



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23602/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2018

Decision & Reasons Promulgated
On 18 July 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

B T W G
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Uddin of Counsel, instructed by OTS Solicitors
For the Respondent: Ms J Isherwood

DECISION AND REASONS

1. The appellant was born on 3 February 2002 and is a citizen of the Ivory Coast. The sponsor in this case is his mother. His application to join her in the United Kingdom was refused by the Respondent on 9 September 2016. At that stage it was not accepted

that the parties were related as claimed. In addition, the respondent was not satisfied that the sponsor had sole responsibility for the appellant and the application was refused under paragraph 297(i)(e) of the Rules. In addition the respondent was not satisfied that there were serious and compelling family or other considerations which made the appellant's exclusion undesirable or that suitable arrangements had been made for his care and the application was additionally refused under paragraph 297(i)(f) of the Immigration Rules. The application was also refused under Article 8, and while the appellant's case had been considered in the light of the respondent's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009, there were no exceptional circumstances.

2. There was a review by the Entry Clearance Manager on 16 January 2017. The concerns about the relationship were maintained and sole responsibility had not been demonstrated. The parties had lived apart since 2002. The decision to refuse the application was maintained.
3. The appellant appealed, and his appeal came before the First-tier Tribunal on 8 September 2017. The sponsor appeared for the child – the appellant was unrepresented on that occasion.
4. The judge accepted that the appellant's biological father had exercised no responsibility for him and the sponsor was the only biological parent who had attempted to exercise responsibility. The judge referred to **TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**.
5. The judge also accepted that the evidence supported the biological relationship between the sponsor and her son and there has been no cross-appeal or challenge to that aspect of the judge's decision. The judge records that the sponsor had been living with her mother in 2002. She had become pregnant, but her boyfriend had had no interest in the appellant and she had taken him away from her family as he was in danger of starvation and malnutrition. She had placed him with an unrelated individual, Mr Y. She was not in contact with the appellant's school and had no school reports. The appellant was being brought up as a Roman Catholic and was in perfect health and had had vaccinations. They communicated by phone and money was sent to buy clothes and she had seen the appellant in 2015 and 2016. It emerged that the sponsor could not read English and she had difficulty with reading in general. The appellant also had a similar issue which was holding back his education.
6. The judge also heard from the sponsor's husband.
7. In his findings, the judge referred to the long period of separation and there had only been two visits by the sponsor and both had been quite recent and money transfers did not go far back in time: "this suggests that the responsibility was not exercised at all, or not solely, until quite recently, thus falling short of the threshold."
8. Paragraphs 36 and 37 of the determination read as follows:

“36. The sponsor said her son had no medical issues and no disabilities. Then it emerged that he has severe difficulties with reading French. I am not persuaded that she understands what the situation is, what some of these words mean or that she has the ability to be solely responsible for a child with problems. Her reading is very limited and so she has not been able to enhance her understanding of life by wide reading. She gave no sign that she had ever sought effective help to address this issue of hers. In those circumstances, it was very brave to start an appeal in a legalistic Court process.

37. In some situations, where the biological father has walked away at the outset, the other parent will have sole responsibility and that allows for delegation to an extent but the major decisions are made by that parent and not actually shared (see **TD (Yemen)**). This is not easy to show and the case law says it is exceptional. I am not sure that the sponsor has appreciated this fact.”

9. The judge did not find that the sponsor was the sole decision maker. She had not attempted to move the appellant from Mr Y’s house. Any lack of progress in school had not been addressed by the sponsor. The judge was not satisfied that Mr Y was going to stop looking after the appellant and there were many others who could look after him. The judge noted there were family members in the Ivory Coast and stated “the situation taken in the round is not so desperate that it amounts to extremely compelling compassionate circumstances.” The judge found there was an insufficient paper trail covering remittances or school reports and he was satisfied that most of the responsibility was exercised by Mr Y, shared with the sponsor.

10. Having referred to **Agyarko v Secretary of State [2017] UKSC 11** and having set out the provisions of Section 117B of the 2002 Act he stated at paragraph 44 as follows:

“44. The appellant does not read or speak any English and thus fails under Section 117B. If his education is as described he is not in any position to be financially independent when he ceases to be a minor. He has never visited the UK and is not used to its culture. The status quo will allow occasional visits and more telephone calls.”

11. The judge accordingly dismissed the appeal under the Rules and on human rights grounds.

12. There was an application for permission to appeal to the First-tier Tribunal. The sponsor filed a supplementary witness statement accompanying these grounds. She said that she had attended the hearing with her husband who had prepared the application for the appellant. He had lodged the appeal and prepared for the hearing and the sponsor said she relied on his support every step of the way.

13. In paragraph 5 of her statement the sponsor said that her husband was asked to leave the court room as he was not a legal representative.
14. The sponsor stated that as soon as he was asked to leave she became extremely nervous as he was the one who had prepared for the hearing – her husband was supposed to represent the appellant’s case and also interpret for the sponsor as she could not speak English very well. After her husband’s departure she had felt nervous and due to her poor understanding of English she did not understand their questions very well. She had tried to answer as many questions as possible, however she was struggling. While she did not suffer from learning difficulties, she could not read or understand English very well and only communicated at a basic level. She was not aware she could request an interpreter on the day. She thought it was evident from the way she was speaking that she could not understand the judge or the Presenting Officer. She was not offered an interpreter. In the grounds a point was taken about the proceedings being unfair and her difficulties, it was submitted, emerged from what had been said by the judge about the sponsor’s lack of understanding and limited reading abilities. The judge should have checked whether the sponsor understood the questions being asked of her.
15. It was also argued that the judge had not considered paragraph 297(i)(f). The last sentence of paragraph 39 of the determination – “the situation taken in the round is not so desperate that it amounts to extremely compelling compassionate circumstances” – did not properly reflect the sub-paragraph. Reference had been made by the judge to the appellant’s bundle in paragraph 9 and the appellant’s statement in paragraph 16, however there had been no bundle and no statement.
16. The judge had misdirected himself in referring to the sponsor exercising responsibility “until quite recently” - it was clear that responsibility might have been exercised for a short duration – reference was made to paragraph 52(ii) of **TD (Yemen)**:

“the term ‘responsibility’ in the immigration rules should not be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.”
17. The judge it was submitted had also erred in paragraph 37 of the decision in stating that sole responsibility was not easy to show and that the case law said it was exceptional. What had been said in **TD (Yemen)** at 52(iv) related to the situation where both parents were involved in the upbringing of the child. In such circumstances “it will be exceptional that one of them will have sole responsibility.” This was not the situation in the sponsor’s case. The grounds also submitted that there had been a failure to consider Section 55 and that the case of **Agyarko** had no application in the instant proceedings. It was also submitted that the judge had erred in referring to Section 117B(2) of the 2002 Act as setting a pass or fail test. It was not there to defeat applications for entry by children who are eligible to join a parent in the UK. In

relation to Section 117B(3) the appellant satisfied the primary maintenance requirement in the substantive immigration rule and accordingly the appellant was not financially dependent on the state. The view that the judge had taken that the appellant would not be financially independent when he ceased to be a minor was speculative and wrong.

18. The application for permission to appeal was refused by the First-tier Tribunal. However the application was renewed and permission to appeal was granted by the Upper Tribunal on 12 April 2017. Permission was granted on each ground of appeal but emphasis was given to the points taken in relation to paragraph 297(i)(f).
19. Mr Uddin acknowledged that this was the primary ground and that the only possible reference to the sub-paragraph was at the conclusion of paragraph 39 of the decision which did not properly reflect the Rule. No consideration had been given to Section 55 and Counsel referred to **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC)**. He elaborated on the grounds of appeal and argued that the judge had made a flawed assessment and had failed to produce a balance sheet when considering Article 8 issues. It was plain that there had been procedural unfairness.
20. Ms Isherwood submitted there had been no material error of law, and the submissions about the hearing had not been supported by evidence. No Record of Proceedings had been requested and there had been no request for an interpreter. The burden of proof lay on the appellant. The sponsor was not in contact with the people who ran the appellant's school and she would have had no difficulty communicating with those people. She had no school reports. The appellant was in perfect health and had had his vaccinations. The sponsor had been able to state her case adequately and was not involved with the appellant's education. The case of **TD** made it clear that factual matters were to be decided on the evidence. Under **TD (Yemen)** if there was only one parent involved in the child's upbringing, that parent may not have sole responsibility. The sponsor had been away from the Ivory Coast for a very long period. The sponsor had not attempted to move the appellant from Mr Y's house.
21. In relation to paragraph 297(i)(f), she submitted that what had been said in paragraph 39 amounted to a typing error.
22. In relation to Section 55, this would not be a factor on which leave to enter under the Rules would be given. The Entry Clearance Officer and the Entry Clearance Manager had made reference to Section 55. Although it was clear that there was no minimum period for the sole responsibility to be exercised, it was still necessary for the sponsor to provide evidence.
23. In reply, Counsel submitted that Mr Y had not taken important decisions. He submitted that remittances had been sent by the sponsor over a lengthy period and further evidence of remittances had been handed in at the hearing before the First-tier Judge. The decision was materially flawed in law.

24. At the conclusion of the submissions I reserved my decision. I have carefully considered the points made. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
25. Some of the points taken are less important than others. For example, the judge refers to the appellant's bundle although there was no bundle, and he refers to the appellant's statement when there was no statement. However, in relation to the latter point, it is reasonably clear and I do not think it was subject to any serious argument before me that the judge was referring to the sponsor's "reasons for reconsideration" dated 10 October 2016 which appears in the respondent's bundle.
26. Counsel made it clear that his primary submission was focused on the judge's treatment of paragraph 297(i)(f) and it is accepted that there was an error if it was intended in paragraph 39 to reflect the provisions of that sub-paragraph. I do not find that what the judge said in the last sentence of paragraph 39 can be described as a typographical error. There also appears to me to be a significant mistake in the judge's interpretation of **TD (Yemen)** in paragraph 37 of his decision. The judge's treatment of the considerations under Section 117B appear to be speculative in relation to the issue of the appellant's independence on reaching adulthood.
27. Considering the question of procedural fairness it is true as Ms Isherwood submitted that there had been no requests prior to the hearing for an interpreter. However I accept that the sponsor was taken by surprise at the hearing when her husband was asked to vacate the court room while she gave evidence. She had been relying on him to represent her and explain matters to her and was at an unexpected disadvantage when attempting to present her case. Furthermore the difficulties which she faced in giving evidence might reasonably have alerted those hearing her to her difficulties. The judge acknowledges that it was "very brave" for the sponsor "to start an appeal in a legalistic court process". It does appear to have been too much for her, and I am not satisfied that a Record of the Proceedings would have assisted in these circumstances.
28. Independently of the issue of procedural fairness the determination is materially flawed in law. In the light of all the difficulties with this decision and the degree of fact finding required I am satisfied that it is appropriate, having considered the Presidential Direction, that this case should be remitted for a fresh hearing before a different First-tier Judge.

The determination is materially flawed in law. The appeal is remitted to be heard afresh before a different First-tier Judge.

Anonymity Direction

The First-tier Judge made an anonymity order which I continue.

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.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date: 16 July 2018

G Warr, Judge of the Upper Tribunal