IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03702/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision and Reasons Promulgated**
On 7th October 2015	**On 4th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ERICK JUNIOR TINOTENDASHE NYABANGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, PRETORIA

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mr David Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ghaffar, promulgated on 10th November 2014, following a hearing at Birmingham Sheldon Court on 6th October 2014. In the determination, the judge allowed the appeal of Master Erick Junior Tinotendashe Nyabanga. The Respondent, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Zimbabwe, a male, who was born on 9th September 1998. He appealed against the decision of the Respondent Entry Clearance Officer, made on 13th February 2014, to refuse to grant him entry clearance as the child of Ms Precious Gwese, a person present and settled in the United Kingdom.

The Appellant's Claim

3. The Appellant's claim is that, there was a time when his mother, Ms Precious Gwese, did not have custody of him. He had lived with his mother's parents until about 2007 and then he did not come home from school one day. That was the last time that he had lived with her parents. He was taken to South Africa and the mother, Precious Gwese, was not allowed to contact him. She was separated from her husband in 1999, and this was only a year after they had married. Between 1999 and 2007, it was the sponsoring mother, Precious Gwese, who had sole responsibility for the Appellant.

4. The Appellant was then taken to South Africa, depriving the mother of her parental right to have access to a child. The Appellant then returned back to Zimbabwe and it is then that Precious Gwese applied for his entry to the UK on the basis that she had sole responsibility for him since then. The Appellant had not been living then in South Africa. The sponsoring mother had herself been to South Africa on three occasions to see the Appellant himself.

The Judge's Findings

5. The judge's findings were based upon the evidence given by the sponsoring mother who had said that she had entered the UK in 2001 as a visitor and had the intention of returning back to Zimbabwe. Her parents were alive at the time and she had left the Appellant with them. She then completed her studies in 2004 and stayed on in the UK thereafter. Her daughter was already living here. Her children are from different fathers. The police did not keep records and there was no investigation. There had then been the removal of the Appellant from his grandparents on the mother's side and this was reported to the police at the time. The sponsoring mother was fearful that the Appellant's father had been involved in this and would use violence given that there was a history of violence in the family.

6. The judge considered at length the refusal letter (see paragraph 3, which maintained that the sponsoring mother in the UK had not exercised sole responsibility and had not made decisions with regard to the Appellant's educational health, especially given that the Appellant had been residing in South Africa with his father from 2011 to 2014.

7. However, the judge then heard the evidence and concluded that the Appellant's case was that it was after 2014 that he had returned to Zimbabwe and his mother had since been exercising sole responsibility for him, having previously made three visits

to South Africa to see the Appellant, before he was allowed to come back to Zimbabwe.

Grounds of Application

8. The grounds of application state that the judge erred in failing to give adequate reasons for his findings. The judge had found (at paragraph 21) that the Appellant's father had abdicated responsibility for him and that the Appellant's cousin was a person who was now exercising day-to-day care over him in Zimbabwe. He had found that the Sponsor had been sending money for the Appellant and that "the decisions about the Appellant's upbringing are discussed with and monitored by the Sponsor". However, the judge had failed to consider the test of "sole responsibility" in the context of the authoritative determination in **TD (Paragraph 297(i)(e) "sole responsibility") Yemen [2006] UKAIT 00049**, which had stated (at paragraph 19) that, "the test is whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life".

9. On 16th December 2014, permission to appeal was granted by the First-tier Tribunal.

Hearing

10. At the hearing before me, on 7th October 2015, Mr David Mills, appearing on behalf of the Respondent Secretary of State, submitted that the case of **TD (Yemen)** had not been applied, even though the judge had summed up the principle and facts of this case at paragraph 20, before proceeding at paragraph 21 to hold that the day-to-day care was undertaken by the Appellant's cousin. The judge had concluded that the father had abdicated responsibility. He had held that the Sponsor had been sending money for the Appellant. He had gone on to say that, "I find that this demonstrates a close interest in and affection for the child. I find that the decisions by the Appellant's upbringing are discussed with and monitored by the Sponsor". This, submitted Mr Mills, was not enough. It showed that there was a shared responsibility with the cousin.

11. In her submissions, Ms Gwese, submitted that one had to look at her affidavit, because this explained the extent of her care and control over her son, the Appellant. She said that she had asked someone to look after her son when he had returned to Zimbabwe, and this was the cousin. She said she herself could not do day-to-day care for him because she was living in this country. It was physically impossible. She was, however, paying for his food, his education, and his health needs. She was not physically there and could not physically look after him in person there. She turned emotional and broke down and submitted that she made all the decisions in relation to her child because she was the mother.

12. There was no reply by Mr Mills.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. First, the challenge in the grounds of application is on the basis that the authoritative determination in **TD (Yemen)** has not been applied. It plainly has been. The judge not only refers to it but actually cites its relevant parts at paragraph 19. The judge then explains what is meant by "sole responsibility".

15. Second, the challenge is on the basis that adequate reasoning has not been given. It plainly has been. The judge gives his reasoning at paragraph 18 and at paragraph 21. It is entirely clear. It is well-established that following **R (Iran) [2005]** it is necessary for there to be "perversity" in a decision under challenge and that this "represents a very high hurdle" (paragraph 11). Lord Justice Brooke made it clear in that case that, "far too often practitioners use the word 'irrational' or 'perverse' when these epithets are completely inappropriate" (see paragraph 12). This is the case here as well.

16. This can be demonstrated as follows. First, the judge finds that, "having perused the documents before me and considered the oral evidence of the Sponsor, I find that she is a credible witness". He finds that initially the Appellant was being cared for by his grandparents from 1999 to 2007, "with the decisions and direction of the Sponsor". This finding was open to the judge. It shows that even from the time in 1999 onwards, the decision making and direction was given by the Sponsor. There is no challenge to this finding and it is difficult to see why the judge is not entitled to come to this conclusion.

17. Second, the judge finds that the Sponsor remained with the Appellant "until 2001 when she came to the UK leaving him in the care of his parents but maintained parental responsibility for him". This again shows that the decision and direction is entirely at the behest of the sponsoring mother.

18. Third, the Appellant's father thereafter took the Appellant from his grandparents' care "without warning and the Sponsor and her family were unable to stop this". At this time the Appellant's father had the Appellant in South Africa "and prevented contact with his mother". However, soon after that, "there came a time when the Appellant's father was not coping financially and sent him back to Zimbabwe to his mother's care". It is at this stage that the fourth reason becomes relevant. This is that the judge found that "since the Appellant has returned to Zimbabwe, the Sponsor has had care and control over the child" (see paragraph 18).

19. Second, the judge considers **TD (Yemen)** and observes that the test is "whether the parent has continuing control and direction of the child's upbringing, including making all the important decisions in the child's life" (paragraph 19). The meaning of this, as the judge summarises is, to cover a situation "where the primary parental responsibility for the child's upbringing rests to all intents and purposes with one parent" (paragraph 20). The judge then makes findings that the Sponsor does have

sole responsibility for the Appellant and that the father has abdicated responsibility, and that although the day-to-day care is provided by the Appellant's cousin, "the Appellant's cousin is not in a position to take on the responsibility of the Appellant as her husband has a serious illness and she has children of her own to care for".

20. There is no challenge to this finding in the grounds of application and none by Mr Mills today. This finding was plainly open to the judge.

21. The judge then concludes that the Sponsor has in these circumstances "also been sending money for him" so that the net result is that "the Appellant's upbringing are discussed with and monitored by the Sponsor" but the decisions are those of the sponsoring parent in the UK, as would practically be the case in any situation where the child is living away in another country and direction and control are exercised from the UK.

22. In short, the decision is unimpeachable. The judge was entitled to find, on a balance of probabilities, that the requirements of the Rules have been made and that the sponsoring parent in the UK, Precious Gwese, had sole responsibility for the child. He was correct to allow the appeal on this basis.

Decision

23. There is no material error of law in the original judge's decision. The determination shall stand.

24. No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 2nd November 2015