



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

Appeal Number: HU/00738/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9 November 2018**

**Decision & Reasons Promulgated  
On 26 November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PEART**

**Between**

**[O H]  
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr Youssefian

For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Egypt. He was born on 20 September 2012. His application for entry clearance as the dependent child of a person present and settled here was refused by the Entry Clearance Officer dated 27 November 2017. The appeal was dismissed by Judge Juss in a decision promulgated on 24 May 2018.
2. The grounds claim the judge erred because he jumped to conclusions he was not entitled to reach, ignored evidence from the sponsor "... *despite him being credible ...*" and mentioning evidence which was not produced by the appellant. The grounds go on to say that given that the oral

evidence was significant, such error was material. Given the judge may have relied upon evidence which was never in front of him, the decision was “*infected with error*”.

3. The grounds took issue with [18] of the decision where the judge commented that the evidence of sole responsibility of the sponsor was lacking. The grounds claim that there was evidence in terms of a sworn declaration that the mother had given up responsibility of her son to the sponsor. The grounds claim the judge was obliged to make a finding about the sponsor’s credibility and that the mother’s declaration was as the grounds put it, “*not correct*” but he failed to do so.
4. The grounds claim the judge misapplied the test in **TD (Yemen) [2006] UKAIT 00049**.
5. Judge Nightingale granted permission on 20 September 2018. She said inter alia as follows:

*“2. The grounds argue that the judge failed to make any findings with regard to the oral evidence given by the sponsor father. The judge also failed to make any findings with regard to the role of the sponsor in the continuing control and direction over the appellant’s upbringing. The judge referred to two affidavits from the appellant’s grandparents, but no such affidavits were submitted. The judge limited his consideration of the situation of the appellant and his mother rather than making any findings on the evidence as a whole.*

*3. It is arguable that the judge made no proper findings on the evidence of the sponsor, who did give oral evidence before the Tribunal. It is arguable that the judge gave no reasons for rejecting his account, if indeed he did reject his account. It is also arguable that the judge erred with regard to the existence of the affidavits which do not appear on the court file. It is also arguable that the judge erred in failing to make any adequate consideration of the sponsor’s role in the appellant’s life in accordance with the test in **TD (Yemen)**.”*

### **Submission on Error of Law**

6. Mr Youssefian relied upon the grounds. The judge had failed to take into account material evidence and had failed to carry out a fact-sensitive analysis as he was obliged to do in terms of **TD**.
7. Mr Clarke conceded that there were errors but submitted that they were not material.

### **Conclusion on Error of Law**

8. The judge said at [17] that he had given careful consideration to all the documents before him and to the oral evidence and submissions which he said were set out in the Record of Proceedings.
9. He carried out an analysis at [18]-[24]. The judge did not accept that the sponsor father had sole responsibility and commented that it was insufficient simply to make a declaration to that effect. The evidence before the judge was that the sponsor father accepted that he had joint responsibility. See statement at P6[2].
10. There was no credible evidence as to why the child's mother would become less willing to care for him and to formally relinquish all parental responsibilities.
11. The judge did not accept as credible that the child's mother should suddenly just decide not to look after her 5 year old son but continue looking after her 3 year old daughter. The judge took the view which he was entitled to come to, that there had been a decision made that the appellant was able to travel alone to join his father here.
12. The judge found at [22] that parental responsibility was jointly shared until the declaration was made but that in any event both children were still jointly cared for. The judge rejected the claim that the appellant aged 5 years or thereabouts was now with the sponsor father's cousin.
13. The judge's decision contains various errors:
14. On the front sheet, the judge refers to the respondent being the Entry Clearance Officer Islamabad and there being an Urdu interpreter.
15. At [2] the judge refers to the burden of proof as of the date of the decision to refuse, whereas, he was meant to be considering the circumstances as of the date of the hearing.
16. At [5] the judge includes the following wholly erroneous paragraph, nothing to do with this appeal:

*"5. Second, two affidavits have been provided from the appellant's grandparents stating that the appellant had been residing with them since the father migrated to the UK in 2007. From these affidavits, which were amounted (sic) to a self-declaration in any event, there was limited evidence demonstrating that he was living with the grandparents."*
17. I must consider whether these errors of law which appear to have been caused by "copy and paste" are material, bearing in mind the findings the judge made.
18. The judge carried out an analysis of **TD** at [20]. Unfortunately, although he refers to the legal application of the role of sole responsibility set out in

**TD**, the judge fails to set the facts of the appellant's case against the **TD** criteria.

19. I bear in mind **ML (Nigeria) [2013] EWCA Civ 844**. Lord Justice Moses said inter alia in [1] quoting Carnwath LJ describing “*anxious scrutiny*” in **R (YH) [2010] EWCA Civ 116**:

*“..... it underlines ‘the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account’. It follows that there can be no confidence that that approach has been taken where a Tribunal of fact plainly appears to have taken into account those matters which ought not to have been taken into account.”*

And at [2] Moses LJ said inter alia “*the instant appeal is yet another unfortunate example where the First-tier Tribunal displayed an absence of care .....*”.

20. In agreeing with Moses LJ, Sir Stanley Burnton said inter alia at [16]

*“A material error of fact is an error as to a fact which is material to the conclusion. If there is any doubt as to whether or not the incorrect fact in question was material to the conclusion, that doubt is to be resolved in favour of the individual who complains of the error.”*

21. It is clear from the judge's decision and for the reasons I have set out above that the appellant's appeal was not considered with the care that was required. The decision of the First-tier Tribunal contains errors of law which infect his findings and render them unreliable. The errors are material.

22. I have found that the judge materially erred. The remaking of the appeal will require significant fact-finding. Having regard to [7.2] ([of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal]), I consider this is an appeal which is appropriate to be remitted de novo to the First-tier Tribunal.

### **Notice of Decision**

The decision is set aside and will be remitted to be heard de novo in the First-tier.

No anonymity direction is made.

Signed

Date 9 November 2018

Deputy Upper Tribunal Judge Peart

