



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03622/2019 (P)

THE IMMIGRATION ACTS

Decision under Rule 34
Without a hearing
9th September 2020

Decision & Reasons Promulgated
On 11th September 2020

Before

UPPER TRIBUNAL JUDGE COKER

Between

THABO MOYO

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. FtT Judge S Aziz dismissed the appellant's appeal against the refusal of his human rights claim seeking entry clearance as a dependant of his father for reasons set out in a decision promulgated on 19th August 2019. Permission to appeal was granted by FtT judge Scott Baker on 26th January 2020. Directions for the further conduct of the appeal were sent on 28th April 2020 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside to be determined on the papers.
2. The appellant did not, either in person or through his father make any further submissions. The respondent made submissions in writing on 18th May 2020. The appellant has not sought to respond to those submissions; no extension of time has been sought. The respondent has expressed her consent to the decision on error of law being taken on the papers; the appellant has not objected, and I note

that the decision on the original appeal was taken on the papers at the request of the appellant.

3. I was satisfied that the submissions made on behalf of the respondent together with the papers before me were sufficient to enable me to be able to take a decision on whether there was an error of law in the decision of the FtT and if so whether the decision should be set aside, on the papers and without hearing oral submissions. On 1st June 2020 I took the following decision and set aside the FtT decision to be remade.

"FtT decision

1. The appellant had sought entry clearance because his sister, with whom he had been living for about a year, was no longer able to look after him. The appellant said that his father had looked after him in Zimbabwe. The respondent refused the application on the basis that the appellant had not provided evidence that he had been looked after by his father, who had arrived in the UK when the appellant was 8 months old and he was now 16, that the appellant had been in the care of his mother and sister and the respondent was not satisfied the appellant's father had sole responsibility for the appellant or that there were serious and compelling family or other reasons which made exclusion undesirable.
2. The FtT judge noted the evidence before him, which included an affidavit from the appellant's mother confirming the father has legal custody; that the appellant's school and boarding fees are paid by the father; that the appellant wrote a letter that his father returned to Zimbabwe between 2012 and 2017 and that they lived together when he was not at boarding school. The judge found the appellant's father had been exercising parental responsibility for a number of years and in particular that the appellant had been financially maintained by his father for school fees, accommodation costs and all living expenses and plays a key role in the appellant's upbringing.
3. The judge did not accept the appellant's mother had completely abrogated her responsibility as a mother on the father's return to Zimbabwe in 2012 by leaving to live in a remote village; he found the evidence vague and lacking in detail on that key issue. He found she had not relinquished all parental responsibility and that parental responsibility was shared; that the appellant was currently at boarding school and has other family members in Zimbabwe such that there were no serious or compelling family or other considerations which made his exclusion undesirable.

Error of law

4. The grounds relied upon place weight upon the asserted failure of the FtT judge to give adequate consideration to the fact that the appellant's father has legal custody. The judge accepts that the father has legal custody but does not accept that he has sole responsibility. They are two different things and there is no error of law by the judge in failing to give adequate weight to that document.
5. Nevertheless, the judge appears to have equated parental responsibility with sole responsibility. A person may retain parental responsibility but not have actual responsibility. The judge has not addressed this. Furthermore, the judge seems to have required reasons for the mother going to live in a remote village and it is in the absence of those

reasons that he finds she has not abrogated her responsibility for the appellant. Furthermore the judge does not appear to have taken into account that during the period 2012 to 2017 the appellant lived with his father, stepmother and siblings rather than with his birth mother.

6. The respondent relies upon the established case law as to sole responsibility not equating to financial responsibility but the decision by the FtT judge has failed to take into account the evidence that was before him as to the family being together until 2017 and the moving between family members since then.
7. The FtT judge has erred in law in failing to properly apply and consider the evidence as to sole responsibility.
8. I set aside the decision to be remade.”

4. I made the following directions:

“I direct that both parties, within 21 days of the sending of this decision, notify the Tribunal IF THEY DO NOT AGREE to the decision in the appeal being remade on the papers presently before the Upper Tribunal. If there is no objection raised, with reasons, the Upper Tribunal will proceed to remake the decision on the basis of the papers before it.”

5. Neither party raised an objection to my taking the decision on the appeal on the papers before me. The appellant and his family have sent in letters which in essence repeat information that was already before the Tribunal. The respondent has made no submissions and has raised no credibility or other challenge to the evidence that was before the FtT other than was made in submissions relating to the error of law which I took into account in my decision as outline above.
6. On the basis of the unchallenged evidence before me, the appellant’s father was in Zimbabwe between 2012 and 2017 and that although the appellant was at boarding school they lived together as a family when he was not at school. The appellant’s father had been exercising parental responsibility for a number of years and in particular the appellant was financially maintained by his father for school fees, accommodation costs, all living expenses and the father plays a key role in the appellant’s upbringing. There was no challenge to that finding of the FtT judge by the respondent. The evidence before the first tier tribunal and before me was that the appellant’s mother had abrogated her responsibility as a mother in 2012 having left the appellant with his father. She played no further role in the appellant’s upbringing. The appellant’s mother retained parental responsibility even though the father has legal custody. The fact that she has parental responsibility does not mean however that she exercises that parental responsibility. The unchallenged evidence before the Upper Tribunal is that she does not.
7. Further unchallenged evidence is that the appellant’s sister with whom he was living after the father returned to the UK, was no longer able to look after him. He had only been with his sister when he was not at boarding school and his father continued to take all necessary decisions in connection with his life. There was evidence that the appellant’s sister with whom he was living when not at boarding school was unwell. The fact that the appellant was at the time of the decision of 16 or 17 years old and therefore did not require day-to-day care does not mean that

his sister took over or participated in responsibility for him such as to amount to a sharing of responsibility between the appellant's father and her. The evidence is that the father continued to bear the full financial and emotional care of the appellant, taking all necessary decisions; the sister merely enabled him to continue to have somewhere to live whilst not at boarding school. There was no challenge to this evidence in the respondent's submissions.

8. On the basis of this evidence it is clear that the appellant's father has had since 2012 and retains sole responsibility now for the appellant. The appellant meets the requirements of the immigration rules and I allow the appeal against the decision to refuse him entry clearance.

Decision

The making of the decision of the FtT did involve the making of an error on a point of law.

I set aside the FtT decision and remake the decision.

I allow the appeal of the appellant against the decision of the respondent refusing the appellant entry clearance.

Jane Coker

Upper Tribunal Judge Coker
Date 9th September 2020