



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

Appeal Number: OA/04097/2014

THE IMMIGRATION ACTS

**Heard at UT(IAC) Bennett House,
Stoke on Trent
On 5th October 2015**

**Determination Promulgated
On 6th January 2016**

Before

UPPER TRIBUNAL JUDGE COKER

Between

LOUISA LARYEA

Appellant

And

ENTRY CLEARANCE OFFICER - Accra

Respondent

Representation:

For the Appellant: Mr S Parke, Dicksons solicitors

For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Ms Laryea applied for and was refused entry clearance as the parent of a British Citizen child resident in the UK because she had failed to provide evidence that she had sole responsibility for the child and alternatively she had failed to produce court documents confirming access rights to the child. She was refused entry clearance because she did not meet all the requirements of EC-PT.1.1 of the Immigration Rules and her application was thus refused under paragraph E-ECPT.2.4. of Appendix FM. A review by the ECM concluded that the evidence produced did not satisfy him that

she had sole responsibility. The ECM also concluded that the evidence provided did not show that she had been 'legally granted access rights' and that the parental responsibility form had not been completed.

2. The appeal was determined on the papers. Included in the papers was evidence from the child's father that the child would live with him (as he has been doing) and that Ms Laryea did not have sole responsibility.
3. Ms Laryea was granted permission to appeal on the grounds that it was arguable that the First-tier Tribunal judge had failed to make clear findings on the two live issues: whether the appellant had "access" rights and secondly whether she had and intended to have an active role in the child's life.

Background

4. The child was born in the UK on 17th July 2004. His father (Mr Kudjodji) – who registered as a British Citizen on 3rd May 2013 having had indefinite leave to remain since 4th November 2010 – is named on the birth certificate. His mother – the appellant in this appeal – is a Ghanaian citizen. Mr Kudjodji and Ms Laryea are not married and were not married at the time of the birth of the child. Ms Laryea has visited the UK on a number of occasions over the past 10 years. There was no assertion that she had remained unlawfully in the UK or had not abided by the terms and conditions of her visas.
5. The application the subject of the decision leading to this appeal was for access rights to her child who has lived in the UK since his birth with his father save for at least one visit to her in Ghana prior to the submission of the application.
6. The ECO considered the application in accordance with Appendix FM. He decided

"... You have provided evidence of your circumstances in Ghana, including your business registration certificate, Form A and evidence of your income from your business. However you have not provided evidence that you have sole parental responsibility for [the child]. You have provided no evidence of contact with your child since he left Ghana in 2005. Your child has been living with his father in the UK. You have provided no evidence that you have any input into his social, education or health matters while he has been living with his father. You have provided no evidence that you have had any economic responsibility for your child. You state you were visited by your child in Ghana in 2013, however you have provided no evidence of this. You have provided an affidavit from your child's father, stating you will be allowed access to your child, however this also states that the child will be living with his father on school days (5 days a week). You have had previous visit visas to the UK but have not indicated in previous applications that you were visiting your child. I am therefore not satisfied that you have sole responsibility for your child or that you have provided any court documents confirming your access rights to the child I therefore refuse your application under Paragraph E-ECPT.2.4. of Appendix FM of the Immigration Rules. I have therefore refused your application because I am not satisfied, that you

meet all of the requirements of paragraph EC-PT.1.1 of the Immigration Rules.”

Error of law

7. The relevant paragraphs of the Immigration Rules are as follows:
- E-ECPT.1.1. To meet the eligibility requirements for entry clearance as a parent all of the requirements in paragraphs E-ECPT.2.1. to 4.2. must be met.
 - Relationship requirements
 - E-ECPT.2.1. The applicant must be aged 18 years or over.
 - E-ECPT.2.2. The child of the applicant must be-
 - (a) under the age of 18 years at the date of application;
 - (b) living in the UK; and
 - (c) a British Citizen or settled in the UK.
 - E-ECPT.2.3. Either -
 - (a) the applicant must have sole parental responsibility for the child; or
 - (b) the parent or carer with whom the child normally lives must be-
 - (i) a British Citizen in the UK or settled in the UK;
 - (ii) not the partner of the applicant; and (iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix.
 - E-ECPT.2.4.
 - (a) The applicant must provide evidence that they have either-
 - (i) sole parental responsibility for the child; or
 - (ii) access rights to the child; and
 - (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.
8. The First-tier Tribunal judge considers the issue of sole responsibility at length. That is not the issue in this appeal where the appellant is seeking entry clearance to enjoy “access” to her son.
9. It is unfortunate that the Immigration Rules continue to use the term ‘access’ to denote the contact that a child has with his or her parents. Contact orders themselves are, since 2014, no longer made in family proceedings. Child Arrangements Orders can be made in family proceedings and these orders can cover all matters relating to a child including parental responsibility, with whom the child lives and for what period of time. Fundamental to such proceedings however is that an order will not be made unless there is a need – the so-called ‘no order principle’. A mother automatically has parental responsibility unless it is removed

from her by order of the court. Where the mother and father are not married, if both parents register a child born after 1st December 2003 then the father has parental responsibility. A parental responsibility agreement is signed in circumstances where a father is seeking parental responsibility and doesn't have it.

10. Mr Kudjodji has parental responsibility; there is no requirement for him to apply to have parental responsibility and the signing of the agreement that is in the papers does not provide him with any more rights than he already has. In circumstances where there is agreement between separated parents as to 'access' a Child Arrangements Order is neither necessary nor required and would not be made.

11. The First-tier Tribunal judge found

"17. ... As the Entry Clearance Manager pointed out, parties appear to have confused parental responsibility with sole responsibility. It was clear to me on the evidence submitted, there was little evidence other than the assertion of the child's father that the Appellant played any part in the child's upbringing, let alone having sole parental responsibility.

18. Both Entry Clearance officers were correct in concluding that there was no evidence of access rights having been granted by a competent court or authority, and the unsigned document, coupled to the absence of a statement from the Appellant, did not satisfy me to the required test. I was satisfied that the application failed and fell to be dismissed ..."

12. In the Rule 24 response the respondent states:

"It was not for the judge to delve into the complexities of the Children's [sic] Act. It was the responsibility of the appellant to demonstrate that she had access rights to her son.

It was open to the judge to conclude on the limited evidence before him that the appellant had not discharged the burden of proof that she had access rights."

13. The documents before the ECO relevant to the issues in this appeal included:

- certified copy birth certificate
- certified copy registration certificate of Mr Kudjodji
- certified copy child's British passport
- certified copy ILR endorsement in Ghanaian passport of Mr Kudjodji and identity page of his Ghanaian passport
- Affidavit of Mr Kudjodji sworn 21st March 2014
- Visa application form

14. Mr Kudjodji's affidavit states that the appellant has played an active role in the child's upbringing; that he visited his mother in Ghana for the first time in 2013; that he and the appellant have agreed that the child will stay with him for most of his school days and the rest of the week with his mother; that the appellant has been taking and will continue to take an active role in their son's upbringing.

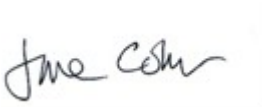
15. Documents submitted with the appeal include:
 - The passport of the child showing his departure from Ghana in 2013
 - Information sheets from Becket solicitors on parental responsibility and an (uncompleted) Parental Responsibility Agreement
 - Copies of phone cards
16. Contrary to the respondent's Rule 24 response, parental responsibility is not a "complexity" of the Children Act; nor are issues as regards contact. To plead ignorance of a fundamental piece of legislation as it affects children and families is no excuse. It was the responsibility of the representatives to bring to the attention of the judge matters of law of which he may not have been fully aware. The Immigration Rules and guidance issued pursuant to those Rules are matters that should be in the minds of both those who take decisions and those who present cases. Immigration law does not exist in a vacuum.
17. The judge failed to take account of the parental responsibility vested in the father and that 'access' does not require a court order. The entry clearance officer failed to take a decision based upon the law - namely that 'access' does not require a court order.
18. It is not clear from the papers whether the Entry Clearance Officer was satisfied that the appellant met the other requirements of the Rules as regards entry clearance for 'access', having taken a restricted view of the necessity for a court order.
19. I am satisfied that the First-tier Tribunal judge failed to consider the decision of the respondent as it reflected the application made. The judge failed to consider the relevant legal provisions as relating to Child Arrangements Orders and the 'no order principle'. I am also satisfied that the entry clearance officer has failed to reach a lawful decision on the application before him. I allow the appeal as not in accordance with the law and the application is therefore to be placed before the Entry Clearance Officer for a lawful decision to be made.
20. No doubt the appellant will submit further and up-to-date information as to her means and the anticipated future arrangements as regards the child and her past involvement in the child's upbringing.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and direct that it be remitted to the respondent for a lawful decision to be made.

Date 4th January 2015

A handwritten signature in black ink, appearing to read "Jane Coker", enclosed within a thin black rectangular border.

Upper Tribunal Judge Coker