



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

Appeal Number: HU/25309/2018

THE IMMIGRATION ACTS

Heard at Field House

On 31 October 2019

**Decision & Reasons
Promulgated**

On 19 November 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**A A L
(DEMOCRATIC REPUBLIC OF THE CONGO)
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ashraf Ali, Legal Representative instructed by ASH
Immigration Services

For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an anonymity order. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties.

Any failure to comply with this order could give rise to contempt of court proceedings.

1. The appellant is a young man from the Democratic Republic of the Congo, now 19 years old. On 2 October 2018, he applied pursuant to paragraph 297 of the Immigration Rules HC395 (as amended), for entry clearance to join his mother in the United Kingdom for settlement. He was 12 days away from his 18th birthday when he made that application.

Background

2. The appellant's account is that his father was a soldier who was deployed on military service in 2003 and has not been seen since. He has had no hand in the upbringing of the appellant. The appellant's mother came to live in the United Kingdom in 2004, when the appellant was 3 or 4 years old, but has returned from time to time to see her children and has sent money. Her mother, the appellant's maternal grandmother, brought up the sponsor's three children for three years; in 2007, one of the appellant's younger sisters joined his mother in the United Kingdom (she was 5 years old).
3. The appellant and his other younger sister remained with the grandmother until she died on 12 July 2017. The appellant was then 16 years old. Following the death of his grandmother, the appellant and his sister went to live with a friend of the sponsor in DRC and the appellant began to study to be a teacher. At the date of hearing, he had completed a year of that study.

Refusal letter

4. The respondent refused entry clearance on human rights grounds in a refusal letter dated 5 December 2018, by which time the appellant was no longer a minor, having passed his 18th birthday on 14 October 2018.
5. The respondent noted that there was no evidence to support the assertion that the appellant was living with a friend of the sponsor, that the sponsor had visited him and could continue to do so, and that the appellant could not bring himself within the provisions of the Rules as he was now an adult.
6. The respondent also considered whether the appellant should be granted leave to enter under Article 8 ECHR outside the Rules. She was not satisfied that it was disproportionate to expect the appellant to continue to live apart from the sponsor and his other sister, as he had done for most of his life.
7. The respondent refused the appellant's application for entry clearance for settlement and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

8. The First-tier Judge heard oral evidence from the sponsor, who knew very little about the appellant's life in Democratic Republic of the Congo, and in particular, about his schooling there. Until her death, the grandmother

decided which schools the appellant and his sister would attend. Thereafter, the appellant undertook the teaching course already mentioned.

9. The sponsor said that she had not made the application for entry clearance promptly after the appellant's grandmother died because she did not have a good job and could not afford the cost of the application, but when pressed, she gave details of her 'good job' which dated back to four years before the grandmother's death.
10. The First-tier Judge was not satisfied that the sponsor had sole responsibility for the appellant's upbringing, applying *TD (paragraph 297(i)(e): 'sole responsibility') Yemen* [2006] UKAIT 00049. The First-tier Judge found as a fact that the sponsor did not have or exercise continuing control and direction over the appellant's upbringing, including making all the important decisions in his life.
11. The sponsor had sent money and had visited in 2014 and 2017 (the year the grandmother died). The appellant and his sister were living in settled accommodation with the sponsor's friend and had been doing so since their grandmother died. The sponsor could continue her relationship with him by electronic means and visits.
12. The First-tier Judge was also not satisfied that serious and compelling family or other considerations had been shown which made exclusion of this appellant undesirable.
13. The primary findings of the First-tier Judge begin at [19]. At [22]-[24], the Judge summarised his findings and at [23] he proceeded to consider the section 55 of the appellant, as though the appellant were a child and living in the United Kingdom:

"23. The appellant's best interests are a primary consideration. It would usually be in the child's best interests to be with the biological parent who can be located. In the appellant's case he has not lived with the sponsor his mother since 2004 when he was 3 years of age. He has not lived with the sponsor for around fourteen years. He has not lived outside the DRC. He has grown up there. His formative adolescent years have been spent in the DRC. He has been educated there. His experience is of society and culture in the DRC. His sister ... is with him in the DRC. He will have a strong relationship with her by virtue of their proximity as they have grown up. I take into account that the accommodation and care provided by [the family friend] is said to be temporary but that accommodation and care has been provided since around 12 July 2017. It seems to be settled accommodation. In all the circumstances I am satisfied that it is in the appellant's best interests to remain in the DRC with his sister in the country of his birth and upbringing. He can continue the relationship with the sponsor in the way it has been conducted throughout most of his life time by electronic means and by visits. There is nothing to suggest that the sponsor will cease to provide financial assistance and so the appellant's financial circumstances will be unaffected.

24. Having come to that finding about the appellant's best interests I am also not satisfied that there are serious and compelling family or other considerations which make exclusion of the appellant undesirable."

14. The First-tier Judge dismissed the appeal under paragraph 297 and outside the Rules. The appellant appealed to the Upper Tribunal.

Permission to appeal

15. Permission to appeal was granted by First-tier Judge Simpson on the basis that the First-tier Judge had arguably erred in his decision under Article 8 ECHR, within and outwith the Rules, in particular regarding the weight given to a lack of evidence that the appellant can speak English, or to the positive evidence that he could be maintained and accommodated adequately. The appellant asserted that following his grandmother's death in 2017, his mother had sole responsibility for him.

16. First-tier Judge Simpson also noted that the grounds of appeal challenged the First-tier Tribunal's recital of the sponsor's evidence. There is no note produced from either Counsel or solicitor of the oral evidence before the First-tier Tribunal, the solicitor not having been present until the very end of the hearing and Counsel when asked, having apparently referred the solicitor to the Birmingham First-tier Tribunal's own presumed recording of the evidence which he considers the Tribunal would have retained, but of which no transcript has been sought.

Rule 24 Reply

17. There was no Rule 24 Reply to the grant of permission.

18. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

19. For the respondent, Mr Avery argued that the Judge's findings were sustainable. Following the grandmother's death, alternative care arrangements were in place for the appellant and his sister, and the First-tier Judge recorded that the sponsor had only very sketchy knowledge of the children's schooling and their daily lives. At best, her relationship with these children was 'very hands off'. There was still no application for the other sister to join her mother in the United Kingdom.

20. The sponsor's evidence to the First-tier Tribunal had been that she had waited to make her application for entry clearance for the appellant until a year after his grandmother's death because of the difficulty of affording the fee for the application and the travel arrangements but that was not supported by her evidence to the First-tier Tribunal.

21. Mr Ali argued that paragraph 297(i)(e) or (f) were met and that entry clearance should have been granted on human rights grounds.

Analysis

22. Paragraph 297 is not set out in full in the judgment: the material parts thereof are as follows.

“297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, ... present and settled or being admitted for settlement in the United Kingdom are that he:

- (1) Is seeking leave to accompany or join a parent ... 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.”

23. On the evidence before the First-tier Judge, at the date of decision this appellant was no longer a child and paragraph 297 was not applicable to him. Even if it had been, I am satisfied that it was open to the First-tier Judge to find on the evidence that the sponsor did not have sole responsibility for his upbringing and that there were no serious and compelling family or other considerations making exclusion of this child undesirable.

24. There is a slightly confused summary of the legal position at [40]:

“40. I have balanced the weight of the public interest in the maintenance of effective immigration controls very carefully against the appellant’s Article 8 family and private life claim. The public interest has considerable weight for the reasons I have identified. Balancing the factors which add weight to and subtract weight from the appellant’s claim I am not satisfied that his claim can be said to amount to the very compelling or exceptional claim required. On the basis of the facts I have found the appellant’s claim does not outweigh the public interest in the maintenance of effective immigration controls. I do not find any exceptional factor. The respondent’s decision does not represent a disproportionate interference with the appellant’s right to respect for his family and private life. The respondent has justified the decision.”

25. I apprehend that the last three sentences relate to Article 8 outside the Rules. The appellant’s family life with his mother has been conducted at a distance for 15 or 16 of his 19 years. He is now a student teacher in Democratic Republic of the Congo and has settled accommodation there with his younger sister. The First-tier Judge did not err in concluding that

there were no exceptional circumstances for which entry clearance should be granted on human rights grounds outside the Rules.

26. The suggestion in the grounds of appeal that there is an error in the record of the sponsor's evidence is unsupported by any reliable evidence and I give it no weight. The First-tier Judge correctly placed only minimal negative weight on the lack of evidence that the appellant could speak English, and neutral weight on the sponsor's ability now to maintain and accommodate him.
27. These grounds of appeal do not identify any arguable material error of law in the decision of the First-tier Judge.
28. The appeal is dismissed. The decision of the First-tier Tribunal is upheld.

DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

I do not set aside the decision but order that it shall stand.

Signed **Judith AJC Gleeson**
November 2019
Upper Tribunal Judge Gleeson

Date: 14