



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06892/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 December 2018

Decision & Reasons Promulgated  
On 7 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

DAMIAN [S]  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms A Oji (for Lewis Sidhu Solicitors)

For the Respondent: Ms J Isherwood (Home Office Specialist Appeals Team)

**DECISION AND REASONS**

1. This is the appeal of Damian [S], a citizen of Jamaica born 17 April 1999, against the decision of the First-tier Tribunal of 4 July 2018 dismissing his appeal against the refusal of entry clearance of 7 May 2017.
2. The application was made on 5 February 2017, and was to join his father, the Sponsor Lloyd [S], who had been granted indefinite leave to remain on 21 June

2003 and naturalised as a British citizen in 2005. The application explained that the Appellant had lived with his mother until, and been abused by her partners, Mr Morris and Mr Vernon, from 2003 onwards. He had lived with Ann [L] from 2014 to 2015. He had been staying with Pauline [B] since September 2016, though could no longer remain with her because her responsibilities for her own two children were too great, as was confirmed in a letter she wrote. A court order of 15 September 2016 agreed for the transfer of custody between the mother and Sponsor.

3. The application was refused because the Appellant had spent most of his life living apart from the Sponsor without his father having sought to bring him to the UK, and there was no good reason for things to now change; there was no evidence to corroborate the claims of domestic abuse from the school or a health professional, and the mother's agreement to the Sponsor taking custody post-dated those claimed difficulties by three years. Furthermore a visit visa application of 2016 had not mentioned any difficulties at home, was made using the mother's address on the basis that the Appellant had lived there for the previous seven years, and Ms Lynch's address was more than an hour's drive from the school he attended, casting doubts as to whether he truly resided with her.
4. Grounds of appeal included medical evidence showing that the Sponsor had been unable to work until July 2014 and had thus previously lacked the ability to maintain his son, which was why no earlier application had been made; and asserted that whilst the Appellant had resided with Ms Lynch in recent times, nevertheless his permanent address was that of his mother.
5. The First-tier Tribunal directed itself that there were two potential routes to entry, via sole responsibility or because there were serious reasons for thinking a child's exclusion undesirable (bearing in mind authorities such as *SG Nepal* and *Mundeba*), and that it was necessary to have regard to the best interests of the child in assessing the claim under the Rules and with regard to Article 8 ECHR.
6. The First-tier Tribunal made factual findings. It accepted the general credibility of the Sponsor, who was thus established as being able to accommodate and financially support the Appellant, that he had visited Jamaica to see the boy regularly, regularly sent money to him, and had taken an active role in the Appellant's education and upbringing.
7. The Tribunal below did not accept the account of physical abuse from the mother's partners, absent corroborative medical evidence or evidence from the school, and noted that the Sponsor referred only to Damian having difficulties with his mother's partner because the latter did not want him around, without referring to any beatings. The Tribunal accepted that the Appellant left his mother's house due to problems with Mr Vernon, and stayed with Ms Lynch as claimed, and that he presently resided with Ms Bruce-George. However it did not

accept that he could no longer reside with Ms Bruce-George, given that she had accommodated him for some time, there was no evidence of lack of space or practical problems, and the absence of evidence from the Sponsor that she could no longer accommodate the Appellant.

8. Having regard to those findings, the Judge went on to consider the routes under the Rules, bearing in mind that the ground of appeal depended on demonstrating a breach of the Human Rights Convention. There was no evidence that the mother had derogated her role in her son's upbringing that might fix the Appellant with sole responsibility. He had been a present and active father. The mere transfer of custody via a court order (one which provided for "liberal contact" with the mother) did not mean that thereafter the mother played no role in her son's care any more than it ruled out the possibility of the Sponsor having previously taken a significant role in his life.
9. That left the question of whether the Appellant's exclusion from the UK was undesirable. Relevant considerations, having regard to the Appellant's best interests, were continuity of residence and being with at least one parent. Although the Appellant did not live with his mother, he remained in contact with her, and was adequately accommodated by Ms Bruce-George; he had a good relationship with his father. At the date of application he was on a Careers Advancement Course due to finish in June 2018. Assessing things in the round, the Judge concluded that his best interests narrowly pointed towards coming to the UK, by a very small margin.
10. Having regard to considerations such as evidence of neglect or abuse (the evidence for which had been rejected), unmet needs, and stable arrangements for physical care, the Judge concluded that Applicant's needs would be equally well served by staying in Jamaica with his mother, albeit wop necessarily living with her, as they would by uprooting to join his father. His father was able to visit him regularly now and the Appellant would be cared for in Jamaica. He was now in education having succeeded in his Stage 3 City and Guilds Mathematics. Overall his circumstances did not present serious and compelling reasons making his exclusion undesirable.
11. Grounds of appeal dated 7 August 2018 argued that
  - (a) The appropriate standard of proof was the "reasonable likelihood"; the Tribunal had applied too high a standard of proof, as was shown by the rejection of aspects of the Appellant's case, including the claim of physical violence – why else, their author asked, would the Appellant have left his mother's home, and in any event emotional abuse was as damaging as physical;
  - (b) Relevant considerations were not adequately taken into account, for example the fact that the Appellant had lived in disruptive circumstances since 2014;

- (c) There was no consideration of Section 117B NIA 2002.
12. The First-tier Tribunal granted permission to appeal on 9 October 2018 on the basis that too stringent a test on sole responsibility might have been applied.
13. Ms Oji submitted that the mother had inevitably renounced responsibility fully, and the Judge had applied an overly strict test in rejecting the case put. The Custody Order was of central importance. Given it was accepted that the Rules were mostly satisfied, it was essential that there was the closest engagement with the Appellant's case having regard to all the evidence. Ms Isherwood replied that the First-tier Tribunal had made no material errors of law and had come to a decision that it was fully entitled to make in the light of the evidence before it.

### Findings and reasons

14. It is an axiom of the Upper Tribunal's jurisdiction that it is necessary to identify a material error of law before it can interfere with the factual findings below. A relevant error can be established by a lack of reasoning or irrationality, or a failure to take relevant evidence into account; or by overt misdirection such as in relation to the standard of proof.
15. The authorities recognise that reasons must be given for both the determination of the appeal and the material findings of fact upon which that decision is based and they must be provided in sufficient detail to "enable the reader to know what conclusion the decision maker has reached on the principal controversial issues": see Lord Bridge in *Save Britain's Heritage v No 1 Poultry Ltd* [1991] 1 WLR 153. As noted by Beatson LJ in *Haleemudeen* [2014] EWCA Civ 558 §35, 37:

"What is required is that the reasons must give sufficient detail to show the parties and the appellate tribunal or reviewing court the principles upon which the lower tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its decision. The reasons need not be elaborate, and need not deal with every argument presented ... judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined and it should not be assumed too readily that the tribunal misdirected itself because not every step in its reasoning is set out in it".

16. Lord Sumption stated in *Hayes v Willoughby* [2013] UKSC 17 §14:

"A test of rationality ... applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

17. As stated by Carnwath LJ in *Mukarkar* [2007] Imm AR 57 §40:

“It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case ... The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ... Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”
18. Where the reasoning of the First-tier Tribunal is comprehensible, then however objectionable it may be, the complaint is essentially one of rationality, unless the reasons given fail to take account of relevant evidence or considerations. Equally, a complaint regarding the standard of proof needs to identify some express misdirection; or at least be able to point to some overt feature of the finding which is flatly inconsistent with the standard of proof (see eg Lewison LJ in *ME (Sri Lanka)* [2018] EWCA Civ 1486 §18).
19. It seems to me that the grounds of appeal and Ms Oji’s submissions amount to no more than a challenge to the factual findings, without reaching the necessary threshold at which the Upper Tribunal can intervene. The mere fact that an assertion is made in adversarial proceedings does not demand its acceptance, so long as reasoned findings are made on the key issues that in dispute.
20. Here the Tribunal’s reasons are perfectly comprehensible. It accepted the strength of family life between father and son, but did not accept that the mother played no role in the boy’s life, which is understandable given that she was allowed extensive contact under the court order. The lack of supporting medical evidence for the alleged physical harm the boy suffered was a perfectly sustainable basis for questioning the reality of any abuse; true it is that emotional abuse can be as serious as physical, but that could equally well be attested to by corroborative evidence from a reliable source, and one can well see why the Tribunal sought corroboration given that the father’s own statement did not clearly detail any such mistreatment. Once the mistreatment was ruled out, it was relatively unsurprising that the Tribunal considered that the Appellant would suffer significant disruption by uprooting to this country for only a very modest benefit, a state of affairs that did not represent a disproportionate interference with the family life in play.
21. Whilst it may well be true that there was no express consideration of the public interest factors identified in section 117B NIAA 2002, this was because the factual findings on the appeal were such that those considerations could have very little role to play. As stated in *Rhuppiah* [2018] UKSC 58 §57:

“In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to highlight their ability to speak English and/or their financial independence; but the legitimate deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims.”

22. So in an entry clearance case, those factors are essentially neutral in impact; they can be relevant to demonstrating the strength of a person’s connection with UK society generally, but that is hardly relevant in a case where the applicant has always lived abroad and relies on family life with a parent. Precariousness of residence is also a neutral factor in this case; the Appellant has never lived in this country, lawfully or otherwise, and the father’s settled status entitles him to apply for his son to join him here, but that is the starting point, not the end, of the application’s viability.
23. In summary, given the absence of any failings to take account of material considerations by the First-tier Tribunal, the Appellant’s challenge to the decision on “standard of proof” grounds amounts to a claim that the reasoning is inadequate or perverse. There is certainly no overt misdirection on standard of proof; essentially the point is a disguised rationality challenge. It seems to me that the Tribunal’s reasoning on the material issues is perfectly clear to the informed reader.
24. I accordingly find that the decision of the First-tier Tribunal should stand.

Decision:

The appeal is dismissed.

Signed:

Date: 3 December 2018



Deputy Upper Tribunal Judge Symes