uganda on a regular basis and seen the appellant and may have paid her school fees, that did not satisfy the judge that it was more probable than not that he had sole responsibility for her upbringing.

10. The judge also rejected the sponsor's evidence about the reasons why it was said that the appellant should be permitted to come to the UK for compelling reasons. At [34] the judge found that if the sponsor had had sole responsibility for the appellant he would have been aware of the alleged violence and would have taken steps to remove the appellant from a violent situation. The fact that he'd not do so was clear evidence that violence did not take place. The judge attached no weight to the letter purportedly from the Uganda Police Force. The judge stated,

> "No credible explanation has been given as to why that refers to the perpetrator of the violence upon the Appellant as the paternal uncle whilst the Sponsor has stated it is the Appellant's mother's partner who is not related to the Appellant in any way. It seems more probable than not that this document has been obtained by dishonest means simply to support the Sponsors claim that the appellant had been subjected to violence and thus that there are serious and compelling reasons why she should not be excluded from the United Kingdom. I am not satisfied that it is more probable than not that that is the case."

11. At [35] he found the sponsor not to be credible, including based on his failure to answer questions as identified at [15] and [16] of the Decision. The judge dismissed the appeal on all grounds.

The challenge to the judge's decision

12. The grounds assert that it was incumbent on the judge to identify which questions the sponsor had failed to answer and that "[w]ithout examples of at least some of the questions that are said not to have been answered it is not possible to discern whether the criticisms of the Sponsor's evidence are ones that are fairly made". That is the more so, it is said, because the sponsor/appellant did not have the benefit of legal representation. The grounds also rely on failure by the judge to identify evidence supporting the finding that an Ugandan Police document was not genuine. The second ground contends that the judge failed to have regard to a legal document, namely a statutory declaration from the appellant's mother, regarding the issue of sole responsibility. It is said that this is contrary to the guidance

given **QZ (Children; Sole Responsibility; Entry Clearance) China** [2002] UKIAT 07463 ("**QZ**").

13. Permission to appeal was granted by Judge of the First-tier Tribunal Keane on 30 April 2020 in the following terms:

> "The grounds disclose an arguable error of law but for which the outcome of the appeal might have been different. The judge found that the appellant's sponsor had not had sole responsibility for her upbringing (paragraph 37 of his decision). A concern which led the judge to such a finding was the judge's understanding that the sponsor, 'prevaricated on a number of occasions through his testimony and simply did not answer questions'. (Paragraph 35 of his decision). The evidential basis which seemingly influenced the judge towards such a finding was perhaps to be found at paragraph 16 of the decision where the judge remarked, 'After failing to answer a number of questions the sponsor confirmed he had been told by the appellant's school that violence had been used against her'. In fairness to the judge at paragraph 34 he did remark that, 'The sponsor has not given credible evidence that the appellant has been subjected to violence from anyone'. However, the ground or basis on which the judge disbelieved the sponsor, namely that he had prevaricated and had not answered questions in a manner which fairly detracted from his tacit claim to be characterised as a truthful witness, arguably did not reflect that reasoned assessment of the evidence which was intrinsic to the judge's function. Indeed, although the judge complained at paragraph 16 that the sponsor failed to answer a number of questions he acknowledged that the sponsor had then confirmed that he had been told by the appellant's school that she had been subjected to acts of violence. The judge was after all acknowledging that the sponsor did after all answer questions put to him under cross-examination. The application for permission is granted."

14. In her written submissions filed on 28 July 2020, in response to directions issued as a result of the Covid-19 pandemic, the respondent contended that the statutory declaration by the appellant's mother was not in the same category of document as that dealt with in **QZ**. The respondent also submitted that the appellant has provided nothing to show there was any error in the judge's findings or reasoning concerning the sponsor's failure to answer questions which would undermine the reasons provided in the Decision, nor had the appellant sought a record of the proceedings to ascertain whether the judge's comments in that regard were justified. It is also said that the judge provided adequate reasons for finding the Ugandan police document not to be genuine.

15. At the outset of the remote "error of law" hearing I emailed the judges typed Record of Proceedings ("ROP") to the representatives and gave them an opportunity to consider the ROP. Mr Wood relied on his written grounds. He submitted that the appellant was entitled to know why her appeal was dismissed based on the Britain decision and

that it should not be necessary to have regard to external documents, such as the ROP, to understand the judge's reasoning. The appellant in any event ultimately provided answers to the questions that were asked. It was therefore wrong for the judge to say at [35] that the appellant "simply did not answer questions". The judge gave insufficient reasons for finding that there had been dishonesty in the application and appeal process and the fact that there was a discrepancy between the perpetrator of violence was incapable of supporting a finding that there had been an active attempt to trick or full or deceive the respondent or the Tribunal. It is one thing to place no wait on a document and another thing to suggest that there had been dishonesty. The judge failed to provide sufficient reasoning to justify his allegation. In respect of the 2nd ground, Mr Wood accepted that there was a difference between a "statutory declaration" and a court order such as the Custody Order considered in **QZ**. The judge however gave no consideration at all to the Statutory Declaration and there had been no consideration of its contents, and in particular, the assertion by the appellant's mother that she was incapable of providing for the appellant.

16. Mr Walker submitted that there appeared to be a conflict in what the judge said at [16] and [35] about the sponsor failing to answer a number of questions but then going on to answer those questions. Mr Walker submitted that the final sentence of [16] was ambiguous and that it could be read in different ways. In respect of the judge's finding that the police document had been obtained by dishonest means Mr Walker submitted that the judge "went a little bit too far" and that there was no particular basis for the judge to have made this "harsh finding", particularly since there was nothing to compare the document to. Mr Walker agreed with Mr Wood that the statutory declaration had not been referred to engaged with by the judge.

Discussion

17. It is unfortunate that the judge did not expressly identify what questions the sponsor did not answer by reference to [16] and [35] of the First-tier Tribunal decision. I note from the context of the judge's summary of the oral evidence at [16] that the sponsor failed to answer questions when he was being asked how he became aware that domestic violence was taking place. One way of reading of the paragraph is that the sponsor failed to answer questions relating to how he became aware of the alleged violence. This was ultimately made clear by reference to the Record of Proceedings maintained by the judge, but it was not clear from the decision itself. I accept Mr Walker's observations relating to the ambiguity of the last sentence of [16]. I additionally accept the criticism made by Mr Wood, acknowledged by Mr Walker on behalf of the respondent, that the judge's assertion at [35] that the sponsor "simply did not answer questions" is not accurate. The ROP does indicate that the sponsor prevaricated, and that he was told to answer questions, but he did

eventually provide answers to all the questions he was asked. [35] gives the impression that the sponsor entirely failed to answer questions which was not the case, and that the judge considered this in finding the sponsor to be an incredible witness.

18. I am additionally concerned that the judge failed to make any reference to or engage with the ‘statutory declaration’ prepared by the appellant’s mother. This was a relevant document from the parent of the appellant going both to the issues of sole responsibility and whether there existed serious and compelling family or other considerations making the appellant’s exclusion undesirable. Although no reference was made to any domestic violence the ‘statutory declaration’ did suggest that the mother was financially incapacitated and unable to meet the appellant’s essential needs and requisites as a mother. Whilst it may well have been open to the judge to reject the accuracy of the assertions made in the ‘statutory declaration’, the judge was still required to make a factual finding in relation to this relevant document. I do not however accept the argument that a ‘statutory declaration’ is similar to the type of document considered in **QZ (Children; sole responsibility; entry clearance) China** [2002] UKAIT 07463. A ‘statutory declaration’ is not the same as a court order and does not apportion or accord legal responsibility for a child. This statutory declaration is evidence that the appellant’s mother made various assertions under oath relating to her ability to provide for her daughter, but it does not confirm the truthfulness of those assertions. It is not apparent that the statutory declaration has been before the Courts, that it has been tested in Court, or that it has the imprimatur or authority of any Court.

19. I am satisfied that the two legal errors identified above render the judge’s decision legally unsafe. It is not therefore necessary for me to determine whether the judge erred in law in finding that the police document had been obtained by dishonesty. I acknowledge Mr Walker’s view that in making this finding the judge “went a little bit too far” and Mr Wood’s submission that the judge failed to set out the requisite cogent evidence to support his dishonesty finding, but I note the clear inconsistency between the police document and the sponsor’s testimony as to the perpetrator of the alleged violence, and I also note with some concern the absence of any reference to violence by the appellant’s mother in her statutory declaration, despite her being the complainant to the police in 2017 and 2018. This last point however was not ventilated at the hearing and can be considered by the judge remaking the decision.

Remittal to First-Tier Tribunal

20 Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21 I have determined that the judge’s decision is unsafe because of errors affecting his credibility assessment and his failure to take into account relevant evidence. In the circumstances both representatives agreed that it was appropriate for the case to be remitted back to the First-tier Tribunal for a fresh hearing.

Notice of Decision

The making of the First-tier Tribunal’s decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Mark Davies.

No anonymity direction is made.

D.Blum 6 November 2020

Signed Date
Upper Tribunal Judge Blum