



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA089142015

THE IMMIGRATION ACTS

Heard at Field House
On 24th April 2017

Decision & Reasons Promulgated
On 5th May 2017

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ENTRY CLEARANCE OFFICER – PRETORIA

Appellant

and

HN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss A Fijiwala
For the Respondent: No appearance and no representation

DECISION AND REASONS

1. The Entry Clearance Officer, with permission appeals against the decision of the First-tier Tribunal (Judge Lloyd) who, in a determination promulgated on 21st October 2016 allowed the Respondent's appeal on human rights grounds. The First-tier Tribunal did not make an anonymity direction however, as the Respondent is a minor, I consider that she requires anonymity for these proceedings in the Upper Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. Whilst the Entry Clearance Officer is the Appellant in these proceedings and HN is the Respondent, I intend to refer to the parties as they were before the First-tier Tribunal for sake of convenience.
3. Before the Upper Tribunal, the Entry Clearance Officer was represented by Miss Fijiwala (Senior Presenting Officer). There was no appearance or representation on behalf of HN. However, there was a letter dated 29th March 2017 stating that neither the Sponsor (HN's mother) nor the legal representatives acting for the Appellant would be able to attend the hearing due to financial circumstances. However, they enclose a copy of the bundle that was before the First-tier Tribunal and also a Rule 24 response. I confirm that I have considered the Rule 24 response dated 29th March 2017 and the bundle that was before the First-tier Tribunal.
4. I have heard submissions from Miss Fijiwala, who brings the appeal on behalf of the Entry Clearance Officer and those submissions are set out in my Record of Proceedings.
5. The Appellant is a national of Uganda and was born on 17th October 1999 and was 15 years of age at the time of the date of the Respondent's decision to refuse her application for entry clearance which was made on 4th May 2015. The Sponsor is the Appellant's mother. The background to the appeal is set out in the decision of the First-tier Tribunal at paragraphs [5] to [10] of that determination. The Sponsor was previously married in Uganda and there were three children by that previous marriage of which the Appellant is the youngest. The Sponsor entered the United Kingdom in 2005 after meeting the man who was to become her husband while she was in the UK on a visit visa. They subsequently married on 9th July 2005 and she later went on to acquire indefinite leave to remain and British citizenship. At the time she left Uganda, the Appellant was approximately 6 years of age.
6. Applications were made by the Appellant in 2007 and 2008 for entry clearance to join her mother in the UK but, on both occasions those applications were refused on the basis that there was no evidence from the Appellant's natural father that he consented to the Appellant coming to the United Kingdom or that he did not have parental responsibility.
7. In a witness statement filed by the Sponsor, it was stated that her ex-husband had been abusive in the relationship and that when she had left Uganda she had left her children in the care of their grandmother. The circumstances of the Appellant's elder siblings are that they are now both over the age of 18 and are living independently.

8. On 25th February 2015 the Appellant applied for entry clearance to join her mother in the UK. The basis of the application was that the Appellant attended boarding school and remained living with her grandmother out of term time. The Sponsor asserted that she remained the person who exercised sole responsibility for her daughter and that she had also sent financial remittances to Uganda to cover her school fees and maintenance. It was further asserted at the time of the application that the Appellant's grandmother was elderly and unwell and had to be admitted to hospital and could not care for the Appellant.
9. The decision of the Entry Clearance Officer which was made on 4th May 2015 set out the following reasons for refusing the application:-

"You wish to join your mother in the UK. I note that your two previous applications made in 2007 and 2008 were refused. It is unclear why your mother has waited a further seven years in making this application.

I note that your mother went to the UK in 2005 and since then obtained British citizenship. You have been placed in the care of your maternal grandmother and during the period of separation your mother has only visited you once (2013) in the last ten years.

It is stated that your father has no involvement in your life, although our records show that you had previously maintained contact with him up to 2005. It is unclear what contact if any you have had with him since then. The fact of the matter is that you have remained and have been cared for by your grandmother for the past ten years. You are financially supported by your mother, you have a carer and you are living in a stable environment. You have other siblings in Uganda who you have contact with. You have no medical condition that requires treatment in the UK. In view of this, I am therefore not satisfied that there are serious and compelling family or other considerations which make exclusion of you undesirable as required under paragraph 297(f) of the Immigration Rules.

I have also considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of the European Convention on Human Rights, warrant consideration by the Secretary of State of a grant of entry clearance to come to the United Kingdom outside the requirements of the Immigration Rules. I have decided they do not. Your application for entry clearance to come to the United Kingdom is therefore refused.

I have therefore refused your application because I am not satisfied on the balance of probability that you meet all of the requirements of the relevant paragraph of the United Kingdom Immigration Rules."

The Appellant sought to appeal that decision and Grounds of Appeal were issued on 1st June 2015. In those grounds, the Appellant set out that the Entry Clearance Officer had made errors of fact, relating to the number of visits that had been made to Uganda in the last ten years [paragraph 7] and that the Appellant, having previously been refused entry clearance twice for similar reasons did not attempt to make another application for seven years because it was felt that the previous two

refusals had led to disappointment. Furthermore, the Appellant's grandmother was able to care for the applicant at that time but that was no longer the case. The Grounds of Appeal enclosed a statement of the Appellant's Sponsor stating that the Appellant's grandmother was elderly and suffered from high blood pressure and was often admitted to hospital. It was also asserted that the Appellant's mother had sole parental responsibility for the Appellant's upbringing and thus there was "no need to bring serious and compelling circumstances into the equation [see paragraph 4 of the grounds]. In the alternative, if there were compelling circumstances, the Entry Clearance Officer should have considered the best interests of the Appellant and an evaluation of her welfare.

10. On 29th October 2015 the Entry Clearance Manager conducted a review having considered the documents that had been submitted with the Grounds of Appeal which included the statement of the Sponsor. In that review, the Entry Clearance Manager gave reasons as to why he was not satisfied that sole responsibility had been established. In relation to the grandmother's ill-health, the Entry Clearance Manager's review considered that the claim had not been supported by the evidence provided and that there had been no explanation as to why the Appellant's siblings, who continue to live in Uganda could not assist with her care. Therefore in addition, he was not satisfied that there were compelling family or other considerations which made her exclusion undesirable. Thus, he was satisfied after undertaking a review of the original application and the Grounds of Appeal that the decision to refuse the Appellant entry clearance should be maintained.
11. The appeal came before the First-tier Tribunal on 14th September 2016. The judge heard evidence from the Sponsor and in addition had a bundle of documents, which have also been placed before the Upper Tribunal.
12. The reasons and findings of fact are set out at paragraphs [14] to [30]. The judge dealt with the principal ground of refusal namely whether the Sponsor had been exercising sole responsibility for the Appellant at paragraphs [14] to [27]. In this regard, the judge gave consideration to the decision of **TD (Paragraph 297(i)(e) "sole responsibility") Yemen [2006] UKAIT 0049** and **Mundeba (Section 55 of the Borders, Citizenship and Immigration Act 2009 and paragraph 297(i)(f)) [2013] UKUT 88**.
13. The judge's findings of fact can be summarised as follows:-
 1. There was no dispute that the Appellant is the Sponsor's child or that the Appellant was living with her grandmother.
 2. The judge accepted that the Sponsor had made visits to Uganda in 2007, 2008, 2009, 2013 and 2014. The judge rejected the Respondent's case that there had only been one visit.
 3. The judge found that the Sponsor had continued to send money for the Appellant's education and maintenance [paragraph 15].

4. In respect of the Appellant's natural father, the judge considered the evidence of the Sponsor (both written and oral) and the judge found that the Appellant's father had relinquished all interest in and responsibility for the Appellant [see paragraphs 16 to 18].
 5. As to the Appellant's elder siblings, they were found by the judge to be too old now to be considered under the provisions for entry clearance based on sole responsibility. The judge found that there was no real factual dispute and that the Appellant's elder brother was working and living independently and that her sister was also at university and that while she continued to receive financial support arrangements would need to be made for her during the university holidays, she was nonetheless increasingly independent.
 6. The judge also found that there had been no assertion made that the brother or sister had ever exercised responsibility for the Appellant.
 7. The judge rejected at paragraph [20] the Sponsor's evidence that the separation was something that had been imposed upon them and was "unfair and cruel". The judge found that the current family situation arose out of choice and that the Sponsor decided to marry and relocate to the UK to take up family life there [see paragraph 20]. The Sponsor and Mr Riley had now had a child of their own born in 2009 who was a British citizen.
 8. There is no factual dispute that the Appellant had been in the day-to-day care of her grandmother since the Sponsor left for the UK in 2005.
14. The judge went on to consider the evidence when reaching a conclusion on the issue of whether or not the Sponsor had been exercising sole responsibility for the Appellant. At paragraph [22], the judge found that the Sponsor had left Uganda over ten years ago to set up a new life in the UK. She accepted, as set out earlier that she had visited Uganda on several occasions although there were several years when she did not so visit. The judge also accepted that the Sponsor maintained a keen interest in her children's lives and wellbeing and that she had sent money to support their education. However, the judge found that there was:-

"No evidence that persuades me that she was the sole point of contact for the school, which is surprising given that it was boarding school and that there would generally therefore have been a reduced need to be on hand, for example, to ensure attendance. By this I mean that it is likely to be easier to be the first point of contact with school that is boarding and to maintain and manage the relationship for another country than it would be if the school arrangements were day attendance only. There is also no evidence to demonstrate that she was making decisions about health issues, although that might also have been because no particular health issues arose during that time."

At paragraph [23], the judge found that whilst the Appellant had been at boarding school, she was nonetheless in the care of her grandmother for over ten years requiring her to live with her whenever she was not at school and therefore the judge inferred that "It would be the grandmother that would have to be available for the

Appellant if there were any problems during the school term.” The Judge also found at paragraph [23] that whilst it was the Sponsor’s contention that because the grandmother’s health was failing, that she was unable to continue her role, the judge found that this “by inference shows that the role that she was required to undertake was active and real.” The conclusions were set out at paragraphs [24] to [27]. Those paragraphs read as follows:-

“[24] In those circumstances, whilst the possibility exists for there to be a day-to-day carer for the child who does not acquire any parental responsibility for the child, whilst being directed by a parent in the UK who retained sole responsibility, I find that this was unlikely to have been the case in this case. The length of time that the grandmother was the responsible person in Uganda for the Sponsor’s children, that there were years when the Sponsor did not visit, and the absence of, for example, evidence in respect of the Sponsor’s influence over the Appellant’s school and education issues, leads me to find that the Sponsor has not had sole responsibility since she moved to the UK.

[25] However, the situation regarding that changed at the time of the grandmother’s death on 28th June 2016, which of course was prior to the ECM review. Much of the time of the hearing was spent on questions concerning the Appellant’s relatives in Uganda and on arrangements for her older sister, particularly when on leave from university. The implication of all this being that whatever those arrangements were, the same could be arranged for the Appellant.

[26] The Sponsor does not claim that there are no other relatives in Uganda however, there is no evidence before me that suggested any of these other relatives have ever taken direct responsibility for the Appellant in any way. In any case, the question before me is one of sole responsibility assessed according to the helpful guidelines in the above case law. It is a factual question. It is not a question of the reasonableness or otherwise of whether the Appellant could be looked after by someone else.

[27] Having considered the totality of all of this I found that since 28th June 2016 the Sponsor had sole responsibility for the Appellant and accordingly, paragraph 297(e) of the Immigration Rules is satisfied.”

15. At paragraph [28] of the determination, the judge made reference to paragraph 297(f) in respect of whether there were “serious and compelling family or other considerations which make exclusion of the child undesirable”. The judge observed that that subparagraph (f) is an alternative provision that would not need to be considered if (e) is met. The judge therefore found that having allowed the appeal under paragraph 297(e) there was no need to make any findings on (f).
16. At paragraph [29], the judge observed that the Entry Clearance Officer had not raised any grounds for refusal in respect of paragraphs 297(iv) and (v) relating to accommodation and maintenance.
17. At paragraph [30] the judge said this:-

“Of course, the matter is brought to me under the new appeal regime with the only available ground being that the decision was incompatible with the Human Rights Act 1998. I spent time up to now considering the Immigration Rules, but I find that in respect of the situation of a parent and child, that Article 8 ECHR is clearly engaged. I have carefully considered the tests set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. With regard to proportionality in particular, I find that satisfying the Rules regarding parents/child reunification is a lens through which the proportionality assessment in favour of the Appellant weighs very heavily, and indeed I find that the overall proportionality assessment weighs in the Appellant’s favour.”

Thus the judge allowed the appeal on human rights grounds.

18. The Entry Clearance Officer sought permission to appeal and on 1st March 2017 First-tier Tribunal Judge Dineen granted permission.
19. Miss Fijiwala on behalf of the Entry Clearance Officer relied upon the Grounds of Appeal.
20. She submitted that the judge erred in law in a number of respects. First of all that at paragraph [24], the judge found that the Sponsor did not have sole responsibility since she moved to the UK. At paragraph [25], the judge found that the Sponsor had had sole responsibility since 28th June 2016 (the Appellant’s grandmother’s death). It was submitted that the judge had erred in law by taking into account post-decision evidence and that the relevant date in an entry clearance case was the date of decision by the Entry Clearance Officer. She also observed that the judge appeared to place weight on the Entry Clearance Manager’s review at paragraph [25] in which she suggested that the grandmother’s death had taken place prior to the ECM review when the ECM review in fact took place on 29th October 2015. Miss Fijiwala submitted that the judge could only take into account evidence appertaining at the time of the decision as set out in Section 85A(2) and reaffirmed in the case of the **SSHD v SS (Congo) and Others [2015] EWCA Civ 387** at paragraph 58. She therefore submitted that the Rule could not be met.
21. As to the judge allowing the appeal on human rights grounds, she submitted that was an error of law and that the judge had proceeded on the basis that appeal rights were limited by what the judge referred to as the “new appeal regime” (see paragraph [30]). However the application was made on 16th March 2015 and whilst decided in May 2015, the new appeal regime did not apply. She further submitted that in any event Article 8 would fall to be assessed in light of the circumstances as at the date of decision (see **AS (Somalia)**). Consequently she submitted that the decision to refuse entry clearance was not disproportionate because at the date of the decision the Immigration Rules were not met and that there was no finding of compelling circumstances. Thus she submitted it would be open to the Appellant to make a fresh application.
22. As to the Rule 24 response, Miss Fijiwala submitted that the medical evidence relied upon by the Appellant, was post-decision evidence contrary to what was set out in the Rule 24 response and that there was no reference to it being relevant or to

affecting the grandmother's ability to care. The judge's findings make it plain that she was able to care for her child until her death. Thus she submitted the decision should be set aside and upon remaking should be dismissed.

23. As I have set out earlier in this determination, there was no appearance or representation on behalf of the Appellant. However what was sent for this Tribunal to consider was a Rule 24 response along with the original bundle of documentation. In the Rule 24 response the following is submitted:-
- (1) The judge did not err in law by allowing the appeal and considering the fact that the Appellant's grandmother had died whilst the appeal was outstanding. Whilst the Respondent argues that post-decision evidence should not have been considered and a fresh application should have been made if the death of the grandmother was to be considered, this is not "new evidence" or a change in circumstances because the situation at the date of the application was that the grandmother was very ill and unable to care for the Appellant and therefore her death did not change this.
 - (2) This issue was not raised at the hearing, denying the judge the opportunity to "justify his decision to allow the so called 'change of circumstances' to be considered and for the issue to be discussed in detail".
 - (3) Whilst it is argued that a fresh application should be made, such application would yield the same results as the appeal because the Sponsor does have sole responsibility for her daughter and meets the requirements of the Rules. The Appellant was 15 at the date of the application and she will be 18 in October this year. This has been a very long process and asking that a fresh application should be made the Respondent was seeking to keep the child away from her mother for an even longer and difficult position in Uganda without a suitable carer. The grounds go on to state "this is a cruel tactic by the Respondent to ensure the Appellant becomes too old to qualify for entry clearance in this category". The grounds make reference to the high application fees with making such a fresh application.
 - (4) As to the test of proportionality, the grounds state that having found the Sponsor did indeed have sole responsibility there was no need for the judge to go further and consider proportionality as the Immigration Rules had been met.

Discussion

24. I have had regard to the submissions made by Miss Fijiwala and also those set out in the Rule 24 response which I have considered in the light of the determination of the First-tier Tribunal Judge. Having done so, I have reached the conclusion that the judge erred in law in a number of respects and that the decision should be set aside. I shall set out my reasons for reaching that conclusion.
25. The first error of law that the judge made was at paragraph [30] when the judge set out that the case fell to be considered under the "new appeal regime". Whilst this was

an application that was made on 25th February 2015 and the decision was made on 4th May 2015, in the light of the legislation and the transitional provisions set out in the Immigration Act 2014 (Commencement Number 4 Transitional and Savings Provisions and Amendment) Order 2015 and the amendments coming into force on 6th April 2015 set out in Article 9(c)(ii) the application fell to be considered under the old Rules and legislation. I can find no reference in the determination to the judge having been referred to either of the parties to the transitional provisions that applied at that time. However as to the materiality of the error, it is necessary to consider the overall determination of the judge.

26. The judge was required to consider the relevant paragraphs of paragraph 297. It reads as follows:-

“Requirements for 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 in the United Kingdom

297. 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 in 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:

... ..
- (e) one parent is present and 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 has not formed 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 the child is seeking to join, own or occupy exclusively; and
- (v) can, and will, be maintained adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds and ...”.

27. The judge was required therefore to consider in particular, as set out in the refusal decision of the Entry Clearance Manager on review, the issue of sole responsibility which the judge referred to as the “principal Ground of Appeal” (see paragraph [14]).
28. There is no criticism made by either party as to the self-direction made by the judge at [14] where the judge made reference to the decision of **TD (Paragraph 297(i)(e) “sole responsibility”) Yemen [2006] UKAIT 00049**.
29. With regard to the “sole responsibility” test, paragraph 52 of **TD** is of relevance. There among other things it is emphasised that the question of who has responsibility for a child’s upbringing and whether that is sole is a factual matter to be decided on all the evidence and the term “responsibility” is a practical one which requires in each case looking at the question of who in fact is exercising responsibility for the child. It may be undertaken by individuals other than a child’s parents and may be shared between different individuals but even if there is only one parent involved in the child’s upbringing that parent may not have sole responsibility. Day-to-day responsibility or decision making for the child’s welfare may necessarily be shared with others such as relatives or friends because of the geographical separation between the parent and a child but that does not prevent the parent having sole responsibility within the meaning of the Rules. The test is not whether anyone else has day-to-day responsibility but whether the parent has continuing control and direction of the child’s upbringing, including making all the important decisions in the child’s life and if not responsibility is shared and therefore not sole.
30. The judge set out the findings of fact at paragraphs [15]-[27] of the determination as I have summarised earlier. At [24] after weighing up the evidence, the judge reached the conclusion that the Sponsor did not have sole responsibility for the Appellant since she moved to the UK. The judge concluded as follows:-
- “24. In those circumstances, whilst the possibility exists for there to be a day-to-day carer for the child who does not acquire any parental responsibility for the child, whilst being directed by a parent in the UK who retains sole responsibility, I find that this is unlikely to have been the case in this case. The length of time that the grandmother was a responsible person in Uganda for the Sponsor’s children, that there were years when the Sponsor did not visit, and the absence of, for example, evidence in respect of the Sponsor’s influence over the Appellant’s school and education issues, leads me to find that the Sponsor has not had sole responsibility since she moved to the UK.”
31. However at [25] the judge went on to state:-
- “25. However, the situation regarding that change at the time of the grandmother’s death on 28th June 2016, which of course was prior to the ECM review. Much of the time of the hearing was spent on questions concerning the Appellant’s relatives in Uganda and on arrangements for her older sister, particularly when on leave from university. The implication of all this being that whatever those arrangements were, the same could be arranged for the Appellant.

26. The Sponsor does not claim that there are no other relatives in Uganda however, there is no evidence before me that suggested any of these other relatives have ever taken direct responsibility for the Appellant in any way. In any case, the question before me is one of sole responsibility assessed according to the helpful guidelines in the above case law. It is a factual question. It is not a question of the reasonableness or otherwise of whether the Appellant could be looked after by someone else.
27. Having considered the totality of all of this I find that since 28th June 2016 the Sponsor had sole responsibility for the Appellant and accordingly, paragraph 297(e) of the Immigration Rules is satisfied.”
32. As Miss Fijiwala submits, the findings at [24 and 25] make it plain that the judge did not find that she had sole responsibility at the date of decision nor until a year later on 28th June 2016. Those findings of the judge are not challenged by either party and there is no cross-appeal on behalf of the Appellant. The submission made by Miss Fijiwala as set out in the grounds, is that the error made by the judge at [27] is that the judge erroneously took into account post-decision evidence and that the relevant date was the date of the decision, that is 4th May 2015.
33. The provisions of Section 85A of the 2002 Act (before the amendment) provided as follows:-

“On an appeal under Section 82(1), 82(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it considers relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.”

However Section 85(5) provides that the Rule in Section 85(4) was subject to the exceptions in Section 85A. Section 85A(2) read:

“Exception 1 is that in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the date of the decision.”

Section 82(2)(b) refers to “refusal of entry clearance.” Therefore the decision in the present case, being a decision to refuse entry clearance, fell within Section 85A(2) and contrary to the general Rule, the Tribunal was entitled only to consider the circumstances appertaining at the date of decision appealed against. As set out by Miss Fijiwala the same also applies to the Article 8 assessment (see **AS (Somalia) v the SSHD [2009] UKHL 32, [2009] 1 WLR 1385.**

34. The Rule 24 response on behalf of the Appellant submits that the evidence of the grandmother’s death was not “new evidence” or “change in circumstances” because the situation at the date of the application was that the grandmother was very ill and unable to care for the Appellant.
35. I have considered this submission in the light of the judge’s findings (which are not challenged) and the medical evidence provided in the bundle. The judge’s findings

do not expressly consider the medical evidence provided but it is plain from the findings made by the judge as to the issue of sole responsibility, that the judge found that the Appellant's Sponsor did not have sole responsibility until 28th June 2016, over a year after the decision was made. It follows from that finding that contrary to the case advanced on behalf of the Appellant, that she had taken over responsibility from the grandmother because of her ill-health which had prompted the application in the first place, had not been accepted by the judge. If it had been accepted by the judge, the judge would have found that the Appellant's Sponsor had sole responsibility for the Appellant at the date of decision and thereafter before 28th June 2016. This is supported by the ECM review who considered that the claim made that due to the grandmother's ill-health she could no longer care for the Appellant had not been supported by the evidence that had been provided. Consequently the judge's findings as to the effect of the grandmother's ill-health before 28th June 2016 did not demonstrate that any ill-health that she was suffering rendered her unable to care for the Appellant or to discharge any sole responsibility that she had for her.

36. Whilst I would accept that Section 85 makes reference to the Tribunal only considering circumstances "appertaining at the date of decision" and that there may be evidence that casts light on the circumstances appertaining at the date of decision, I am not satisfied that the medical evidence falls into that category. If it had done, as I have set out in the preceding paragraph, the judge's finding would have been that the grandmother's ill-health was such that she was unable to discharge sole responsibility before 28th June 2016. Furthermore, the medical evidence that was provided in the bundle that was dated May 2015 did not demonstrate that the grandmother's ill-health was such that she was not capable of discharging those duties. The witness statement filed by the Sponsor provided general comments [see paragraph 17] which made reference to problems with sleeping, heart and kidney, shortness of breath and high blood pressure. The document at page 32 was a handwritten document which gave no details of the person compiling or writing it or in what capacity, it referred to "hepatomegaly" which has not been explained in any of the evidence before the First-tier Tribunal or before the Upper Tribunal but which it is believed refers to an enlarged liver. There is also at page 33 an echocardiography report which refers to "DCM". Again none of that has been explained although "DCM" is known as "dilated cardiomyopathy" which relates to the Appellant's grandmother having a heart problem. However none of that evidence which was before the First-tier Tribunal demonstrated that the Appellant's grandmother was incapable of discharging responsibility or the sole responsibility that she had before that date or was unable to continue to give care to the Appellant which was a finding the judge made on the evidence. The judge's finding is clear that it was only since the date of 28th June that the Sponsor had sole responsibility and therefore from that finding it must be inferred that the grandmother, despite any other medical problems that she had, was still continuing to care and look after the applicant and thus have sole responsibility.
37. The submission made in the Rule 24 response does not give any explanation relating to that or explains how the evidence one year later demonstrates that it casts light on what was reasonably foreseeable at the date of decision (see Section 85 of the 2002

Act before the amendments). A person may have a range of ailments but there has to be an evidential link between the condition and in this case the circumstance which is the cause of the death in June 2016. There was no evidence at the time of the decision which suggested that she had abdominal cancer or that she was being treated for this or that her life expectancy had been shortened. None of the evidence provided in 2015 supported that and therefore the evidence provided in 2016 could not reasonably be described as evidence which shed light on the circumstances appertaining at the date of decision. Importantly there was no evidence as at the date of decision or beyond until June 2016 that the Appellant's grandmother was unable to care for the Appellant and that she continued to discharge her responsibility as she had done for the previous ten year period.

38. It is also right to observe that the judge was purporting to consider the ECM review as the operative date but the judge was mistaken about that date. At paragraph [35] the judge recorded that the grandmother's death on 28th June 2016 was prior to the ECM review but as Miss Fijiwala submitted the Entry Clearance Manager's review was dated 29th October 2015 and therefore the date of death was significantly later in 2016.
39. Consequently the judge's decision at [27] that she had met paragraph 297(e) of the Immigration Rules and on the same basis that there was a breach of Article 8 of the ECHR [see paragraph 30] cannot be maintained in the light of the above. I therefore set aside the decision.
40. As to remaking the decision, no further submissions have been made in the Rule 24 response. The directions sent to the parties with notice of today's hearing made it clear that if the Upper Tribunal decided to set aside the decision of the First-tier Tribunal it would proceed forthwith to remake the decision. Nothing further is offered. The parties have not attended before the Tribunal.
41. I have therefore considered the material that was before the First-tier Tribunal as set out in the bundle which accompanied the Rule 24 response on behalf of the Appellant. In the light of the matters set out above and the unchallenged findings of fact made that the Appellant's Sponsor at the date of decision did not have sole responsibility and that the Appellant cannot demonstrate that she met the requirements of paragraph 297(e). As to paragraph 297(f) the Respondent relies on the matters that were set out in the decision letter, noting that the Appellant had remained being cared for by her grandmother who had sole responsibility, that she was being financially supported by her mother and living in a stable environment and had contact with her other siblings and that she had no medical condition that required any treatment.
42. Whilst the judge made no specific findings as to paragraph 297(f), the findings made in the determination overall are relevant to this issue. The findings which I have summarised earlier demonstrate that the judge was satisfied that she was well cared for in a stable environment that had continued for a sustained period of ten years, that she had continuing contact with her elder siblings, that she continued to receive

financial assistance from her mother in the UK and that she was not subject to any medical problems and that her grandmother had responsibility in dealings with the school. Those findings remain unchallenged by the Appellant.

43. The skeleton argument in the original bundle made reference to the decision of **Mundeba (Section 55 and paragraph 297(i)(f)) DRC [2013] UKUT 88**. In that decision the Upper Tribunal held that “serious” meant that there needs to be more than the party simply desiring a state of affairs to obtain .” “Compelling” in the context of paragraph 297(i)(f) indicates considerations that are persuasive and powerful. It sets a high threshold and it excludes cases where, without more, it is simply the wish of the parties to be together, however natural that ambition may be. Family considerations require an evaluation of the child’s welfare including emotional needs “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 unacceptable social or economic environment. “Serious” read with “compelling” together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The focus needs to be on the circumstances of the child in the light of his or her age, social background and other history and will involve an inquiry as to whether there is evidence of neglect or abuse, unmet needs that should be catered for, stable arrangements for the child’s physical care. The assessment involves consideration as to whether the combination of circumstance is sufficiently serious and compelling to require admission. (See paragraphs 34 to 37 of **Mundeba**).
44. The exercise of the duty by an Entry Clearance Officer to assess the application under the Immigration Rules as to whether there are family and other considerations that make the child’s exclusion undesirable, involve an assessment of what the child’s welfare and best interests require. It is common ground that that is a primary consideration.
45. When applying those factors to the unchallenged findings of fact that were made by the judge, the Appellant’s circumstances do not demonstrate that there are any “serious or compelling” family or other considerations that would make the Appellant’s exclusion from the United Kingdom undesirable. It could be said that a child’s best interests are to be brought up by her natural parent (rather than her grandmother) this would still have to be considered alongside the evidence and the findings made that there was no evidence of neglect but evidence of a stable arrangement for her care which had endured for a significant part of A’s life from the age of 6 and she continued to have contact with her other elder siblings and that no unmet needs were advanced from the evidence. There was no evidence either of any neglect. This is an evaluation of those findings and do not demonstrate considerations that are “powerful or persuasive” (see **Mundeba**). The Appellant at the relevant time was being looked after by her family members and her needs were being met and therefore the evidence does not demonstrate that the Appellant could meet paragraph 297(f) of the Immigration Rules.

46. As to Article 8 outside of the Rules, I have had regard to the decision of **SS (Congo)** and whether there are any compelling circumstances to consider the case outside of the Rules. In the light of the findings made and the evidence that I have referred to, there is no evidence upon which can be properly said to amount to compelling circumstances to give consideration outside of the Rules. I do not consider that there have been any matters advanced on behalf of the Appellant which might be capable of amounting to compelling circumstances when considering the evidence as at the date of decision. There are no circumstances which are advanced on behalf of the Appellant that have not already been considered under the Immigration Rules when considering Article 8 outside of the Rules. The Appellant could not meet the Rules and given the nature and scope of the Rules, there could not be any compelling circumstances which would enable her to succeed outside of the Rules when all the relevant compelling circumstances (if any) would necessarily have been considered in the context of whether the Appellant could satisfy 297(e) or bring herself within 297(i)(f).
47. Nonetheless If I were to consider the claim outside of the Rules on Article 8 grounds and whether the refusal grant entry clearance would result in unjustifiably harsh consequences for the applicant and as such that the refusal would not be proportionate under Article 8, that assessment would have to be made in the light of the factual findings of fact that were made by the Judge and those I have set out relating to Paragraph 297(f) and in accordance with the best interests of the child concerned which are a primary consideration (see *Zoumbas V Secretary of State for the Home Department* [2013] UKSC 74 and in accordance with the duty set out in S.55 of the *Borders, Citizenship and Immigration Act 2009*). Those findings are in summary that it could be said that a child's best interests are to be brought up by her natural parent (rather than her grandmother) however this would still have to be considered alongside the evidence and the findings made that there was no evidence of neglect or unmet needs but evidence of a stable arrangement for her care which had endured for a significant part of A's life from the age of 6. She received financial assistance from her mother and regular visits had taken place and she continued to have contact with her other elder siblings with whom she enjoyed family life and that no unmet needs were advanced from the evidence. No further evidence has been provided to demonstrate that those findings are undermined. In applying paragraph 5A of the 2002 Act [introduced by Section 19 of the *Immigration Act 2014*] and Section 117A or B ("public interest considerations") the maintenance of immigration control is in the public interest as declared in section 117B(3). As to the other considerations, there does not seem to be a dispute that the Appellant can speak English and that she herself is not financially independent although the finding of the judge was that her mother could support her. Those are in essence neutral factors and do not by themselves demonstrate that a grant of leave to enter should be made. But having taken into account the factual findings of the judge and those matters set out above in the proportionality balance, I can find no grounds for concluding that the decision of the Entry Clearance Officer amounted to a disproportionate interference with the Article 8 rights of the Appellant.

48. I therefore dismiss the appeal under the Immigration Rules and on human rights grounds.
49. As the Rule 24 response recognises, it will be open to the Appellant to make a fresh application before the Entry Clearance Officer. The findings of fact made by the judge relating to the circumstances in 2016 and that since that date the Sponsor has had sole responsibility and that the Appellant's father has no ongoing relationship with his daughter, no doubt will form the evidential basis upon which any new decision is made.
50. However for the reason given, the decision of the First-tier Tribunal Judge erred in law and therefore I set that aside. The appeal is remade as follows. The appeal is dismissed under the Immigration Rules and on human rights grounds.

Signed

Date 2/5/2017

Upper Tribunal Judge Reeds