



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

Appeal Numbers: OA/08739/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2016**

**Decision & Reasons Promulgated
On 13 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**M A J D
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Vidal, counsel
For the Respondent: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge L M Shand QC ("the FTTJ") promulgated on 25 November 2015, in which she refused the appellant's appeal against the refusal of his application for entry clearance to join his mother who is settled in the United Kingdom.
2. No anonymity direction was made in the First-tier Tribunal but, given the appellant is a minor, an anonymity order is appropriate.

Background

3. The appellant sought entry clearance to join his mother in the UK. This was refused because the respondent did not accept the sponsor had sole responsibility for the appellant or that there were any serious and compelling family or other considerations which would make the child's exclusion undesirable (paragraph 297(e) and (f) of the Immigration Rules).
4. The FTTJ found, on appeal, that responsibility for the upbringing of the appellant was shared by the sponsor with the appellant's grandmother, with whom he lives in Mauritius. The FTTJ also found that there were no serious and compelling family or other considerations which merited the grant of entry clearance. The appeal was dismissed under the Immigration Rules and also on human rights grounds.
5. Permission to appeal was sought and granted in the following terms:

“The judge's determination is lengthy and carefully reasoned and a point underlying the case and the grounds is the effect of the grant of the visa in 2011 referred to at the outset of the determination in paragraphs 9-10 and the judge's disagreement with counsel's submissions on the point as set out in paragraph 22.

Without prejudice to the other grounds there may be some force in the submission that the Entry Clearance Officer must have been satisfied in 2011 that the sponsor had sole responsibility and some change of circumstances would need to be identified in order to demonstrate that she no longer exercised such responsibility.”

6. Hence the matter comes before me.

Submissions

7. Both Ms Vidal and Mr Avery agreed that paragraphs 319H and 297 of the Immigration Rules make similar provisions for entry clearance to join a parent. Thus the relevant potential basis for the grant of entry clearance in 2011 was the same as that before the FTTJ, i.e. whether the receiving parent had sole responsibility for the applicant or that there were serious and compelling family or other considerations.
8. Ms Vidal submitted for the appellant that the FTTJ had failed to appreciate the impact of the grant in 2011 under paragraph 319. The ECO must have concluded, at that time, in the absence of compelling circumstances, that the appellant's upbringing was the sole responsibility of the sponsor. The FTTJ had noted there was no evidence as to the basis on which the visa had been granted in 2011. It had been unreasonable therefore to make findings contrary to the appellant's circumstances in 2011. The only difference in the appellant's life was the death of his grandfather, with whom he had lived in 2011. There was sufficient evidence of continuing sole responsibility from 2008.
9. Mr Avery submitted for the respondent that the FTTJ had dealt with the appeal appropriately; it had been the function of the FTTJ to assess the evidence and the FTTJ had not known what evidence was before the respondent in 2011. There could, for example, have been a letter with good reasons why the grandparents were not capable of looking after the appellant. The issue was whether the appellant fulfilled the requirements of the Rules at the date of decision. The FTTJ had given good reasons for finding responsibility was shared from 2008.

10. Ms Vidal referred me to the appellant's grandmother's affidavit produced at the appeal hearing. Her evidence is that it is the sponsor, who finances the appellant's upbringing, has sole responsibility for the child. There was no reference to this in the decision, only to the fact that the grandmother referring to treating the appellant as her child. The FTTJ had failed to take into account all the evidence.

Discussion

11. The witness evidence before the FTTJ was to the effect that the sponsor, his mother, had had sole responsibility for his upbringing since 2008 and that he had been living with his grandmother and grandfather in 2011 when he was granted entry clearance to join his mother in the UK. Whilst the appellant's grandmother says that she and her husband (prior to his death) treated the appellant like their child, she also says that the sponsor "was the only one taking all the responsibility for the child. The mother of the child is the only one to finance for the upbringing of the child and she was sending me money regularly for the upbringing of her son". The FTTJ made no specific adverse credibility findings with regard to the witness evidence.
12. The task of the FTTJ was to make a decision on the basis of all the evidence. That evidence included the grant of entry clearance in 2011 under paragraph 319H. The FTTJ accepted the terms of that paragraph were similar to those in paragraph 297. The 2011 grant was consistent with the appellant's evidence that the sponsor had had sole responsibility for his upbringing since his father left in 2008. It also explained the relative paucity of evidence before the FTTJ on the issue of responsibility for the child's upbringing between 2008 and 2011.
13. The burden of proof was on the appellant. Entry clearance must have been granted in 2011 because the appellant had demonstrated he fulfilled one or more of the relevant criteria in paragraph 319H. The fact of the grant was consistent with the appellant's claim that his circumstances in 2011 were similar to those at the date of decision. The FTTJ states (paragraph 22) she does "not know what evidence was put forward in support of the application in 2011". This statement does not take account of the appellant's evidence that the application in 2011 was made on similar grounds to that under 297. That evidence warranted consideration by the FTTJ and, if she rejected it, she should have said so and why. Instead, the FTTJ reiterates the finding she has already made (paragraph 21) that responsibility for the upbringing of the appellant was shared. I conclude that the FTTJ's finding on the issue of responsibility was made without consideration of the fact of the grant in 2011 and the likely basis for that grant. Thus the FTTJ has failed to consider relevant evidence which should have been considered in the round with the remaining evidence before a finding on the issue of responsibility was made.
14. The FTTJ's failure to factor the grant of entry clearance in 2011 into her assessment of the evidence before coming to a decision on the nature and extent of the sponsor's responsibility for the upbringing of her child renders her findings unsustainable in law. She has failed to take material evidence into account in reaching her finding under paragraph 297(e). Had she done so, the outcome might have been different. I set her decision aside.
15. The parties' representatives agreed that, in such an event, I should remake the decision and this I now do.

16. It is not claimed that the appellant is living in difficult circumstances or that he has ever done so. I find that, on the balance of probabilities, entry clearance was granted in 2011 on the basis that the appellant's mother, the sponsor, had sole responsibility for him at that time. In the absence of any evidence that the appellant's circumstances have changed since the grant in 2011 under paragraph 319H, I accept that the sponsor continued to have sole responsibility for the appellant's upbringing, at the date of decision, as she had done since 2008.

Decision

17. The making of the decision of the First-tier Tribunal did involve an error of law, as set out above.
18. I set aside the decision of the First-tier Tribunal.
19. I re-make the decision in the appeal by allowing it under the Immigration Rules.

A M Black

Dated 13 July 2016

Deputy Upper Tribunal Judge A M Black

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.

Fee Award

The FTTJ made a fee award and that stands.

A M Black

Dated 13 July 2016

Deputy Upper Tribunal Judge A M Black