



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04781/2020
HU/04783/2020
HU/04785/2020

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 7 October 2021

Decision & Reasons Promulgated
On 10 November 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MHA
HHA
FHA
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr A Joseph instructed by Elisabeth Dean Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the

appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The three appellants are citizens of Somalia. They are siblings and are the children of the sponsor (their mother) living in the UK. The age of the first appellant (MHA) is a matter of dispute; he was born either on 2 January 2002 or 5 October 2008. The second and third appellants were born respectively on 15 November 2006 and 9 September 2010.
3. On 8 October 2019, the appellants made applications for entry clearance to settle in the UK with their mother (the sponsor) under para 297 of the Immigration Rules (HC 395 as amended).
4. On 14 January 2020, the Entry Clearance Officer ("ECO") refused each of the applications for entry clearance.

The Appeal to the First-tier Tribunal

5. The appellants appealed to the First-tier Tribunal. In a determination sent on 4 March 2021, Judge I D Boyes dismissed each of the appellants' appeals. As regards the first appellant, he was not satisfied that the appellant was, in fact, born in 2008 and was, as a consequence, under the age of 18 as required by para 297(ii) of the Rules. Further, as regards each of the appellants, the judge was not satisfied that the sponsor had "sole responsibility" for their upbringing as required by para 297(i)(e) of the Rules or that there were "serious and compelling family or other considerations" which made their exclusion undesirable as required by para 297(i)(f). Finally, as regards each of the appellants, the judge was not satisfied that there would be adequate accommodation in the UK as required by para 297(iv) of the Rules. Having concluded that the appellants could not meet the Immigration Rules, the judge went on to find that the refusal of entry clearance to each of them was not a breach of Art 8 of the ECHR.

The Appeal to the Upper Tribunal

6. The appellants appealed to the Upper Tribunal on four grounds. First, the judge had wrongly assessed the first appellant's age on the basis of the documents submitted. Secondly, the judge had wrongly assessed whether the sponsor had "sole responsibility" for each of the appellants. Thirdly, the judge had wrongly assessed whether there were "serious and compelling family or other considerations". Fourthly, the judge had wrongly assessed whether adequate accommodation would be available.
7. On 12 May 2021, the First-tier Tribunal (Judge Landes) granted the appellants permission to appeal on all grounds.

8. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 7 October 2021. The appellants were represented by Mr Joseph and the respondent by Mr Howells.

The Issues

9. At the outset of the hearing, Mr Howells conceded that the judge had erred in law in two respects. First, he accepted that the judge had erred in law in assessing the first appellant's age in that the judge had taken into account what he stated to be evidence of the first appellant's age in his passport (a document which was reliable) when, in fact, the first appellant had not presented a passport. Secondly, as regards each of the appellants, Mr Howells conceded that the judge had erred in his assessment of whether the accommodation available to the sponsor would be adequate if the appellants came to live with her in that accommodation.
10. However, Mr Howells did not accept that those errors were material as he contended that the judge had been entitled to find both that the appellants had not established that the sponsor had "sole responsibility" for them or that there were "serious and compelling family or other considerations" which made their exclusion undesirable. Mr Howells' position on behalf of the ECO was that those findings were legally sustainable and that, therefore, any error of law was immaterial as the judge was bound to have found that the appellants could not meet the requirements of para 297.

The Appellants' Submissions

11. Mr Joseph accepted that the issue was the 'materiality' of the conceded errors. Mr Joseph accepted that the errors in relation to conceded errors did not 'spill over' into the findings in relation to "sole responsibility" and "serious and compelling circumstances" which were self-contained findings.
12. Mr Joseph, relying upon the grounds, submitted that the judge had erred in reaching his findings under paras 297(i)(e) and (f).
13. First, he submitted that the judge had erred in law in reaching his adverse finding in relation to "sole responsibility". He submitted that the judge had erred in law by failing to make any finding in relation to the sponsor's credibility when her evidence was that the appellants' father had not been involved in their lives in Ethiopia since December 2018. Mr Joseph submitted that the judge had failed to take into account two letters provided by the two neighbours who had "successively" had the care of the appellants in Ethiopia. He referred me to the letter at page 52 of the bundle from "NAS" who had the care of the appellants until she left to travel back to Somalia and also a letter at page 53 of the bundle from "SM" who confirmed that she had had the care of the appellants since 10 October 2020 after NAS left for Somalia. Further, Mr Joseph submitted that the judge had failed to take into account the transfer of money first to NAS up until October 2020 and to SM thereafter. Finally, there were phone calls evidencing contact between the sponsor and the appellants in Ethiopia which the judge had failed to take into account.

14. Secondly, Mr Joseph submitted that the judge had erred in reaching his alternative finding that there were not “serious and compelling family or other considerations” because he had taken into account (wrongly) that the appellants’ father was still involved in their lives in Ethiopia.

The Respondent’s Submissions

15. On behalf of the ECO, Mr Howells submitted that the judge had reached a sustainable finding in relation to whether it was established that the sponsor had “sole responsibility” for the appellants. Mr Howells pointed out that the judge had taken into account the guidance in TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 0049 at [41] of his determination. Mr Howells pointed out that, in that decision, the AIT stated that it would be exceptional for a sponsor in the UK to establish “sole responsibility” when both parents were involved in the upbringing of their children abroad. In such a case, shared responsibility was more likely. Mr Howells submitted that the letter from the two carers were very brief and that the judge had, in fact, referred to them and none said anything about the involvement of the appellants’ father in their lives. That was a sustainable finding.
16. Further, Mr Howells submitted that the judge had, in any event, concluded that the sponsor did not have “sole responsibility” because it was not established that she made all the important decisions in their lives. Mr Howells accepted that the judge should draw a distinction between ‘day-to-day’ decisions and important decisions such as attending school. He pointed out that at para 43 the judge specifically looked at decisions concerning the appellants’ schooling and that the evidence was silent on the issue. Finally, he submitted that the money transfers and phone call evidence did not discount the possibility that the appellants’ father was still involved in their upbringing.
17. As regards “serious and compelling family or other considerations”, Mr Howells submitted that the judge had made a sustainable finding given that he concluded that the appellants’ father continued to be involved in their lives and it was difficult, therefore, to argue that there were “serious and compelling family or other considerations” which made their exclusion from the UK undesirable.

Discussion

18. The focus of the judge’s decision, and the submissions before me, concerned whether the appellants could succeed under para 297 of the Rules. The purpose of considering that first was that, if the appellants could meet the requirements of the Rules, then there would be no public interest in their exclusion and the refusals of entry clearance would breach Art 8 of the ECHR (see TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34]).
19. So far as relevant, para 297 provides as follows:

“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;

...”

20. Para 297(ii) requires that the individual be “under the age of 18” and para 297(iv) requires that the individual will be “accommodated adequately” in the UK without recourse to public funds.
21. As is clear from what I have set out above, the judge’s adverse finding in relation to the first appellant under para 297(ii) is accepted to be unsustainable and his finding in relation to each of the appellants under para 297(iv) is also accepted to be unsustainable.
22. I turn first to consider the “sole responsibility” requirement under para 297(i)(e). Guidance on that issue was given by the AIT in TD at [52] of its decision as follows:
- “52. Questions of "sole responsibility" under the immigration rules should be approached as follows:
- i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
- ii. The term "responsibility" in the immigration rules should not to 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.
- iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.
- iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, 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 child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. 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. If not, responsibility is shared and so not "sole".

23. In this appeal, perhaps the two important points made in TD which were particularly relevant to the judge's assessment of whether the sponsor had "sole responsibility" were points (iv)-(v) that if both parents of the appellants were involved in their upbringing it would be "exceptional" for one of them (here it would be the "sponsor") to have sole responsibility for the appellants. Then, looking at the issue of "sole responsibility" even if only the sponsor was involved in their upbringing, points (vi)-(ix) identify that there is a difference between 'day-to-day' responsibility for a child's welfare which will necessarily be shared by others who have the care of individuals in their own country and whether the parent in the UK has "sole responsibility" because he or she has "continuing control and direction of the child's upbringing including making all the important decisions in the child's life".
24. In this appeal, Judge Boyes made adverse findings both in relation to the claim that the appellants' father was no longer involved in their upbringing and whether the sponsor made the "important decisions" in their lives and so had sole responsibility rather than sharing it with their carer in Ethiopia.
25. The background to the appeal was that the sponsor last came to the UK in December 2013. In January 2014 the appellants and the sponsor's husband (their father) moved from Somalia to Addis Ababa in Ethiopia. Their father cared for them at that time. Applications were made for the appellants to join the sponsor in the UK but these were refused and subsequent appeals were dismissed. The sponsor's evidence before Judge Boyes was that their father left the appellants in December 2018 and thereafter the appellants lived with neighbours first, NAS until October 2020 when NAS returned to Somalia; and secondly, with SM from October 2020 after NAS returned to Somalia. During that time, the sponsor provided financial support to the appellants and money receipts were set out at pages 63-83 of the bundle relating to that. Payments were made initially to the appellants' father and then NAS and

latterly SM. Further evidence was provided consistent with WhatsApp contact between the sponsor and the carers and appellants in Ethiopia.

26. In his decision, Judge Boyes did not accept that the appellants' father was not involved in their lives. He also did not accept that the evidence established that the sponsor made the "important decisions" in their lives. To some extent, the judge intertwined these issues in his reasons at [42]-[46] and [49]-[50]. At [42], he said this:

"42. The sponsor maintains that the children's father is absent and has no involvement in the lives of the children whatsoever however the sponsor [] failed to produce any evidence that he is not involved in the children's life. It is difficult, I appreciate, to prove a negative however there is no statement from the care[r] or the children for example explaining why she is looking after the children or whether or not she has had any contact with the father or otherwise. The respondent makes the case it is rather convenient that the father was around and present up until very recently, almost before the appellant made the current application, and as such this is nothing less than a ruse to create a false aura of sole responsibility. It is perhaps not the strongest point of the respondent that the appellant and the sponsor have failed to prove a negative however it is a matter which does support the respondent's case that the father is no doubt still alive and well involved in the children's lives".

27. As Mr Joseph submitted, and as I understood it Mr Howells did not demur from, it would be difficult for the appellants to prove a negative.

28. Then at [43]-[46], the judge continued:

"43. In terms of other factors, the sponsor is silent as to any schooling issues and whether she is able to or does direct their school attendance or which school they should attend. It is clear that the sponsor has little if any control in terms of the manner in which the children should be brought up or indeed the food they eat having remarked that the children should just concern themselves with having nutritious food and be grateful for that. It is clear that the mother cannot assert to the carer at any level of control is to discipline or respect as she seeks to placate the children who lament at the manner in which they have been treated.

44. If the mother had sole responsibility for them and was directing them in their lives and could exercise sufficient and just control over their lives and those who had an input in the lives I have no doubt the mother would have sought to rectify this forthwith. That she is silent in terms of such issues lends weight and credence to the Secretary of State's case that the aura of sole responsibility it is exactly that, and aura, rather than anything tangible and real.

45. The fact that the mother provides monies to the carer is not determinative of the issue as there is little or no evidence from the carer as to what this money is for, how it is utilised and used and what would happen if it was not sent by the sponsor.

46. In essence, there was insufficient evidence before the court to make a finding that the sponsor has exclusivity in terms of the decisions about the child's upbringing".
29. If the judge's reasoning in [43]-[46] stood alone then it *might* be sustainable that the judge had not reached an irrational or unreasonable conclusion on the evidence that the appellants had simply failed to prove that the sponsor had sole responsibility.
30. However, the judge added further reasoning at [49]-[50] as follows:
- “49. The sufficiency of the income and the property itself are however academic considerations for I have found that I do not accept that the sponsor has exclusivity in terms of control of the children or that she has sole responsibility which follows from such exclusivity. I am not satisfied that the appellants' father is absent and plays no part in the life despite the fact that he has been there for a considerable period of time in their lives right up until almost the date of application for the current proceedings. On balance, I am persuaded that the Secretary of State's case is correct that the father does indeed have input into the lives of the children and that in any event that the mother does not exercise sole and exclusive responsibility which is, on the evidence, often demerged and deferred to the carer. It appears that the carer can make such important decisions as she may wish to make in relation to the children certainly in terms of who they socialise with, the school attendance and the food that they eat. These are factors which detract from the validity and credibility of the sponsor's suggestion that she exercises sole responsibility for the children.
50. It therefore follows that the appeals of HHA and FHA under the heading of sole responsibility must be dismissed”.
31. The judge's reasoning at the end of [49] is not consistent with the approach set out in TD at [52] as it appears to focus upon 'day-to-day' decision-making that would necessarily be made by the carer in the appellants' own country. Who the children socialise with, whether they go to school on any one day (which is what the judge must have meant by "attendance") and what food they eat, are not "important decisions" which reflects upon responsibility and the issue of "sole responsibility" of the sponsor. They are day-to-day decisions made by a carer who is there, 'on the ground', looking after the children. Whether the appellants should attend school at all, and if so, what school, are "important decisions" but the everyday decisions that a person makes who looks after children, namely what particular meals they eat and whether they go out to socialise with their friends and when, are not decisions which detract from a parent in the UK having "responsibility" for them as recognised in TD and is not indicative that that responsibility is shared with the carer who is left to make those day-to-day decisions for themselves.
32. Although I do not accept Mr Joseph's submission that the judge failed to mention the supporting evidence from the two neighbours (who were the appellants' carers) or the payments made by the sponsor to the carers - because plainly the judge did make reference to this evidence at [15]-[17] and [45] - nevertheless the judge has, in my view, misdirected himself in [49] as to the correct approach to assessing evidence of

whether the sponsor had “sole responsibility” for the appellants. The judge specifically said in [49] that those factors (which related to day-to-day decisions) detracted from “the validity and credibility of the sponsor’s suggestion” that she exercised sole responsibility for the children. That was an error.

33. As regards the involvement of the appellants’ father, the sponsor’s evidence was clear that he had not been involved since December 2018 and, in my judgment, it was incumbent upon the judge to give adequate reasons why he did not accept that evidence.
34. The only reason given by the judge for concluding, and he does so positively, that the respondent’s case is correct that the father does indeed have input in their lives is that there is an absence of other supporting evidence that the father has no contact with them. The evidence from both carers was that they had the care of the appellants as their (sequential) temporary guardians conferred upon them by the sponsor. Likewise, it was the sponsor’s evidence that the appellants’ father had no involvement in their lives. The only reference to the “credibility” of the sponsor and her evidence is in [49] set out above. The judge, in my view, did not give adequate reasons why he did not accept this evidence which, in itself, might well have led him to make a different finding concerning the involvement of the appellants’ father in their lives and, therefore, on the issue of “sole responsibility” applying TD.
35. In my judgment, the judge erred in law by failing properly to assess the evidence and give adequate reasons for his adverse finding on the issue of “sole responsibility”.
36. In addition, the judge’s finding that the appellants’ father continued to be involved in their lives, in my judgment, spilt over and affected his conclusion (at [50]-[53]) that there were not “serious and compelling family or other considerations” which made the appellants’ exclusion from the UK undesirable. The errors in relation to the former, in my view, necessarily tainted the latter. Neither finding is, therefore, sustainable.
37. Of course, it remains for each of the appellants to establish on the evidence that they meet the requirements of para 297, including in the case of the first appellant that he is, in fact, under 18 years of age. The errors of law which were conceded together with the errors of law I have identified, leave those issues under para 297 to be determined on the evidence presented at the remitted hearing.

Decision

38. For the above reasons, the First-tier Tribunal’s decision to dismiss the appellants’ appeals under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.
39. Having regard to the nature and extent of fact-finding required, under para 7.2 of the Senior President’s Practice Statement, the appropriate disposal of this case is to remit

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it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Boyes.

Signed

Andrew Grubb

Judge of the Upper Tribunal
22 October 2021