



IAC-FH-NL-V1

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

Appeal Number: OA/21862/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 21 October 2014**

**Decision and Reasons
Promulgated
On 20 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MASTER JOEL ALEX GEORGE WILES
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Royston instructed by Heath and Power Solicitors LLP
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISIONS AND REASONS

The Appellant

1. The appellant is a citizen of Jamaica, born on 13 March 1996 and he appealed against the decision of the Entry Clearance Officer made on 19 November 2013 to refuse him entry as a dependant child under paragraph 297 of HC 395 as amended.

2. In a determination by Judge Maxine Myers promulgated on 12 August 2014 she dismissed the appellant's appeal under the Immigration Rules and under the Human Rights Act.

3. The particular section of paragraph 297 in issue was paragraph 297(i)(f) which reads:

"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."

4. There is an unfortunate background to this appeal which Judge Myers set out. The sponsor who was the appellant's mother married the father in 1995 and was a victim of domestic violence. She did not report the incidents to the police but left Jamaica in 2001 as she was frightened of her husband and wanted the appellant to go with her but he was refused his passport. She returned to Jamaica in 2002 in another attempt to take her son but was again assaulted by her husband.

5. The appellant made an application to join his mother on 19 August 2013. An application for permission to appeal was granted by First-tier Tribunal Judge Landes.

6. I shall deal with the grounds of the application for appeal as they are set out.

7. The first ground was that the judge had not taken into account the circumstances of the appellant's mother and sister in conjunction with the appellant's own circumstances could amount to serious and compelling considerations. The findings were confined to the appellant's circumstances in Jamaica and failed to have regard to material consideration.

8. I can see that at the skeleton argument provided by Mr Royston he quoted sections of Macdonald which confirmed at 11.97 that:

"The IDI state that where the UK sponsor is the UK-settled parent, the circumstances may relate to the child or the parents but where the sponsor is not settled or is not a parent, the factors to be considered must relate only to the child... In Saluguo IAT 18815 the fact that the child was living comfortably with her aunt and siblings in the Philippines was outweighed by the fact that her mother, a Filipino domestic worker who had worked under poor conditions for a number of years to provide her children with financial security and an education, had a strong desire to bring her youngest child to the UK, and secondly, at 11.98 in Rudolph v Entry Clearance Officer (Colombo) [2984] Imm AR 84 the Tribunal rejected the "intolerable conditions" test pointing out that the underlying purpose of the

Immigration Rules is to unite families, not divide them, and holding that where a father was capable of caring for a child that in itself would be grounds for deeming exclusion undesirable. Voluntary abandonment may make the circumstances compelling: this rule, unlike certain of the adoption rules, does not require inability to care for the child on the part of the parent or carer abroad: Sharma v Entry Clearance Officer (New Delhi) [2005] EWCA Civ 89."

9. First I would state that the judge did take into account the circumstances of the mother and the sister when one reads the determination overall. The judge set out the circumstances and wrote at [15]

'The picture painted is that of a couple who split up, ultimately divorced and were in dispute about where their child should live. However objectionable the father's parenting may have been at times the fact is that the appellant lived with him for almost the entirety of his childhood and many of the allegations of inadequate parenting are historic.

The judge noted at paragraph 16 "furthermore as the sponsor is settled in the UK the serious and compelling circumstances can relate both to the child and parent". The judge did not accept that there was sole responsibility on the part of the mother. It was clear that the judge had the consideration of the mother in her mind. This is not a case whereby the sponsor was seeking to be reunited with a minor child. The judge's findings indicated at [16] she had taken account of the circumstances.

10. Further, the judge states:

"The sponsor has been separated from her son for many years and although she has done what she can to keep in contact with him this has frequently been frustrated by the father. In this case there is also the consideration of the appellant's half-sister who lives with her mother; she has a right to enjoy family life with her brother. The appellant and her daughter it was found could not live in Jamaica as it would not be safe and it would be unreasonable to expect them to uproot themselves."

11. Although her findings were short I do not consider that this discloses a material error. The mother has made her life in the United Kingdom over many years albeit having removed herself because of the unhappy marriage and conduct of the appellant's father but there was no indication that the mother alone had raised this child, unlike *Salugo*, and this was a finding that the judge made.
12. It would seem that the judge accepted that she needed to consider the circumstances of the sponsor but she noted from **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88 (IAC)** it was held that family considerations required an evaluation of the child's welfare including emotional needs and "other considerations" come into play where there

are other aspects of a child's life that are serious and compelling, for example where an applicant is living in an unacceptable social and economic environment. The focus needed to be on the circumstances of the child in the light of his or her age, social background and developmental history. The assessment which included whether there was a neglect or abuse, whether there were unmet needs or whether there are stable arrangements for the child's physical care included a consideration of whether the combination was sufficiently serious and compelling to require admission.

13. Not least serious meant that there needed to be more than the party simply desiring a state of affairs to obtain and compelling in the context of paragraph 297(i)(f) indicated considerations were persuasive and powerful. She noted that such an interpretation set a high threshold and she noted that "other considerations" came into play where there were other aspects of a child's life that were serious and compelling and that the focus needed to be on the circumstances of the child in the light of his or her age, social background and developmental history.
14. The judge took as a starting point and focus the circumstances of the child and leading on from that the considerations of the parent.
15. She took into account the fact that at the date of decision the appellant was a minor but he was only a few months away from a majority and he had lived all his life in Jamaica and it may well be in his best interest to continue with residence there. This was one of the factors identified in **Mundeba**.
16. She considered whether he was still subject to abuse and concluded that he was not despite the fact that she had acknowledged that there had been abuse previously. She did not find that there were needs that should be catered for and thirdly, which was also the subject of a challenge, found that there were stable arrangements for his living.
17. It was submitted by Mr Royston, the second ground of appeal, that although she had attributed weight to all statements there was a contradiction between the statement of Pastor Jackson and the appellant himself. I do not find that there is a contradiction. The judge was very clear when she stated that "a letter from Pastor Jackson dated 28 July 2014 stated that the appellant is now living in a *more* settled and stable home environment with his uncle and his family, hence suggesting that contrary to what might have been said the arrangements are far from temporary." Although the judge preferred the evidence of the appellant and the Pastor to that of the mother, who does not live there, leading on from that, it was open to the judge to prefer the evidence of Pastor Jackson which is, in effect, what she did, to that of the appellant himself who stated that his position was only temporary. But the Judge went on to make an even further finding at paragraph 19 which was that "although I accept that the appellant may still need emotional support from a parent

or parent figure, he is working and is of an age when it is not unusual for young people to leave home and care for themselves”.

18. Thus, the judge not only found that she accepted the evidence of Pastor Jackson and indeed as the appellant’s evidence was that it was only temporary accommodation, she by inference accepted Pastor Jackson’s evidence over and above that of the appellant’s but she also went on to state that he was in a position to find a home for himself.

19. I have addressed the criticism of the appellant’s present living arrangements and it is correct to state that the judge quoted the evidence of the pastor. Nowhere does the judge state that they are “now reasonably permanent” and indeed, on a careful reading of the letter of 28 July 2014, the pastor states:

“I have been the church pastor for the Wiles family over the past (4) years and have full knowledge of the situation. Therefore, it is my firm belief that while Joel is now living in a more settled and stable home environment with his uncle Robert and his family, notwithstanding I believe visiting or living in the United Kingdom with his mother will offer far greater opportunities for personal growth and future prosperity.”

20. The pastor did not state that the arrangement was temporary. It was clear from a reading overall of paragraph 19 that the judge placed more weight on the evidence of the pastor as opposed to the sponsor or the appellant whose evidence she stated lacked clarity with respect to living with other relatives.

21. It is clear that by the time of the decision of the Entry Clearance Officer he found that the mother only had a peripheral role in the appellant’s upbringing. He had lived with the uncle for at least six months and this the judge was clearly aware of. I find that the approach taken by the judge started with the best interests of the child as a primary consideration and focused on the evaluation of the child’s welfare. She followed the approach that other considerations came into play when there were other aspects of a child’s life that were serious and compelling. Clearly the judge did not find they were serious and compelling and when reading the determination as a whole it is clear that she accepted that the family life of the mother would be interfered with but did not consider this because of the approach she took.

22. I do not think that the judge was in error in this regard.

23. A further criticism was made on the basis that the judge had failed to cite **LD (Article 8 - best interests of child) Zimbabwe [2010] UKUT 278 (IAC)**. In particular this states that:

“Weighty reasons would be required to justify separating a parent from a lawfully settled minor child or child from a community in which

he had grown up and lived for most of his or her life. The general situation in the relevant home country is also relevant, especially if it is known that the conditions there are dire as they are, for example, in Zimbabwe at present."

24. In this context it is not the situation that immediate physical family life has been enjoyed over many years. It is accepted that family life consists of the inter-dependent bonds and the judge acknowledged that there were specific reasons as to why the appellant's mother may have come to the UK but the fact is that this is a situation which is the status quo and has been the status quo for over twelve years. LD referred to the circumstances where the family were living with each other in the UK and the parent would be returned to Zimbabwe. That is not the case here.
25. I can appreciate that the submission of Mr Royston was that the state had an obligation to ensure that the family life was developed. Even Section 55 of the Borders Citizenship and Immigration Act 2009 only states that there is onus on the respondent to discharge the functions under Section 55(2) having regard to the need to safeguard and promote the welfare of a child who is *in* the UK . The government has ratified the Convention on the Rights of the Child but this, I do not find makes it incumbent upon the UK Government to ensure that historic injustices are compensated in this way, particularly where the government has had no part in the development of family life hitherto. As **LD** states

'Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases. A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law'.

Although I appreciate that the State must have regard to potential family life and refrain from inhibiting the development of real family life in the future, and may be required to consider how to assist the development of family life I do not find that the respondent can be responsible for forging family life or further developing it in these particular circumstances. Indeed, the case of **R (on the appn of Ahmadi) v SSHD [2005] EWCA Civ 1721** emphasises an illustration of those principles but they do not take this appellant's case further forward. **Ahmadi** confirmed

'The pre-existing blood ties, coupled with the declared intention of the one brother to care for and support his other brother, are, in my judgment, of greater significance than Sullivan J was prepared to accept. There is ample authority for the proposition that the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future. That is not to say that, where there has been no pre-existing family life and there exists only a future intention, that will be sufficient to engage Article 8. There is the world of difference between interfering with a long-established

family life and merely preventing or inhibiting an opportunity in the future to develop such a family relationship. Nevertheless, it seems to me that the judge, in considering the propriety of the certification, failed to pay sufficient heed to the declared intentions of the brothers, coupled as they were with at least some experience of the support that the brother was able to give to his seriously ill younger sibling'.

The right to enter the UK is not guaranteed by Article 8 and the exclusion is not a breach in every case. The fact is that the appellant, as the judge identified had a family life in Jamaica where he had lived all his life first with his father and secondly with his uncle; the appellant was approaching his majority and the status quo was to be maintained.

26. I find therefore that there is no error of law in the decision and the decision shall stand.

Signed

Date 19th November 2014

Deputy Upper Tribunal Judge Rimington