



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

Appeal Number: HU/02722/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19 December 2017**

**Decision & Reasons
Promulgated
On 23 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**[S K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

**ENTRY CLEARANCE OFFICER,
SHEFFIELD**

Respondent

Representation:

For the Appellant: Mr N Aghayere of Freemans Solicitors

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Widdup promulgated on 24 February 2017 dismissing the Appellant's appeal against a refusal of entry clearance.
2. The Appellant is a citizen of Nigeria born on [] 2006. He made an application for entry clearance to join his father, [MK] ('the sponsor'), who is settled in the UK. The application was refused for reasons set out in a Notice of Immigration Decision dated 17 June 2015. Amongst other things the refusal made reference to the absence of a TB certificate and the unsatisfactory nature of DNA test results relied upon in support of the application. These are no longer live issues before me. The issue that detained the First-tier Tribunal was primarily in relation to the extent of the sponsor's involvement in the life of the Appellant and in particular whether or not he had 'sole responsibility' for the Appellant.

3. The Appellant's appeal was dismissed by the First-tier Tribunal for reasons set out in the decision of First-tier Tribunal Judge Widdup.
4. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted on 9 October 2017 by First-tier Tribunal Judge Farrelly. In granting permission to appeal Judge Farrelly identified the First-tier Tribunal Judge's consideration of the case with reference to the Immigration Rules and in particular paragraphs 297(i)(e) and (f) in respect of 'sole responsibility' and 'serious and compelling circumstances'. Judge Farrelly observed that "*Insofar as the judge considered if the relevant rule was met [there was] no arguable error*". However, permission to appeal was granted on the basis that there was some uncertainty as to the extent to which the Judge had properly identified and considered the case with reference to Article 8 of the ECHR. Judge Farrelly said this:

"However, the decision suggests the appeal was proceeding on the basis the ability to meet the rule was the central issue. This impression is supported by the comments made and the absence of any reference to the jurisprudence. It is arguable such a restricted approach infected the consideration of article 8."

5. The Respondent has filed a Rule 24 response dated 16 November 2017 which resists the challenge in the following terms:

*"The grant of permission is limited to the consideration outside the Rules. It is contended that the test for an appeal to be allowed outside the Rules is now set out in **MM (Lebanon)** and **Agyarko** that the decision must lead to unjustifiably harsh consequences for the Appellant and other family members. Given the FtTJ's finding in respect of there being no serious and compelling circumstances in this appeal and the finding that the responsibility for the Appellant is shared with the maternal grandmother, who is able to take care of him, it is asserted that it cannot be shown that the decision leads to unjustifiably harsh consequences and as such it is asserted that there is no material error in the determination."*

6. Ms Fijiwala essentially relied upon that argument before me and additionally directed my attention to **Agyarko [2017] UKSC 11**, in particular at paragraph 48 where the reference to a refusal resulting in "*unjustifiably harsh consequences*" is to be found.
7. Inherent in the reasons given for the limitation of the grant of permission is that the Judge's findings of fact so far as a consideration of the case by reference to the yardstick of the Immigration Rules was concerned were not arguably impugnable. In those circumstances I turn to the findings of the First-tier Tribunal Judge, which are set out in substance from paragraphs 30 onwards. I do not propose to rehearse in full detail all such findings as they are a matter of record. However, it is appropriate to highlight the following matters.

(i) The Judge found that the evidence provided in respect of the mother's consent to the Appellant's relocation to the UK was "*very unsatisfactory*" (paragraph 35).

(ii) The Judge also considered that evidence purportedly emanating from the Appellant by way of a handwritten letter was such that "*little weight*" was to be attached to the letter (paragraphs 37-38).

8. The Judge concluded that he was not satisfied "*that the mother has indeed consented to the application nor am I satisfied on the evidence before me that the mother has no role in the Appellant's life*" (paragraph 39). It seems to me that that was a conclusion entirely open to the Judge given the unsatisfactory nature of the evidence provided in respect of consent of the mother and the letter purportedly written by the Appellant.
9. This is perhaps a convenient juncture to pause to note that in his submissions Mr Aghayere raised a matter not identified in the grounds of appeal, namely the absence of a copy of the mother's consent letter before the First-tier Tribunal. He initially suggested that in circumstances where the letter itself was not before the Tribunal it was not open to the Judge to express the concerns and reach the findings in respect of the mother's consent.
10. Putting aside for a moment that this was not a ground of challenge raised in the grounds in support of the application for permission to appeal and that there has been no attempt to amend or augment the grounds, it seems to me that this is ultimately a point with no merit. It was not the contents of the letter that caused the Judge to marginalise its significance and characterise the issue of the mother's consent as being "*very unsatisfactory*". Rather it was the manner in which it was said that the letter had come into existence. Bearing in mind that it was common ground between the parties that such a letter had indeed been submitted as part of the application, it seems to me that the absence of a copy of the letter was not material to the Judge's consideration of the narrative account of how the letter had come to be written.
11. In any event, the logic of Mr Aghayere's position was to the effect that in the absence of the letter no findings could be made on it. If that was indeed the case then that would have been a matter that would have, as it were, cut both ways. It would have meant that the Appellant had no supporting evidence of his claim that his mother had consented to him joining his father in the UK. In the circumstances Mr Aghayere did not pursue the point any further.
12. At paragraph 41 of the Decision the Judge noted that there was no evidence from the paternal grandmother, in whose care it had been said the Appellant had been left by his mother at the age of about 4. Other omissions in the evidence were identified by the Judge from paragraphs 43 onwards: the Judge considered that there was little evidence in respect of money transfers to Nigeria; it was noted there was no evidence from the

Appellant's church to the effect that his father had been responsible for choosing the church at which he attended; it was also noted that there was only post-decision evidence by way of a single letter from the Appellant's school; no receipts had been produced to show for how long expenses had been paid, and there was no evidence to show what involvement the sponsor had had in the choice of school or in the Appellant's progress at the school; although the Sponsor had claimed that he sent money for the Appellant's medical expenses no evidence had been provided about any such medical needs.

13. The Judge in all of the circumstances - which, as I have noted above, Judge Farrelly did not consider were arguably impugnable - reached the conclusion that the Appellant had failed to demonstrate that the sponsor had sole responsibility for him, and also *"that the reality is that the responsibility for the Appellant has been shared with the paternal grandmother and/or with other family members"*. This evaluation in respect of paragraph 297(i)(e) informed the evaluation in respect of paragraph 297(i)(f): e.g. see paragraph 49.
14. It may be seen that in significant part the Judge made findings that rejected aspects of the premises of the Appellant's case; moreover, he reached conclusions that undermined the notion that was at the core of the case - that the Appellant's father was the primary adult in the Appellant's life and solely responsible for him.
15. Further to the above, and for the avoidance of any doubt, it seems to me that the substance of the grounds as pleaded and the majority of the submissions advanced by Mr Aghayere before the Tribunal today were to seek to challenge the factual findings of the First-tier Tribunal Judge by attempting to re-argue the case and not by identifying any error of law. This seemed to be the approach notwithstanding the basis of the grant of leave to appeal.
16. Mr Aghayere reiterated the substance of paragraph 6 of the grounds of appeal to the effect that the Judge's evaluation of best interests was unsustainable in circumstances where the Appellant had provided a statement expressing his wish to join his father in the UK. For reasons that, in my judgment, were entirely sustainable the Judge explained why he considered that little weight could be given to the letter from the Appellant. The Judge considered that the language and vocabulary used in that letter and the quality of the spelling was such that he could not overlook the possibility that the letter had been composed for the Appellant. It seems to me it was open to the Judge to take that view.
17. More particularly, as the Judge identified, the letter was not consistent with the narrative advanced by the sponsor. The letter included the phrase *"I have never known my mother"*. Plainly, that was factually discrepant with the suggestion that he had lived with his mother up until the age of 4 or 5. Charitably, the Judge decided to also consider whether

perhaps the Appellant had meant that he could not recall his mother but found that that was improbable, given that somebody who had lived with their mother up until the age of 4 or 5 would unlikely have forgotten all about her by the time he was 10 or 11.

18. Paragraph 8 of the Grounds suggests that the Judge “*has been preoccupied with making key findings of fact (which he is entitled to) against the Appellant in relation to his presumed relationship with his mother*”. I am afraid I quite simply do not follow the substance of that ground. It seems to acknowledge that it is open to the Judge to make relevant findings of fact. Indeed, in this context, bearing in mind that there was an issue as to who was responsible for the Appellant’s upbringing, it seems to me that the Judge was doing no more than considering and trying the issues in the appeal.
19. I turn to the particular considerations that Judge Farrelly considered merited the grant of permission to appeal.
20. I note that at paragraph 5 of the Decision the Judge identified in terms the basis of the Appellant’s appeal: “*The Appellant appealed on human rights grounds.*”
21. This was indeed an appeal limited to human rights grounds: there was no jurisdiction to allow or refuse the appeal on Immigration Rules grounds. That of course does not mean that the Immigration Rules were not relevant to an evaluation of the human rights grounds - in particular the issue of proportionality.
22. Paragraph 7 of the Decision is in these terms:

“The burden of proof is on the Appellant to show that at the date of the refusal he met the requirements of the Immigration Rules. Alternatively he must prove to the civil standard the facts on which he relies in support of his Article 8 claim.”

Whilst there is an element in that passage to suggest that the Judge thought that he had a mixed jurisdiction in respect of both the Immigration Rules and Article 8, it is nonetheless clear enough that the Judge was alert to Article 8 being a relevant ground of appeal before him. Ultimately any possible misconception that there was also an appeal under the Rules is not inevitably a material error in circumstances where it was incumbent upon the Judge to have regard to the Rules even if that was only to inform his Article 8 evaluation.

23. In setting out his conclusions and findings of fact the Judge at paragraph 30 embarks upon his consideration of paragraph 297(i)(e) and (i)(f). In my judgement it cannot be inferred from paragraph 30 that the Judge had lost sight of the fact that there were human rights grounds to be considered: indeed, at paragraph 53 the Judge identifies in terms: “*The final question*

is whether the appeal can succeed outside the Rules under Article 8", and the rest of the decision is then taken up with a consideration of Article 8.

24. In those circumstances I do not accept that the Judge fundamentally misconceived that he was required to determine 'human rights' grounds of appeal.
25. I nonetheless acknowledge that the consideration of Article 8 is somewhat brief. Be that as it may, the Judge states in terms at paragraph 54: "*I am unable to identify any circumstances which could be said to be compelling enough to justify the grant of entry clearance under Article 8.*" The Judge also identifies the significance of the Immigration Rules and their general compliance with aspects of human rights and promoting the best interests of children (paragraph 55). Further, the Judge identifies that the interests of the Appellant "*are of first consideration*" (paragraph 55), which seems to me to be an accurate reflection of the primary- but-not-paramount importance of the best interests of children in immigration cases.
26. The simple reality is: given the First-tier Tribunal Judge's findings the conclusion on Article 8 is sustainable.
27. The Judge's findings were to the effect that the factual premise of the Appellant's case was rejected. The Appellant had been looked after in Nigeria since his father had left for the United Kingdom when the Appellant was approximately 1 year old. The Appellant's father had not returned to Nigeria and had not seen the Appellant between 2007 and 2015. The Judge found that the evidence of the extent of the sponsor's involvement with the Appellant was limited and unsatisfactory. The Judge also found that the effect of the Respondent's decision would not interfere with the *status quo* in which the sponsor had essentially acquiesced, and that there was no evidence of any adverse impact upon the Appellant - who would continue to be able to enjoy the family life that he had enjoyed in Nigeria since his father's absence, notwithstanding the supposed separation from his mother.
28. The Immigration Rules were not met. This is a significant aspect of the public interest considerations. No exceptional circumstances were identified - a conclusion entirely open to the Judge, and indeed one that seems to me near inevitable on the findings made by the Judge.
29. Accordingly, notwithstanding some reservation as to the extent to which the Judge clearly identified that this was a human rights grounds only appeal - a reservation in substance ameliorated because a consideration of the Rules was necessary as informing the Article 8 consideration) - I am not persuaded that a material error of law has been identified.

Notice of Decision

30. The decision of the First-tier Tribunal contained no material error of law and stands.

31. The Appellant's appeal remains dismissed.

32. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: 21 January 2018

Deputy Upper Tribunal Judge I A Lewis