



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

Appeal Number: OA/08639/2015

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Determination & Reasons
Centre Promulgated
On 15th March 2017 On 5th May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[K W]

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr Sarwar (Counsel)
For the Respondent: Ms R Pettersen (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge James promulgated on 21st June 2016 following a hearing at Birmingham on 8th June 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was

granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

2. This is a short form judgment and the relevant facts in the documentary material are set out in the judgment under appeal.
3. The facts are set out in the judgment of IJ James, as is the legal framework.
4. I allow the appeal.
5. At the hearing before me on 15th March 2017 a number of criticisms were raised. These are based upon the Grounds of Appeal of Mr Pipe of Counsel, dated 4th July 2016, who represented the Appellant before IJ James, following which permission to appeal was granted in this matter by the First-tier Tribunal on 21st October 2016. What was being asserted was that the judge had accepted that the Appellant's mother had abdicated responsibility for the Appellant in Jamaica, but the judge then went on to find that the Sponsor did not have "sole responsibility", and this conclusion was not open to the judge because what the judge required was corroboration of this matter, and this was unnecessary under the law.
6. Second, the judge failed to consider the "best interests" of the Appellant child in his assessment of Article 8. Third, the judge failed to consider the "positive obligation" imposed by Article 8 to promote family life. This being so, the judge's assessment of Article 8 was inadequate.
7. Finally, at paragraph 17 the judge specifically noted a court order giving custody of the Appellant child to the sponsoring father in the UK, and whilst the judge recognised (at paragraph 18) that the "best interest" of the Appellant child had to be taken into account, nowhere in the determination does the judge make a formal assessment as to where those best interests actually lie.
8. On 31st October 2016, a Rule 24 response was entered by the Respondent Secretary of State stating that the judge had considered the evidence and carefully applied the ratio in **TD (Yemen) [2006] UKAIT 00049** and it was open to the judge on the facts presented to conclude that the Sponsor did not have "sole responsibility" for the Appellant. The Sponsor had not met the Appellant until 2008. As far as Article 8 is concerned the ratio of **SS (Congo)** sets a high threshold for leave to enter cases (see paragraph 27 of that case). Moreover, the case of **I (Jamaica) [2011] UKUT 483** states in the headnote (i) that "Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom". For all these reasons, the judge was right to have concluded as she did.
9. The submissions before me on behalf of the Appellant have been as follows. First, the judge erred in requiring corroboration from the Appellant's aunt and/or in consideration of the lack of clarity in the account that was imparted to the judge (see paragraphs 22 and 24 of the

determination). Given that the Respondent had not fielded a Presenting Officer on the day of the hearing, the judge had raised matters of her own initiative. The well-known authority in **MNM (Surendran Guidelines) (Kenya) [2000] UKIAT 00005** established that it is not the function of the judge to expand upon the refusal letter and nor is it his function to raise matters which are not raised in the refusal letter. If the judge was to conclude, as the judge did in the event conclude, that corroboration was needed from the aunt, then it was not insignificant that this matter had not been raised in the refusal letter itself.

10. Third, given that the court order gave “full custody” (see bundle at page 79) to the Sponsor the finding that the Sponsor did not have “sole responsibility” was perverse. Equally so was the suggestion (at paragraph 21) that, the Sponsor has told me he has had regular contact with the Appellant ... I see no records to establish this” given that there was evidence of contact of telephone cards being used, and the evidence before the judge was that the Sponsor spoke with the Appellant child “every day” via WhatsApp, and would speak with her by telephone calls every evening when she came home from school (see paragraph 12 of the determination).
11. Fourth, as far as the “best interests” of the child was concerned there is no reference at all in the determination to an appraisal of this (see paragraph 27). Moreover, the conclusion that Section 55 of the BCIA 2009 does not expressly apply to entry clearance decisions was erroneous because what the case of **T (Jamaica)** established was that the spirit of Section 55 should be taken into account.
12. Fifth, the judge failed to consider the positive obligation to promote family life. Indeed, the determination on Article 8 is couched on the basis of maintaining the status quo (see paragraph 27), because the judge concludes that “in this case the decision will have no impact upon the Appellant’s family and/or private life which will continue in the same manner ...” (see paragraph 27 of the determination). This approach is flawed in the light of **Mostafa [2015] UKUT 112** at paragraph 16 and the Supreme Court judgment in **Quila [2011] UKSC 45** at paragraph 40.
13. Finally, there were inadequate findings made with respect to family life because there is only a short paragraph dealing with Article 8 and the “**Razgar** process” is not followed. This was particularly important given the evidence of the aunt’s intended departure to Canada, which was only on hold pending the proper resolution of the welfare situation of the Appellant child (see paragraph 12 of the determination).

Submissions

14. At the hearing before me on 15th March 2017, the Appellant was represented by Mr Sarwar of Counsel. He submitted that this was a case where the judge had accepted that the mother had abdicated responsibility for the Appellant. However, in coming to the conclusion that

the sponsoring father did not have “sole responsibility” for the Appellant, the judge was requiring there to be corroboration, and this was not a requirement under the Immigration Rules.

15. If anything, the judge ought to have regard to the fact that there was a court order granting full custody to the father. However, in coming to the conclusion that the sponsoring father did not have “sole responsibility” for the Appellant, the judge was requiring there to be a corroboration, and this was not a requirement under the Immigration Rules. If anything, the judge ought to have regard to the fact that there was a court order granting full custody to the father.
16. Moreover, even though the sponsoring father may not have had a significant involvement with his child, the Appellant, when she was born, he did return back to Jamaica in 2008 and had seen the Appellant during the two months that he was there, and thereafter there was clear evidence of his involvement with the child. This was important, as there is no rule to the effect that “sole responsibility” must stretch back all the way to the time of the child’s birth, and it can be acquired at any point in the life of the child, provided that it is meaningful and substantial, and in this case, not only had the mother abdicated responsibility, but there had been a court order, and the aunt was now awaiting resolution of the situation before she went to live in Canada. In the circumstances, the “best interests” of the Appellant child were only being provided for through the context of her father with her.
17. For her part, Ms Pettersen submitted that the judge did consider all the evidence presented and applied the ratio in **TD (Yemen) [2006] UKIAT 00049**. The judge properly concluded that the sponsoring father did not have “sole responsibility” for the Appellant. He had not met the Appellant until 2008. He had only returned back on two further occasions when he travelled to Jamaica. There was no statement at the time from the Appellant’s aunt with whom the Appellant was now purportedly living.
18. In reply, Mr Sarwar submitted that I should make a finding of an error of law and then remake the decision because all the evidence was now before this Tribunal, and in particular at paragraphs 22 to 24 of the determination, it was being said that there was no evidence from the aunt, but the aunt had now provided an updated statement (see page 8 of the bundle) where she entirely corroborates the position of the sponsoring father, and indicates that the mother had indeed abdicated responsibility, and it was the sponsoring father who now looked after the Appellant child to intents and purposes.

Error of Law

19. I am satisfied that the making of the decision by the judge did 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 and remake the decision. My reasons are as follows. First, the judge had evidence that the mother had

abdicated responsibility. There was also evidence that full custody had been given by way of a court order to the sponsoring father. It was an error of law to require there to be corroboration of the situation as this is not required under the Immigration Rules.

20. Moreover, it is an error to not recognise that “sole responsibility” can arise at any time after the birth of a child, and in this case began to emerge after the Sponsor returned back to Jamaica in 2008, and there was subsequently a court order granting him custody of the Appellant child. The judge also applied too high a standard in concluding (at paragraph 21) that, “the Sponsor had told me he has had regular contact with the Appellant I see no records to establish this”, given that there were calling cards, and the judgment in **Goudey [2012] UKUT 00041** makes it clear that such evidence will suffice, and does in this case suffice, given the other matters that fell favourably on the side of the Appellant in this case.

Remaking the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the following reasons.
22. First, there are the matters that I have set out above.
23. Second, there is the aunt’s statement now at page 8 of the updated bundle (the bundle being dated 27th February 2017 with a supplementary witness statement from the Appellant’s father).
24. Third, in **T (Jamaica) [2011] UKUT 483**, it was established that even in an entry clearance case the principles of “best interests” must be borne in mind. In **JO (Nigeria) [2014] UKUT 00517**, it was established that in entry clearance cases regard must be had to the age and care arrangements of the child and the decision maker must be properly informed of the position of the child. This involves conducting a scrupulous analysis and it is a prerequisite of identifying the child’s best interests and then balancing them with the other essential considerations. This is a duty upon the decision maker which is intensely fact-sensitive and contextual in its essence.
25. Fourth, such an analysis leads one directly into Article 8 because “it is difficult to contemplate a scenario where a Section 55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not (see paragraph 29 of **T (Jamaica)**). Moreover, in **Mundeba** it was established that the focus in Section 55 cases is on the circumstances of the child in the light of her age, social background and developmental history. It requires an enquiry into whether there is (a) evidence of neglect or abuse; (b) there are unmet needs that should be catered for; and (c) whether there are stable arrangements for the child’s physical care.

26. In all these respects (barring the absence of evidence of abuse), the indications are that the best interests of this particular child lie in her being reunited with her father in the UK because he can cater for her unmet needs and provide her with a stable arrangement.
27. Finally, the test of “sole responsibility” is satisfied in favour of the Appellant because there is the inability of relatives in Jamaica to care for the Appellant and to maintain and accommodate her. This evidence cannot be plausibly contradicted. The starting point of the evidence is always the narrative presented by the Appellant, unless it can be properly rejected, and it cannot be so rejected on the evidence before this Tribunal today. It is clear that the Appellant’s mother has abandoned her. The aunt is on the verge of so doing and is awaiting emigration to Canada. There can never be absolute “sole responsibility”. It is a relative matter.
28. In the present circumstances, however, her natural father is a person who had exercised practical care and day-to-day support for the Appellant and is able to continue doing so in a far better manner if the Appellant were to be reunited with him in the UK.
29. On the totality of the evidence before me, I find that the Appellant has discharged the burden of proof and the reasons given by the Respondent do not justify the refusal.

Notice of Decision

30. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
31. No anonymity order is made.;

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd May 2017

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd May 2017