



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

Appeal Number: HU/12388/2018

THE IMMIGRATION ACTS

**Heard at North Shields (Kings
Court)
On 18 July 2019**

Decision & Reasons Promulgated

On 29 August 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

**LUHANGA CHINYAMA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANC OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Ms Weatherall, Genesis Law Associates Ltd

For the Respondent: Ms Pettersen, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Zambia, appeals with permission of Deputy Upper Tribunal Judge Chamberlain, the decision of First-tier Tribunal Judge Fowell. For reasons given in his decision dated 11 February 2019, Judge Fowell dismissed the appellant's appeal against the decision of the Entry Clearance Officer who had refused the appellant's application to settle in the United Kingdom with his mother.

2. In refusing the application the Entry Clearance Officer observed the following:
 - (i) Money transfers by his mother to numerous individuals had been submitted, none of whom had been identified in the application.
 - (ii) The appellant had not lived with his mother since 2011 and had been living with his aunt.
 - (iii) No evidence had been provided showing the appellant was related as claimed.
 - (iv) The application had been made four days prior to the appellant's 18th birthday.
 - (v) Photos that appeared to show the appellant's mother visiting him in Zambia as well as supporting documents from his school and general practitioner (the latter stating an active role by his mother in the appellant's upbringing).
 - (vi) It had been stated that the appellant's father had had no input into his life and effectively will relinquish all responsibility but in the absence of a birth certificate, the Entry Clearance Officer was not satisfied this was the case.
3. These matters led the respondent to refuse the application under paragraph 297(i)(e) of the Rules. This provision sets out the requirements to be met where someone is seeking indefinite leave to enter the United Kingdom as a child of a parent present and settled here. Specifically in relation to the issues in this case the rule requires that:

“(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; ...”
4. The judge accepted the appellant was related to his mother Ms Kakoma in the light of DNA evidence submitted with the appeal. She gave evidence at the hearing. Ms Kakoma explained the appellant had lived with his father after she had left for the United Kingdom but he gave him up when he re-married and so the appellant went to live with his grandmother. This continued until she was too old to manage and he then went to live with her brother Joseph. She had made five trips to Zambia since 2011, the most recent being in February 2014.
5. Mrs Kakoma married in January 2011 but this had ended in 2016. She became a British Citizen in 2014. The appellant had not accompanied his mother to the United Kingdom because she was living in a studio flat and wanted him to have a better environment. The application for the appellant to join his mother was made on 13 March 2018 four days prior to his 18th birthday. Her evidence is that this was because she had now acquired a house big enough to accommodate him.
6. The judge directed himself with regard to the relevant rule and in relation to article 8. After setting out the evidence, he noted the submissions and

began his conclusions with a survey of the established authorities on family life and child dependency cases including *TD (Yemen)* from which he cited the key passages.

7. At paragraphs [22] to [26] of his decision, the judge set out his findings as follows:

- “22. The first point to address therefore is whether Luhanga’s father has abdicated responsibility as claimed. The striking fact here is that according to his mother’s statement, when she came to the UK in 2011 she left him in the care of his father.
23. No real information is given about why she came to the UK and how much involvement Luhanga’s father had in his life at that point. Piecing things together, Mrs Makoma [*sic*] married someone else in January 2011 so she cannot have been living with Luhanga’s father when she came to the UK. That marriage was to a British citizen, so presumably that was the reason for the move to the UK, but Mrs Makoma [*sic*] would at the same time have wanted to ensure that her son was going to be properly looked after. She chose his father to look after him, rather than her mother. The fact that the father was involved at that stage means that for the first 11 years of Luhanga’s life he played a part, and for a period was the main carer. There seems no plausible reason why he would not still be in contact now, or at least contactable.
24. The claim in Mrs Kakoma’s statement that he has abdicated all responsibility for his upbringing provides no surrounding detail about when or why this was. It suggests some breach or argument, some definite decision, but nothing is put forward as the basis for what would be a drastic step. The only further detail provided is that his arrangement ended when he re-married, but that does not provide sufficient cause for such a separation.
25. There is no statement from him. On Mrs Kakoma’s evidence, his whereabouts are unknown, so that is not inconsistent, although that fact itself is surprising without some explanation for this estrangement. Luhanga then went to live with his grandmother. If so, that suggests some change in the relationship with his father. It may well be that at that stage he remarried, though why that would change the care arrangements for his son is unclear. This could all have been explained and described. Luhanga’s grandmother is shown in some of the photographs but has not given a letter or statement of any sort. There is a letter from his uncle, but that is exceptionally brief. It gives no surrounding detail and states that Luhanga has been living with him since 2011. That appears to be at odds with the statement of his sister to the effect that in 2011 she left Luhanga with his father. Lastly, there is no statement at all from Luhanga himself to clarify these points. His upbringing is therefore shrouded in mystery, and the one statement that has been provided from Zambia, essentially a one-line letter from his uncle, contradicts Mrs Kakoma’s statement on this central point. In the circumstances I am unable to accept that his father has abdicated responsibility for Luhanga as claimed.

26. Clearly his mother is in frequent contact. Like the mother in **TD (Yemen)**, she sends money regularly and retains a close interest in, and affection for, her son. That was enough to show sole responsibility in that case, where the other parent had abdicated responsibility, but here it is different. The only examples given of decisions made over his life are that she directs or arranges for regular medical checks and that she chose his school. This degree of involvement is understandable, but is a slender basis for a finding of sole responsibility, even if accepted uncritically. There is however little surrounding detail about Luhanga's day to day life against which to set this evidence, and this does not add greatly to the fact that she is involved in his life and concerned for him. Overall, given this lack of detail and my finding that the father has not abdicated responsibility, I do not find that the test of sole responsibility is met."

8. It follows from the above that the judge did not consider the requirements of the rule has been met as to the issue of sole responsibility, the issue of the relationship having been settled by the evidence. He referred in [28] to s.117B of the Nationality, Immigration and Asylum Act 2002 and then further directed himself in relation to Article 8 before concluding at [30] as follows:

"30. There is also the best interests of any child to be considered, under section 55 of the 2009 Act. In a case such as this, it is hard to see that it has any significant application. Firstly, Luhanga was a few days short of his 18th birthday when the application was made, and so his needs as a minor will be relatively few. Secondly, it was thought by his mother to be in his best interests to remain in Zambia until that point in time, even though that involved separation and having to pay for schooling and medical attention. All that has changed apparently is that Mrs Kakoma has now moved to a bigger property to accommodate him, although it is not clear how much space he currently enjoys. Lastly it is generally in a child's interest to have continuity of care and a settled environment. Although he would be able to enjoy better educational prospects in the UK, it is not obviously in his best interests as a child to leave his friends and family in Zambia for an unfamiliar environment in Edinburgh, even if it is with his mother. This factor does not in my view affect the balance in any way."

9. The grounds of appeal argue that the judge had materially misdirected himself in law and there was a real possibility that a tribunal may consider the appeal differently on reconsideration. Further, it is argued that the judge had materially erred in [23] in his assessment of the evidence by speculating. The judge had failed to apply the correct test in [24], the question is not why or how but if the parent has abdicated responsibility. Paragraph [24] revealed an internal inconsistency by reference to an observation earlier in the decision where the judge recorded the appellant's mother's evidence that the appellant's father had been involved in the appellant's life but had abdicated subsequently.

10. In granting permission to appeal the Deputy Upper Tribunal Judge considered it was arguable the judge had erred by speculating as to why the appellant was not in contact with his father and had failed to give sufficient reasons for this finding.
11. The hearing began with my questions for clarification of the evidence that was before the judge. The precise date when Ms Kakoma came to the UK in 2011 was not known and not in evidence before the tribunal. She had married in the husband that had led to her grant of visa to enter the UK "at some point" in January 2011. Again the precise date was not in evidence. There was no evidence from the appellant himself. He was an adult by the time of the hearing on 31 January 2019 having turned 18 on 17 March 2018.
12. In her submissions, Ms Weatherall argued as to the first ground that the judge had erroneously speculated as to why the appellant's father had not been in contact with the appellant rather than reaching a finding on the clear evidence from Ms Kakoma that was before her. It was not a question of plausibility that he was not but instead the judge should have explained why he had not accepted her evidence. In any event there was an explanation which was that the father had "moved on".
13. As to the second ground, Ms Weatherall argued that the judge had applied his own test to the evidence by asking why the father had abdicated responsibility rather than deciding whether he had. Ground three related to the inconsistency in the decision at paragraphs [9] and [10]. Ms Weatherall accepted that the ground was not clearly drafted but argued that there was no evidence to counter that of Ms Kakoma which was that she was in ultimate control of the appellant.
14. Ms Pettersen contended that rather than speculating, the judge was concerned with the lack of evidence with reference to paragraphs [23] and [25] (cited above) which included a lack of information and a contradiction in the evidence of the uncle and Ms Kakoma. As to ground two, the judge had directed himself in relation to the right test with the references to *YD (Yemen)*. The passages at [9] and [10] were a recital of the evidence on which the judge had reached a conclusion.
15. I invited Ms Weatherall to consider in her reply whether the real issue in this case was the judge's concern that there was insufficient evidence for him to be satisfied that Ms Kakoma had sole responsibility. She accepted that might be a fair way of putting it had the judge applied the right test to the evidence of the clear pattern of what had happened.
16. I reach these conclusions on each of the grounds which I consider in their entirety in the light of the overlap. In my judgment the judge had unarguably directed himself correctly as to the approach he was required to take. As I have observed above, he quoted the relevant passages from *TD (Yemen)*.

17. In deciding whether the sponsor had sole responsibility, the judge raised as a plausibility concern (rather than speculating as asserted in ground one), the reason why the appellant's father was not in contact. It was open to the judge to do so if this was a reasonable enquiry to draw from the evidence and context. He explains why in the preceding passage and provides further context in paragraph [25].
18. In the light of the evidence that on leaving Zambia the appellant's father took care of him, I consider the judge was entitled to question the absence of evidence on how it was he had abdicated all responsibility and severed connections with the appellant beyond the assertion that he had simply done so on remarriage. No evidence of any exchange of letters, emails, texts or telephone calls on the matter was provided. The date when the remarriage occurred has also not been given. There was a clear inconsistency over events after the claimed abdication. Ms Kakoma explains in her statement that her mother took over from the appellant's father until she was unable to do so because of her age and that the appellant now lives with her brother. His statement however explains that the appellant has been living with him since 2011, the year Ms Kakoma left for the UK and that he has had the role of guardian on a "temporal basis". These aspects raise credibility concerns that the judge was entitled to take and I am unable to accept Ms Weatherall's submission that, absent other evidence, the judge should have accepted Ms Kakoma's evidence.
19. The judge took account of the evidence that pointed to the appellant's mother's role in his life but here too he was entitled to observe in [26] the absence of detail surrounding the appellant's daily life. In my judgment, in the light of the absence of evidence that could have been provided and the credibility concerns that arose as a result, the judge gave adequate reasons for his finding that the appellant's father had not abdicated responsibility and he did not simply speculate on matters unsupported by the evidence. The task before the judge was to decide whether the rule had been met in particular whether the sponsor had sole responsibility for the appellant. I consider that the judge assessed all the material relied on and gave adequate reasons open to him on the evidence why he considered this requirement of the rule had not been made out.
20. As to the final ground which asserts an inconsistency by the judge, paragraphs [9] and [10] record the evidence and did not include any positive finding. There is no force in this ground as pleaded.
21. Accordingly, I am not persuaded that the judge erred in law on the basis of the challenges made. There is no challenge to the findings made with reference to article 8. Accordingly, this appeal is dismissed.

Signed

Date 22 August 2019s

UTJ Dawson

Upper Tribunal Judge Dawson