



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00966/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 23 November 2020

Decision & Reasons Promulgated
On 7 December 2020

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

KYWANI ALSHON ODANE HIGGINS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellant: none (the appellant's father/sponsor - Mr A Higgins, appeared on his behalf)

For the respondent: Ms Cunha, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Cameron (“the judge”) promulgated on 8 June 2019, dismissing the appellant’s appeal on human rights grounds against the respondent’s decision dated 13 November 2018 refusing to grant him entry clearance to the UK to join his father, Mr A Higgins (“the sponsor”).
2. The appellant is a national of Jamaica born on 9 November 2000. His sponsor came to the UK in 2002. In 2014 the appellant made an application under paragraph 297 of the immigration rules to join his father. In order to be granted entry clearance under paragraph 297 a child must show that he is applying to enter the UK in one of a number of circumstances. These circumstances include one of the child’s parents being present and settled in the UK who has sole responsibility for the child’s upbringing (paragraph 297(i)(e)), or one of the child’s parents being present and settled in the UK and the existence of serious and compelling family or other considerations which makes exclusion of the child undesirable (paragraph 297(i)(f)). The appellant’s application in 2014 was based on the latter circumstance (paragraph 297(i)(f)).
3. The appellant’s application was refused and an appeal lodged by him was dismissed by Judge of the First-tier Tribunal Bartlett in a decision sent on 9 August 2016. Judge Bartlett noted the appellant lived with his paternal grandmother during the week and with his biological mother and half-siblings at the weekends. Although it was claimed that the appellant’s relationship with his mother was poor, Judge Bartlett did not accept it was as bad as claimed, particularly given that the appellant lived with his mother two out of seven days. Nor did Judge Bartlett accept the arguments that the appellant’s paternal grandmother was too old and unable to look after him. Judge Bartlett noted that the appellant’s paternal grandmother had been a constant and stable presence in the appellant’s life for 13 years. Judge Bartlett was not satisfied that the requirements of paragraph 297(i)(f) were met and concluded that the decision to refuse entry clearance did not breach Article 8 ECHR.
4. On 26 June 2018 the appellant made a further application to join his father. The respondent was not however satisfied that the appellant’s sponsor had sole responsibility for him, or that there were serious and compelling considerations making his exclusion from the UK undesirable. The respondent was not satisfied the appellant’s mother had no involvement in his upbringing or that there was sufficient evidence to show that the sponsor was responsible for taking all the important decisions about the appellant’s upbringing. The respondent also believed that the appellant could continue living with his paternal grandmother. The respondent was not satisfied that the appellant could be adequately maintained by his father, as required by paragraph 297(v) of the immigration rules. The appellant appealed the respondent’s decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

5. The judge had before him a large bundle of documents that included witness statements from the appellant and his sponsor and his spouse. The bundle also included several WhatsApp messages between the appellant and his sponsor, a short letter from York Castle High School confirming that the appellant was a Grade 11 student, and a letter from Dr Minott, dated 6 June 2018, who had been the appellant's doctor "for several years". The judge heard oral evidence from the sponsor. The judge summarised the evidence given to him, as disclosed in the statements and the oral evidence, and indicated that he had taken account of the submissions made by the appellant's barrister and the Presenting Officer.
6. In the section of his decision headed 'Conclusions' the judge considered, at [49] to [58], the evidence relied on by the appellant to support his claim that his sponsor had sole responsibility for him. The judge noted that, although claiming in his witness statement that he was not in a stable environment and that his biological mother hardly provided for him, the appellant had nevertheless spent every weekend with his mother prior to 2017 when she relocated to the USA, and that in his statement he stated that his biological mother loved him a lot. The judge additionally noted the sponsor's oral evidence that the appellant's biological mother would travel back and forth between Jamaica and the USA and that the appellant would visit her when she came to Jamaica. At [53] the judge noted that, although the appellant had been living with his paternal grandmother, he had had regular and consistent contact with his biological mother and continued to have contact with her even after she relocated to the USA.
7. At [54] the judge referred to inconsistencies in the WhatsApp evidence concerning references to 'Marcia' (the appellant's biological mother), 'mummy' and 'mommy'. The judge stated:

"Although Mr Higgins attempted to explain the references to Marcia and also mummy and mommy there were clear references which did not seem to apply to the person Mr Higgins said that they were in fact applying to and some of the references appeared to apply to the biological mother."
8. The judge then noted (at [55]) the absence of any evidence in the appellant's bundle confirming that his sponsor was the only person who had contact with the school, and, at [57], the judge stated:

"After considering all of the evidence available although I accept that Mr Higgins and his wife financially support the appellant and have done so for a considerable period of time, I am not satisfied that the appellant's biological mother has abandoned or abdicated her responsibility towards the appellant. His biological mother clearly had regular contact with him and maintains contact when she returns to Jamaica. Although he was looked after by his paternal grandmother his biological mother has always maintained a role in his life."

9. The judge concluded that there was insufficient evidence that the sponsor had been solely responsible for the major decisions in the appellant's life, even after the appellant's mother moved to the USA in 2017.
10. With respect to paragraph 297(i)(f), the judge took the findings of Judge Bartlett as his starting point. The judge noted that the evidence before him confirmed that the appellant's paternal grandmother had looked after him for most of his life and the judge made specific reference to the letter from Dr Minott (at [61]). At [62] the judge considered it relevant that the appellant's paternal grandmother had continued to care for him and, although there was an indication that she was unable to do so, the WhatsApp messages referred to his paternal grandmother looking for a job. At [63] the judge was not satisfied that the medical evidence indicated that the appellant's paternal grandmother was unable to continue to look after him and noted, given the appellant's age, that he would in fact be able to provide some assistance to her in relation to his great-grandmother. The judge found that the appellant's paternal grandmother was able to continue to care for him with the financial assistance of his father and that there were no serious and compelling family or other considerations making his exclusion undesirable.
11. The judge finally considered whether the respondent's decision breached Article 8 applying the five questions set out in **Razgar** [2004] UKHL 27 and the public interest considerations set out section 117B of the Nationality, Immigration and Asylum Act 2002. The judge noted that the appellant did not meet the requirements of the immigration rules, that he had lived all his life in Jamaica and had undoubtedly formed a family life with his grandmother and presumably great-grandmother. Given that the appellant's sponsor left Jamaica in 2002, and that the appellant and his sponsor could continue to enjoy their family life in the same way they had throughout the appellant's life, the judge was not satisfied that there would be a material interference with the family life. Nor was the judge satisfied that the respondent's decision would cause very substantial difficulties or exceptional circumstances such as to warrant a grant of leave outside the immigration rules. Having found that the decision was proportionate under Article 8, the judge dismissed the appeal.

The challenge to the judge's decision

12. The grounds of appeal contend, on the basis of the judge's factual findings (including financial support to the appellant, visits to Jamaica, regular contact, the appellant's residence with his paternal grandmother and the evidence that the sponsor spoke to his school and teachers), that he should have concluded that the sponsor did have sole responsibility for the appellant's upbringing. The judge's finding that the appellant had contact with his biological mother was said to be insufficient to demonstrate shared responsibility or that she was involved in the child's upbringing. The grounds rely on **TD (Paragraph 297(i)(e): 'sole responsibility')** **Yemen** [2006] UKAIT 00049 to support the contention that the fact that the appellant lived with his paternal grandmother

was insufficient to demonstrate shared responsibility. The grounds further contend that the judge failed to provide any or adequate reasons for his finding at [54].

13. The grounds further contend that, in reaching his conclusions under paragraph 297(i)(f), the judge erred in his assessment of the letter from Dr Minott. Nor did the judge make any or adequate findings in respect of the maintenance issue. The grounds finally contend that the judge made a mistake in law in his evaluation of Article 8 outside the immigration rules by failing to take into account the positive obligation to facilitate family reunion (with reference to **Mostafa (Art 8 in entry clearance)** [2015] UKUT 00112 (IAC) and **ECO v Box** [2002] UKIAT 02212, and that the judge failed to consider the Article 8 rights of the sponsor and his wife and their children. The judge's conclusion that any existing family life relationships could continue in the manner in which they had previously been maintained was said to be contrary with the approach taken in **LD (Article 8 - best interests of child) Zimbabwe** [2010] UKUT 278 (IAC). The judge failed to take account of the statement of the sponsor's wife when assessing the proportionality of the respondent's decision or the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002. Permission was granted on all grounds.
14. Although he made his submissions from a solicitor's office, the sponsor was not legally represented at the 'error of law' hearing. He explained that he was a self-employed market trader and that he was unable to pay a barrister to represent him. He was unsure when he would be able to restart trading and hoped that it may be in time for Christmas. Given the considerable uncertainty as to whether the sponsor would be able to afford legal representation even if the hearing was adjourned, and having regard to the detailed grounds of appeal and overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we considered it to be in the interests of justice to proceed with the hearing.
15. We explained to the sponsor at some length the basis for the judge's conclusions and, with reference to the grounds of appeal, the reasons why it was said that the judge made a mistake on points of law. The sponsor claimed that there had been a misunderstanding in respect of the WhatsApp evidence and that it was the appellant who was looking for work, not his grandmother. The sponsor explained that the appellant referred to his grandmother as 'mommy', and that he referred to his biological mother as 'mummy' or 'Marcia'. The sponsor stated that his grandmother had dementia and not Alzheimer's. The sponsor confirmed again that he spoke to the appellant a lot on the telephone, that he paid the school fees and for the bus to take him to school, and that he had a strong emotional attachment with the appellant. The appellant listened to the sponsor and, although he talked with his mother, he depended on the sponsor for guidance. The sponsor explained how he worked hard to ensure that the appellant had a good education.

Discussion

16. In determining whether the judge's decision involved the making of an error on a point of law we have been assisted by the decision in **TD (Paragraph 297(i)(e): 'sole responsibility') Yemen** [2006] UKAIT 00049, a case relied on by the judge at [19] of his decision and by the appellant in his grounds of appeal. In **TD** the Tribunal indicated that 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".
17. (iv) and (v) are of particular relevance in this case as the appellant argued that his mother had abdicated responsibility for him (see the skeleton argument prepared by Mr R Solomon, counsel, who represented the appellant at the First-

tier Tribunal hearing). When assessing the evidence relating to the involvement of the appellant's mother in his life the judge took into account a number of relevant factors including the appellant's assertion in his statement that his biological mother loved him a lot and the WhatsApp messages referring to the appellant's biological mother. These messages, such as those on pages 200, 204, 209 and 212, suggested that the appellant's mother was involved in the appellant's life. The judge also took into account the sponsor's oral evidence that the appellant would see his mother whenever she visited Jamaica, and considered the evidence in light of the previous findings of Judge Bartlett that the appellant lived (at least until 2017) with his biological mother 2 out of every 7 days and that his relationship with her was not "as bad as claimed by Mr Higgins."

18. There was, moreover, limited independent evidence before the judge that the sponsor was the only one exercising control and direction of the appellant's upbringing and that it was he who made all the important decisions in the appellant's life. As noted by the judge at [55] the letter from the appellant's school merely indicated that he was in Grade 11; it made no reference to the sponsor or any decisions that the sponsor may have made in respect of the appellant's education, or in respect of any involvement (or lack of) by the appellant's mother.
19. The grounds contend that the judge failed to give any or adequate reasons for his finding, at [54], that there was inconsistent evidence in the WhatsApp evidence relating to contact, but [54] must be read holistically, and, in particular, with reference to the judge's summary of the evidence at [38] to [40]. In these paragraphs, which consider references to 'mummy' and 'mommy' in the WhatsApp messages, the sponsor first stated that 'mummy' referred to the appellant's paternal grandmother, and 'mommy' to his biological mother [38]. the sponsor then however stated (at [39]) that a reference to 'mummy' at page 200 of the appellant's bundle was actually a reference to the biological mother. In our judgement it is clear, having read the judge's decision 'in the round', that the reasons for the judge's conclusion at [54] was adequately discernible from the decision. We observe in passing that, during the 'error of law' hearing, the sponsor transposed the references to 'mummy' and 'mommy' in comparison to the explanation he gave to the judge at [38].
20. In a human rights appeal, including one concerning the requirements of paragraph 297 of the immigration rules, the burden of proof remains on the appellant to demonstrate that the rules have been met. This includes the requirement to demonstrate that one parent has sole responsibility. In light of the guidance offered in TD and the judge's assessment of the evidence made available to him, and in the absence of any evidence from the appellant's biological mother (noted by the judge at [36]), the judge was entitled to conclude that there was insufficient evidence, contrary to the assertions in the appellant's skeleton argument prepared for the First-tier Tribunal hearing, that the appellant's biological mother had 'abdicated' her responsibility for the

appellant. It was consequently open to the judge to conclude that the appellant failed to demonstrate that his sponsor was solely responsible for his upbringing.

21. In relation to the grounds relating to serious and compelling circumstances, the judge demonstrably considered the letter from Dr Minott (at [61]) and considered this evidence in the context of Judge Bartlett's findings and the appellant's particular circumstances. Dr Minott's letter refers to the appellant's paternal grandmother as being diabetic and having hypertension, for which she receives medication, and that she cares for her 87-year-old mother who has Alzheimer's (at the 'error of law' hearing the sponsor said that his grandmother had dementia and not Alzheimer's, but we take no issue with this inconsistency), but it is unclear on what basis the doctor was able to conclude that the grandmother "is no longer able to provide the time, effort and discipline" needed to keep the applicant "in check." The letter from Dr Minott was of limited probative value and the judge did not err in law in his consideration of that letter. Although the judge may have mistakenly thought the paternal grandmother was looking for a job rather than one for the appellant, he noted, in any event, that the appellant was of an age where he would be able to provide some assistance in relation to his great grandmother. Any mistake could not, on any reasonable view, undermine the judge's assessment of paragraph 297(i)(f).
22. Although the judge did not make any findings in respect of the maintenance issue, this could not have made any material difference given his lawful assessment of paragraph 297(i)(e) and (f).
23. Nor are we persuaded that the judge erred in his assessment of Article 8 outside the immigration rules. The judge properly directed himself in respect of the **Razgar** questions and the considerations in s.117B of the Nationality, Immigration and Asylum Act 2002, and he was entitled to take into account, when assessing whether there had been an interference with Article 8, and whether the respondent's decision was proportional under Article 8, the manner in which the appellant's relationship with his father had been maintained. This was relevant both in respect of the Article 8 rights of the appellant and that of his sponsor and his sponsor's family in the UK. In **Mostafa** the Upper Tribunal held that a person's ability to satisfy the immigration rules was capable of being a weighty, though not determinative, factor when deciding whether refusal of entry clearance was proportionate to the legitimate aim of enforcing immigration control. The appellant in the instant case did not however meet the requirements of the immigration rules and this was relevant to the weight to be given to the maintenance of effective immigration controls in the public interest. There was nothing in the evidence before the judge or the factual matrix as found by him that could have entitled him to conclude that the positive obligation to facilitate family reunion rendered the respondent's decision disproportionate under Article 8. **LD** cannot assist the appellant as this was not a case concerning entry clearance but the

deportation of someone who lived in the UK with his children, and therefore related to an entirely different scenario.

24. For the reasons set out above we find that the judge did not make a mistake on a point of law that requires his decision to be set aside.

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law

The appeal is dismissed

D. Blum

27 November 2020

Signed
Upper Tribunal Judge Blum

Date