



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA083422015

THE IMMIGRATION ACTS

Heard at Field House
On 12 May 2017

Decision & Reasons Promulgated
On 5 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS TARISAI MABIZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Muzenda, Solicitor, Longfellow Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Rodger sitting at Taylor House on 30 September 2016) dismissing her appeal against the decision of an Entry Clearance Officer to refuse her entry clearance for the purposes of settlement as a child, under the age of 18, of a person present and settled here. The First-tier Tribunal did not make an anonymity

direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 20 March 2017 First -tier Tribunal Judge Baker granted the appellant permission to appeal as it was arguable, in the light of the finding that the appellant's father had died some time previously, that the Judge may have inadvertently erred in not considering the application of Rule 297(i)(d).

Relevant Background Facts

3. The appellant is a national of Zimbabwe, whose date of birth is 8 April 1997. Just before her 18th birthday, she applied for entry clearance to join her mother in the UK.
4. On 1 April 2015 an Entry Clearance Officer in Pretoria (post reference: Pretoria\1203498) gave his reasons for refusing her application by reference to Rule 297. He acknowledged that she had stated that her father was deceased, and that she had submitted a death certificate to substantiate this. The death certificate showed that he had passed away in March 2003.
5. She said that her mother had left Zimbabwe and travelled to the UK on 28 August 2001. She had therefore resided in Zimbabwe without her parents for the last 12 years. She had not submitted evidence to show that she had maintained contact with her mother, nor had she submitted evidence to show that her mother had been financially and/or emotionally responsible for her since her birth. She attended school in Zimbabwe and she apparently had close family in Zimbabwe to whom she could turn for support. She did not appear to have any medical concerns. He was not therefore satisfied that she was living in compelling and compassionate circumstances.
6. In her VAF, she stated that her sponsor was registered blind on 19 January 2012, and she did not work in the UK. The documents that she submitted showed that her sponsor was in receipt of public funds. She said that she wanted to join her sponsor in the UK so that she could improve her quality of life and assist her with her day-to-day activities. So she wanted to relocate to the UK in order to care for her sponsor, rather than out of necessity due to her own living conditions in Zimbabwe.
7. In consequence of the above considerations, the appellant did not meet the requirement of Rule 297(i)(f).

The Hearing Before, and the Decision of, the First-tier Tribunal

8. Both parties were legally represented before Judge Rodger. Mr Muzenda appeared on behalf of the appellant. In her subsequent decision, Judge Roger gave very detailed and comprehensive reasons for the following findings with reference to Rule 297:

- a) She was not satisfied that the sponsor had had sole responsibility for the appellant's upbringing;
- b) She found that the appellant had been brought up by her aunt and older sister, and that her mother had not made the important decisions in her life;
- c) She was not satisfied that there were serious family or other considerations which made her exclusion from the UK undesirable;
- d) She did not accept that the appellant's aunt was intending to move away and that the appellant would be left alone in Zimbabwe;
- e) It was in the appellant's best interests to remain in Zimbabwe, the country of which she was a national and where she had grown up and been educated.

9. With regard to an alternative Article 8 claim, the Judge held as follows, at paragraph [43]:

No application was made until 2015 and I am not satisfied that the relationship between them is close as suggested, and I am not satisfied that it is likely that the application was made for purposes other than for the appellant to come and care for the sponsor. While this may be a natural desire of a child to care for a parent, I am not satisfied that this is a compelling reason to not apply the Immigration Rules and grant leave outside the Rules as the sponsor's care needs are currently being met by the state and her needs are not unmet. Therefore, whilst the refusal decision as a result of the appellant not being able to come and join her mother in the UK, I am satisfied that the decision was lawful and proportionate to the legitimate aim of maintaining effective Immigration control. Whilst it may be said that the provision of care by the appellant could reduce the amount of care needed to be provided by the state, I am not satisfied that this is sufficient either on its own or on a cumulative basis for the other factors relied upon by the appellant to render the refusal decision disproportionate, it does not take into account that the appellant would be likely to use educational facilities and may use the NHS, such that it cannot be proved that she will not seek the benefits of being a resident in the UK and will not be a burden on the state resources.

The Hearing in the Upper Tribunal

- 10. At the hearing before me to determine whether an error of law was made out, Mr Bramble conceded that the Judge had materially erred in law in not considering the application of Rule 297(i)(d). After further discussion, I accepted Mr Bramble's concession, and held that an error of law was made out. My reasons for so finding are set out below.
- 11. For the purposes of re-making the decision, I sought clarification from the sponsor as to her financial means and hence her ability to maintain and accommodate her daughter in the United Kingdom without additional recourse to public funds. Mr Bramble declined to question the sponsor on this topic.
- 12. In his closing submissions on behalf of the Entry Clearance Officer on the topic of re-making, Mr Bramble said it was open to me to find that all the relevant requirements

of Rule 297 were met. Mr Muzenda invited me to make this finding in the appellant's favour, and accordingly to allow her appeal.

Reasons for Finding an Error of Law

13. Rule 297 provides that the requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled, or being admitted for settlement into the United Kingdom, are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

...

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement *and the other parent is dead* (my emphasis); or

(e) one parent is 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; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and is not from an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative of the child is seeking to join, own or occupy exclusively; and

(v) can, and will be maintained adequately by the parent, parents or relative of the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(viii) does not fall for refusal under the general grounds for the refusal.

14. The Judge gave more than adequate reasons for finding that the appellant did not satisfy the gateway requirement of sole responsibility or the gateway requirement of there being serious and compelling family or other considerations which made her exclusion undesirable. However, she failed to address the question of whether the appellant qualified for entry clearance on the simple basis that her father was dead.

15. Mr Bramble's colleague, who settled the Rule 24 response, queried whether this point had been relied on at the hearing before Judge Rodger. Having reviewed the papers, I am not satisfied that the matter was specifically drawn to the Judge's attention. It appears to me that the hearing before the First-tier Tribunal proceeded on the ground of battle chosen by the Entry Clearance Officer, which was to focus on the appellant's asserted inability to satisfy sub-paragraph (f), rather than addressing the consequences of her apparent ability to satisfy the alternative gateway requirement set out in sub-paragraph (d).
16. However, the law always speaks. So Mr Muzenda's failure to advance a clear case under sub-paragraph (d) before the First-tier Tribunal Judge is not determinative of the outcome of the error of law challenge. A material error of law is made out as the Judge has not addressed an alternative ground, which is mentioned in the refusal decision, on which the appellant can qualify for entry clearance under Rule 297.

Discussion and Findings on Re-making

17. It is accepted in the refusal decision that the appellant's father is dead. Accordingly, the appellant is able to bring herself within Rule 297(i)(d) as her mother is present and settled in the United Kingdom, and "*the other parent is dead*". It appears to be the view of the Entry Clearance Officer who refused the application that the death of the father was not the reason why the appellant was seeking entry clearance just before her 18th birthday, which is probably true, and that therefore his death was irrelevant to the question of the appellant's ability to bring herself within the scope of Rule 297. But the appellant was not required to justify her motivation. All that the Rule requires is that one of the set of circumstances set out in sub-paragraph (i) applies. The appellant was applying in circumstances where one parent was settled in the UK, and the other parent was dead. That was all that the appellant needed to prove.
18. The Entry Clearance Officer did not put in issue any of the other requirements of Rule 297. In particular, the Entry Clearance Officer did not raise any concern about the sponsor's ability to maintain and accommodate the appellant adequately without recourse to public funds. As the sponsor is reliant on public funds for her own maintenance and accommodation, what is in effect required is that there should be no additional recourse to public funds.
19. I note that Judge Rodger did not find the sponsor to be a reliable witness on various matters which were canvassed with her during the hearing. In addition, I have not been provided with a breakdown of the sponsor's income and expenditure, or underlying documents such as bank statements which evidence the sponsor's asserted level of savings and current income.
20. However, it is reasonable to infer that she provided the necessary documentary evidence to satisfy the Entry Clearance Officer on these matters, as otherwise I would have expected the Entry Clearance Officer to have raised the issue of funding as an additional reason for refusing the application. Moreover, the sponsor gave credible and unchallenged oral evidence that: (a) she lives in a council flat which is paid for by the council; (b) there is sufficient room in the one-bedroomed flat to accommodate

her daughter as well as herself, without her daughter having to pay an additional amount for her occupancy; (c) she has savings of about £6,000; and (d) she is receiving Disability Allowance amounting to £450 a month, and Employment Support Allowance amounting to £372 paid every two weeks.

21. I further note that, when considering proportionality, Judge Rodger did not make a finding that there was a risk of the appellant having to access state benefits in order to fund her maintenance and accommodation. Judge Rodger's concern related to the wider economic impact of the appellant's presence in the UK, namely her accessing the NHS or free education provided by the state. But this does not count as having recourse to public funds for the purposes of the Rules.
22. In conclusion, I am satisfied that all the relevant requirements of Rule 297 are met, and that therefore the appeal should be allowed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal is allowed under the Rules.

I make no anonymity direction.

Signed

Date 18 May 2017

Judge Monson
Deputy Upper Tribunal Judge

TO THE RESPONDENT **FEE AWARD**

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, I have decided to make no fee award as I have allowed this appeal on different grounds from those ventilated before the First-tier Tribunal.

Signed

Date 18 May 2017

Judge Monson
Deputy Upper Tribunal Judge