Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/12087/2015
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 October 2017	**On 23 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MASTER KELVIN EDWARD PRAH
MISS KELSEY YEBOAH PRAH
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondents: Ms S Sharma of Counsel instructed by Justice and Law Solicitors

DECISION AND REASONS

1. The appellant in this case is the Entry Clearance Officer and the respondents are Master Prah and his sister Miss Prah, citizens of Ghana born on 21 June 2002 and 14 January 2004. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where Master Prah and Miss Prah were the appellants.

Background

2. The appellants before the First-tier Tribunal appealed the decision of the respondent dated 20 October 2015 to refuse their applications for entry clearance to join their mother in the UK pursuant to paragraph 297 of the Immigration Rules HC 395 (as amended). In a decision promulgated on 12 April 2017 Judge of the First-tier Tribunal Sweet allowed the appellants' appeals.

3. The Entry Clearance Officer appealed on the basis that the judge failed to give adequate findings on a material matter; it was argued the judge allowed the appeal on the basis of serious and compelling family or other considerations under paragraph 297(i)(f) but that the reasons given, on the basis of the sponsor's earnings and her life with her son Karl could not be regarded as serious and compelling; it was further submitted that the judge had found at paragraph 18 that it was not accepted that the appellants' grandmother was sufficiently unwell to look after them and there was no other evidence or updated medical evidence stating that the grandmother cannot continue to look after the children as she has done to date. In light of those findings there was no basis for the judge finding that paragraph 297(i)(f) is met; it was further submitted that the appellants' grounds were restricted to human rights grounds whereas the judge had made findings in relation to the Immigration Rules only.

Error of Law Hearing

4. Mr Wilding did not rely on the final ground as he conceded that paragraph 297 was one of the paragraphs where the Immigration Rules were a complete code and any error the judge made was not material and the judge did not allow the appeal under the Immigration Rules (which would have been an error) but rather allowed the appeal.

5. However Mr Wilding submitted that there were material errors in the judge's decision. Whilst he considered that a brief decision in itself did not amount to a material error of law the judge's findings at [19] did not explain why or how there were serious and compelling family or other considerations which made the appellants' exclusion undesirable. It was submitted that this conclusion was particularly perverse given that at paragraph [18] the judge had found that there was no reason why the appellants' grandmother could not continue to look after the children as she had done to date. Ms Sharma on behalf of the respondent submitted that if the medical report which had been submitted with the Rule 24 Notice had been considered then the appeal would have been allowed under paragraph 297(i)(e). She submitted that the appellants' grandmother was illiterate, that she was unwell and not in a position to look after them. However she conceded that there were matters that should have been considered by the judge in the decision.

Error of Law

6. I am not satisfied that Judge Sweet gave adequate reasons for finding that the appellants met the requirements of paragraph 297(i)(e) which provides as follows:

Requirements for indefinite leave to enter the United Kingdom as a child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

"297. 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:

(a) both parents are present and settled in the United Kingdom; or

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(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;

…".

7. The judge made findings of fact at [17] of the decision and reasons that the children both attend school with the first appellant currently living at school preparing for his final exams. The judge also found that the sponsor came to the UK in 2008 leaving the children in the care of her

mother who at the date of the hearing was aged 66. The sponsor entered the UK with an EEA family visa on the basis of marriage. Her two children are the first and second appellants. The judge took into consideration the witness statement evidence from the appellants' father that he had lost touch and had no direct contact with the children although he had provided some limited financial support following their divorce but had never visited the children in Ghana and had left them in the care of their mother and grandmother. However the judge noted that this was conflicted with the grounds of appeal where it stated that both the appellants' parents had been responsible for their upbringing. The judge also took into consideration that although the sponsor claimed to have sole responsibility for the children she had help from her mother who had looked after the children. Significantly the judge did not accept that the appellants' mother was sufficiently unwell to be unable to look after the children as she had done so since 2008 and that the medical report that was provided, dated 3 July 2015, showing that the grandmother suffered hypertension and diabetes, together with a photograph which purported to show that the appellants' grandmother had an injury to her hand, did not amount to evidence that the grandmother could not continue to look after the children as she had done to date

8. It is a matter of settled law that sole responsibility is not confined to just financial support but also relates to matters of emotional support and an abiding interest in a child's welfare and wellbeing over the period of separation. The appellants have resided in Ghana since their mother came to the UK in 2008. The sponsor has a further son living with her in the UK who is 7 years of age.

9. The judge noted the conflict in the evidence between what was said by the appellants' father and what was said in the grounds of appeal as to both appellants' parents having been responsible for their upbringing.

10. In terms of the judge's reasoning at [19], that he took into account the evidence from the sponsor as to her current situation "both in respect of her earnings and her life with her 7 year old son Karl" and noted that the sponsor explained that she had been unable to visit her children on a regular basis until recently but had made money transfer receipts and provided evidence of her interest in their school and church, the judge has failed to provide adequate reasons or indeed any reasons at all as to why this amounts to serious and compelling family or other considerations which make exclusion undesirable; it is unclear how or why the sponsor's earnings and her life with her third child, Karl would amount to serious and compelling family and other considerations which would make exclusion undesirable. I am satisfied therefore that there is an error of law such that the decision to allow the appeal should be set aside.

Re-Making

11. Both parties indicated that there was sufficient evidence and fact-finding in the decision before me to allow me to remake the decision taking into

account the additional evidence in the form of the additional medical report and photographs provided. Ms Sharma submitted that the Tribunal did not need to hear from the sponsor.

12. Mr Wilding submitted that given the findings of fact in the decision the appeal must fall to be dismissed and that the medical report, dated 15 September 2017 took the appellants no further. Mr Wilding submitted that the medical report indicated that the appellants' grandmother had attended the facility on 23 September 2014 which was three years ago and submitted that it did not address how the appellants' grandmother was incapable of looking after her grandchildren now.

13. Ms Sharma submitted that if the medical report referred to had been before the judge he would have found that the appellants' mother had sole responsibility. It was further submitted by Ms Sharma that the evidence was that the mother was the only person who can assist the children and that the son has moved to boarding school and that there are difficulties with the grandmother's care.

Findings and Reasons

14. I must consider this appeal as a human rights appeal as the appellants' right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 to human rights only. However I note the concession of Mr Wilding that paragraph 297 is considered a complete code in relation to Article 8 and where the provisions of paragraph 297 are met there would be a breach of Article 8 if an applicant is refused entry.

15. I am satisfied on a balance of probabilities that family life exists between the minor appellants and their mother despite the long term separation and that the decision arguably interferes with that family life. I am satisfied that the decision is in accordance with the law and for the purposes of maintenance of effective immigration control I therefore go on to consider whether that decision is proportionate.

16. In so doing I rely on the findings of fact of Judge Sweet which I preserve. These include the lack of adequate medical evidence that the appellants' grandmother cannot continue to look after the children as she has done to date. I have considered the evidence in the round including in light of the additional photograph of the appellants' grandmother, which I considered takes their case no further and the medical report of 15 September 2017. This report indicates that the appellants' grandmother reported to the clinic for the first time on 23 September 2014 with complaints of weakness on the left side of her body, headache, palpitation, dizziness and fainting. The report goes on to state that she was diagnosed with a stroke secondary to severe hypertension and diabetes and that she was admitted and subsequently managed on medication and physiotherapy. The report goes on to state that the appellants' grandmother's blood pressure and sugar have not been controlled and it has "major incapacity to perform on her own and therefore all assistance to relief her is welcome" (sic).

17. I note that as referred to in the decision of Judge Sweet the same clinic provided a letter dated 3 July 2015, which made no reference to a stroke instead simply stating that the appellants' grandmother suffers from hypertension and diabetes and listing the medication that she is in receipt of. I have considered the new evidence in the round but can give it limited weight as there is no adequate evidence as to how the condition of the appellants' grandmother has made her incapacitated to perform on her own or indeed why this was not detailed in the previous report from the same clinic dated 3 July 2015. Although the report is dated 15 September 2017 and refers to the appellants' grandmother attending in September 2014 there is no adequate information or evidence as to any subsequent visits and it is unclear whether the report is referring to her condition now or in 2014.

18. The findings of fact of Judge Sweet, including that he took into account the sponsor's circumstances and that she was unable to visit the children until recently but had made money transfer receipts and provided evidence of her interest in the school and church which they attend, stand. I take into account that the appellants were currently separated from their brother who is resident in the UK.

19. I have considered the best interests of the children in this case. I have taken into consideration that the children have resided all of their lives in Ghana and the majority of which they have been cared for by their grandmother. However I have considered and applied the relevant case law in **TD (paragraph 297(i)(e) sole responsibility) Yemen [2006] UKAIT 00049** which reminds that sole responsibility is a factual matter to be decided upon all the evidence and that where one parent is not involved in the child's upbringing the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing including making all the important decisions in the child's life.

20. It was set out in the witness statement of the sponsor that she had left the children under the day to day care of her mother as their father was not around and that she had come to the UK including to provide a better life for her children. It was stated that she was not previously able to sponsor her children and that her mother was then fit and well but she is now in a more secure environment. She also noted that the children's biological father did not visit them in Ghana but her ex-husband Mr Sammy Amponsah Davis initially visited her children and the sponsor had been able to visit them in the past few years and evidence of this was provided. I am not satisfied therefore that there was any material conflict in the sponsor's evidence.

21. The appellants' mother provided evidence, which I accept, that she had taken on sole responsibility for her children and had continued to transfer monies to her mother for their benefit and provided money transfer receipts as well as her then husband supporting her to look after the

children. The sponsor provided evidence that she made decisions in relation to her children's studies and was "in touch with the school and she was responsible for payment of school fees". Her elder child, her son is currently at boarding school. It was also the sponsor's evidence which is not disputed that she made a decision in relation to the church they attended and communicates with their pastor. This was supported by additional letters from both the appellants' school and church confirming their ongoing contact with their mother who has been in regular contact both about their education and pastoral wellbeing.

22. Taking all this into account, although the judge found that there was insufficient evidence that the appellants' mother has sole responsibility for their upbringing primarily it would appear because there was no medical evidence stating that the grandmother could not continue to look after the children as she had done to date this failed to engage with the requirements of 297(i)(e) and the jurisprudence in relation to the meaning of sole responsibility. The fact that there is limited evidence to show that the appellants' grandmother could not continue in the circumstances that she has done does not mean that responsibility has been shared with her.

23. On the basis of the consistent evidence I am satisfied that the sponsor has had sole responsibility. This included evidence from the appellants' mother, the sponsor and the supporting evidence from the appellants' father and their grandmother who confirmed that the sponsor has taken all the major decisions concerning the appellants' lives together with evidence from the school and church, the financial evidence and the photographic evidence of the sponsor's visits together with the evidence from the first appellant who provided the letter dated 13 January 2017 to his mother setting out what he was doing at school and that he wished to join his mother. There was also a handwritten statement dated 4 April 2017 from the appellants' father confirming that he was in a relationship with their mother from 2000 to 2004 and that he left Ghana in 2003 when the sponsor was pregnant with the second appellant and he came to the UK on the basis of marriage to a Dutch national. He confirmed that he was unable to provide any financial support to the sponsor or the children and that they lost touch. He further confirmed that "from birth Diana has been responsible for caring for the children. I have had no direct contact with them. I had provided some financial support following Diana's divorce, when I have been in a position to do so". He also confirmed that he had never visited the children in Ghana and they continued to be cared for by their mother.

24. On the basis of all the evidence before me I am satisfied that the appellants' sponsor has continued to have sole responsibility for the care of her children and that their grandmother has merely provided day-to-day care and has not been responsible for making any other decisions in relation to the welfare of her grandchildren who have been provided for both emotionally and financially, by their mother. I am not satisfied that any limited assistance that the appellants' mother had from the children's

father for a short period and from her ex-husband amounts to shared responsibility.

25. Applying those findings of fact to Article 8, I am satisfied that the appellants have in fact demonstrated that their mother has had sole responsibility for their upbringing and therefore they meet the requirements of the Rules. This is a significant factor therefore given that these Rules are a complete code in considering Article 8. I have taken into consideration Section 117 of the 2002 Act. However the evidence indicates that the appellants who are minors will have financial assistance from their mother and such was not disputed. It was also not disputed that the appellants speak English and this is evidence including by the supporting letters before me.

26. I have taken into account that maintenance of effective immigration control is in the public interest. However in light of my findings that the appellants meet the requirements of the Immigration Rules this public interest has limited weight. I have taken into account that the best interests of all the children are to be reunited. I also take into account as one of the factors that although there may be inadequate evidence that the appellants' grandmother could not continue circumstances as she has done, she is 67 and there is evidence of some difficulties with her health which I accept has precipitated the decision of the sponsor to bring her children to the UK.

27. I am satisfied therefore that the decision is a disproportionate interference with the family life of the appellants, the sponsor and the sponsor's third child.

Decision

28. The decision of the First-tier Tribunal is set aside for error of law. I remake the decision allowing the appellants' appeals on human rights grounds.

No anonymity direction is made.

Signed Date: 19 October 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award was sought and no fee award is made given that adequate evidence of sole responsibility was not produced until the appeal.

Signed Date: 19 October 201

Deputy Upper Tribunal Judge Hutchinson