Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19843/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 19th July 2013	**On 1st November 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

KOMAIL MUSTAFA MOHAMED HUSSEIN

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr J Martin, Counsel, instructed by the BEAP Community Partnership
For the Respondent: Mrs C Brewer, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Kelly made following a hearing at Bradford on 19th July 2013.

Background

2. The Appellant is a citizen of Tanzania born on 10th August 1995. He applied for entry clearance to join his mother Sarah Mohammed Hadji but was refused on 23rd April 2012. The Entry Clearance Officer was not satisfied that he was related as claimed to his Sponsor, nor that he could be adequately maintained in the UK. He also refused the appeal under paragraph 320(7A) because he was satisfied hat false documents i.e. a birth certificate had been produced with the visa application.

3. The factual background of this matter is as follows. The Sponsor arrived in the UK in 2002 following her divorce from the father of her three children, Fatima, Rukaiaya and Komail, the Appellant. She was granted indefinite leave to remain in 2008. She applied for entry clearance for the two younger children to join her, the oldest being over age. Tragically, following the refusal, her daughter Rukaiaya committed suicide on 9th May 2012.

4. The Appellant's father was responsible for the care of the children whilst they were growing up but has recently remarried. He sent a letter to the Tribunal stating that he wanted to give full custody of his child to his biological mother. He said that he was intending to settle in India with his current wife Zainbab shortly but could not taken his son with him because of personal issues with his new wife.

5. The judge found in favour of the Appellant with respect to the mandatory refusal under paragraph 320(7A) and, following DNA evidence, was satisfied that he was related as claimed to the Sponsor. However, he was not satisfied that the Appellant could meet the requirements of paragraph 297(i)(e) or (i)(f) i.e. that the Sponsor had had sole responsibility for the Appellant's upbringing or that there were serious and compelling family or other considerations which made his exclusion undesirable. He also concluded that the decision to refuse was not disproportionate.

6. The judge recorded that at the date of the application the Appellant and his two siblings had been brought up for approximately ten years by his father and later by his stepmother. He was not satisfied that the Sponsor had had any significant influence concerning the faith in which the Appellant was brought up and whilst he did not doubt that the Sponsor had properly contributed financially to the upbringing of the children, the evidence did not demonstrate that she had had sole responsibility for his upbringing. Many of the receipts for the goods were luxury items which he accepted provided evidence of joint parental responsibility. The Appellant admitted in his Grounds of Appeal that his father took all the major decisions concerning himself and his sister. The judge concluded that the application was due to his father's wish to relocate to India rather than a sudden desire to be with his mother.

7. The judge considered the argument that, whilst there may have been joint parental responsibility in the past, it had been abandoned as a result of the recent remarriage of the Appellant's father. However he could see no evidence to suggest that the father had suddenly ceased participating in his children's upbringing on his

remarriage and it was clear to him that he had always intended to defer his planned relocation to India pending the outcome of the application.

8. He wrote as follows:

> "At the date of decision the Appellant was age 16 years, his sister Rukaiaya had just turned 18 years and Fatima was 22 years. At that time they lived with their father in Dar-Es-Salaam as they had done for the preceding ten years. The Sponsor contributed to her children's upbringing from the UK principally by providing financial and emotional support in addition to that which was provided by their father. At the time of the decision the Appellant's father had recently remarried. I accept that this may have led to tension between the Appellant and his stepmother but I am not satisfied that these were as significant as has been implied by the Appellant's father. This is because the Appellant does not cite this matter as a reason for not wishing to go with his father to India; rather he gives the reason that India would be 'totally alien' to him. I am satisfied that it was the desire of the Appellant's father to relocate to India (the expression that the Appellant used in his grounds of appeal was that his father had wanted to do this) but I am equally satisfied that his intention to do so was predicated upon the Appellant being granted entry clearance to the UK."

9. He said that, so far as finances were concerned, he said that he was not satisfied that the third party who was offering support had fully appreciated the scale of the commitment he was undertaking and there was no evidence that he had discussed the prospect of devoting the entire of his surplus income to the children of another woman with his own wife.

10. He was not satisfied that there were compelling or other considerations which made the Appellant's exclusion from the UK undesirable and he then considered Article 8.

11. He said:

> "Although the Appellant described the prospect of relocating to India as totally alien I am not satisfied that he would have found the UK (which he has never visited) any less culturally alien when compared to that to which he was accustomed in Tanzania. The effect of the decision was to leave the Appellant in the country of his birth, nationality and life long residence. Any other decision would have potentially led to considerable disruption in his settled circumstances, not least to his education. Even if I were to be wrong in my assessment of his father's intentions concerning relocation to India, the Appellant was able to continue to call upon the care and emotional support of his adult sister Fatima and the sponsor was able to continue to provide all the emotional and financial support that she has hitherto provided to him from the UK."

The Grounds of Application

12. The Appellant sought permission to appeal on the following grounds.

13. First, there was nothing in the written evidence of the Appellant's father and the written and oral evidence of the Appellant's mother to support the judge's conclusion that the father's intention to relocate to India was conditional upon the Appellant being able to join his mother in the UK. It was the Sponsor's intention once the Appellant's father had remarried that he should give up any responsibility for his children and the Sponsor should henceforth have sole responsibility. Alternatively the judge had erred in his assessment of serious and compelling reasons and should have taken into account the tragic suicide of the younger daughter.

14. With respect to maintenance, the judge had given insufficient reasons for rejecting the offer of third party support. Mr Shah had gone to considerable lengths to make available evidence of his financial circumstances. It was not a legal or evidential rule that someone offering third party support should give oral evidence or evidence that he had discussed it with his spouse.

15. Third, the judge had erred in considering that the Appellant's circumstances in Tanzania were settled and in equating the emotional and financial support that his mother had provided from the UK with the actual love and care which a united family could provide for each other.

16. Permission to appeal was granted by Judge Lewis on 14th August 2013 particularly in relation to the judge's consideration of the financial evidence.

17. On 28th August 2013 the Respondent served a reply defending the determination.

Submissions

18. Mr Martin relied on his grounds. He accepted that Judge Kelly had produced a carefully constructed determination in which all of the issues had been considered but he submitted that he had erred by speculating and making unwarranted inferences with respect of the Appellant's father's intentions and with respect to the third party support. There were serious and compelling circumstances here which made the Appellant's exclusion undesirable following the tragic suicide of his sister, although he accepted that this was post-decision. The Appellant was not settled in Tanzania but was in a situation of great change and turmoil and the refusal of entry clearance was a disproportionate interference with his right to a family life with his mother.

19. Mrs Brewer defended the determination and submitted that there was clear evidence that the father retained responsibility for his son evidenced by the fact that he had remained there whilst the entry clearance was processed. The Appellant's oldest sister was to remain in Tanzania which went both to the requirements of paragraph

297(1)(f) and to Article 8. The judge's conclusions on the maintenance were ones which were open to him.

Findings and Conclusions

20. The grounds amount to a disagreement with the decision but do not disclose any error in this determination. There was ample evidence before the judge that the Appellant's father's intention to relocate depended upon the Appellant joining his mother. The interpretation which the judge put on the letter from the father was plainly one which was open to him, but in any event, as the judge said, the very fact that the father remained in Dar-Es-Salaam some seventeen months after the date of the application to enter the UK indicated not an abandonment of parental responsibility but its continuation. The contention that the Appellant's father had abandoned responsibility for him is belied by his continuing presence there.

21. With respect to the consideration of third party support, the judge was entitled to conclude from the statement which Mr Shah had produced that the offer does not meet the requirements of the Rules as they were as at the date of application. There was evidence before him that Mr Shah could afford to give some of his income to the Sponsor but in reality he had not shown that he was going to do so. The judge did not criticise the fact that the third party was not able to attend court but his comment that as a consequence he was not subjected to the scrutiny of cross-examination is unimpeachable.

22. With respect to the question of whether there are serious and compelling circumstances, the fact that the Appellant's older sister intends to remain in Tanzania and his father is still there makes it very difficult to see how this requirement could be satisfied.

23. As Mr Martin fairly acknowledged, his strongest points were in relation to Article 8 rather than the Rules. However, the assessment of the proportionality of the decision was a matter for the judge. The fact that the Appellant has always lived in Tanzania and that his sister will stay with him and his mother can visit and continue to offer financial support were plainly relevant factors. The Appellant is not in a position to meet the requirements of the Rules. With respect to the Appellant's best interests, whilst another judge might have found otherwise, it cannot be said that the judge's assessment that his best interests lie in maintaining the status quo is in any way perverse.

Decision

24. The judge did not err in law and his decision stands. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor