Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18217/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decisions& Reasons Promulgated**
On 20th December 2019	**On 10th January 2020**

Before

UPPER TRIBUNAL JUDGE COKER

Between

DANIEL OSEI MENSAH

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hawkin, counsel, direct access
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 12th November 2019, I set aside the decision of First-tier Tribunal Judge Freer for the following reasons:

    1. This is the appeal of the Secretary of State against a decision by First-tier Tribunal Judge Freer following a hearing on 3 July 2019. He allowed the appeal of Mr Mensah for reasons set out in a decision promulgated on 18 July 2019.

    2. Mr Mensah is a Ghanaian citizen born on 1 May 2000 who applied on 27 April 2018, just a few days short of his 18th birthday, for entry clearance under paragraph 297(f) of the Immigration Rules. He sought entry clearance as a

dependant of his aunt on the basis that there were serious or compelling family or other considerations which make exclusion of the child undesirable. Unfortunately, Judge Freer considered the application and the appeal under paragraph 297(e) of the Rules which is only applicable where the sponsor is a parent not, as in this case, an aunt. Although the question as to whether or not the sponsor had sole responsibility for the child as he then was may well impact upon the decision under 297(f) of the Rules that is not the end of the consideration that has to be given.

3. The judge set out in his decision the background material that was before him and found the sponsor to be very frank and co-operative. She plainly came across extremely well, but unfortunately despite the fact that she has been supporting the appellant financially and visiting once or twice a year there was, so far as I could see, no evidence before the First-tier Tribunal Judge that there were any serious or compelling family or other considerations which made Mr Mensah's exclusion undesirable.

4. The judge in paragraph 27 of his decision found that the sponsor satisfied the requirements of the Rules as the sole parent. She was settled in the UK and has had sole responsibility now for many years. She is not the sole parent. She may well be settled in the UK and she may well have looked after him for a number of years, but that does not result, without more information, in a decision that there are serious or compelling family or other considerations. The appellant was three days short of his 18th birthday when the application was made. There does not appear to have been any evidence put to the First-tier Judge what the compelling family circumstances were, or indeed what the family circumstances were other than there was a full-time carer for his grandmother with whom he was living. There was nothing to show that his exclusion would be undesirable, particularly given that he had completed education and was now attending college. There is one reference to him having to go out and look for friends, but it cannot be concluded that amounts to a serious consideration or compelling circumstance. Presumably that is what most 17 and 18 year olds do. Furthermore, the fact that there is a real connection between the sponsor and the appellant does not in itself mean that there was a relationship which could only continue if he were resident in the UK and that his continued residence in Ghana was in some way harmful to him.

Notice of Decision

5. I am satisfied that the judge has applied the incorrect test; has made findings that Mr Mensah meets the Immigration Rules when he does not; and has failed to provide any proper assessment of the proportionality of the decision to allow the appeal on Article 8 grounds. I set aside the decision as an error of law to be remade.

6. I note from the file that the sponsor was unable to attend the hearing on 12 November 2019 and was informed that if the decision was set aside it would be relisted for further hearing. An adjournment was refused, and she said she was content for the error of law to be determined in her absence.

Conclusion

The First-tier Tribunal Judge erred in law and I set aside the decision to be remade.

2. Thus the appeal came before me on 20th December 2019. The appellant had filed a comprehensive and helpful bundle of documents. I heard oral evidence from the appellant's aunt, Josephine Clementine Ammah and her

husband Anthony Acquah and submissions from Mr Hawkin and Mr Melvin. I reserved my decision which I now give with reasons.

3. Judge Freer found, having heard oral evidence, that Ms Ammah had sole responsibility for the appellant for several years, since the death of her sister who was the appellant's mother. The judge accepted that there were good reasons for the delay in the making of the application for entry clearance. Although Mr Melvin in submissions drew attention to the existence of other family members in Ghana, the finding of sole responsibility was not subject to appeal to the Upper Tribunal and is a finding that, as submitted by Mr Hawkin is retained. The issue before me, which was not addressed by the First-tier Tribunal judge was whether there were serious and compelling family or other circumstances such as to render exclusion from the UK undesirable. The existence of other family members may impact upon the question of whether exclusion is undesirable, but their presence does not impact upon the finding that Ms Ammah has and had sole responsibility.

4. Ms Ammah was frank, co-operative and clear in her evidence before me, as she was before the First-tier Tribunal Judge. Her husband had not given evidence before the First-tier Tribunal but his evidence before me was generally consistent with that of his wife although it lacked the detail of that of Ms Ammah. He is not related to the appellant other than through marriage to the appellant's aunt. I am satisfied that such lack of detail or inconsistencies in the evidence such as the detail of Ms Ammah's sister, where she lived, the collection of money which was sent by Ms Ammah for the appellant and the grandmother's state of health were of relatively minor import and stemmed from a lack of knowledge (understandable given the nature of the relationship) rather than through any attempt to mislead or deceive the Tribunal.

5. Mr Melvin took issue with Ms Ammah's evidence as to what appeared from her description, to be the appellant's learning difficulties, that he was bullied, reclusive, had limited reading and writing skills and was vulnerable. He submitted that none of this evidence had been before the First-tier Tribunal and he submitted that although not going so far as to submit that Ms Ammah was attempting to deceive the Tribunal, it was 'over-egging the pudding' in an attempt to substantiate the claim that there were serious family or other considerations. He drew attention to the evidence, including documentary evidence, that indicated the appellant had completed his education, was no longer receiving any additional education and that he was taking an automotive course which contradicted the assertion the appellant could not read or write. Such assistance as the appellant required could, he submitted, be provided by the other family members in Ghana from whom he noted there was no witness statement.

6. I note there was no witness statement from Ms Ammah's sister. Ms Ammah's evidence was that her sister lived in the outskirts of Accra, travelled in perhaps once a month, collected the money sent for the appellant and delivered it to the grandmother's home. She did not, Ms

Ammah said, have any particular contact with the appellant and provided no care for or support to him. It would have been of assistance if there had been a witness statement from the sister. Nevertheless, I accept Ms Ammah's evidence that her sister has little or no contact with the appellant. The existence of the sister would have been before the First-tier Tribunal judge and would have been a matter he considered in reaching his decision on sole responsibility. I do not accept Mr Melvin's submission that the sister could or would or has taken any role in the care of the appellant since his mother's death or that she would in the future.

7. The evidence before me from Ms Ammah as to the appellant's possible learning difficulties was substantiated by the school report which indicated his aptitude was weak, very weak or fail. At automotive school the only subjects on which he was good were auto mechanics and technical drawing. Other subjects he failed or merely passed. It is correct that there was no report into possible learning difficulties or what particular measures could or should be taken to address these difficulties. Ms Ammah said she had arranged additional tuition for him, but the teacher had said there was little point in continuing because the appellant could not read; she had not had time in her visits to Ghana to arrange for particular assessment or testing to be undertaken. I accept this evidence.

8. Ms Ammah was very clearly and plainly concerned and caring of the appellant. She was firmly of the view that with the assistance she could give if he were living with her and her husband and with the contact he would gain from his cousins, he would begin to achieve basic English and maths skills and increased confidence. I accept her heartfelt evidence which was thoughtfully given. I do not accept Mr Melvin's submission that she was 'over-egging the pudding'; nor do I accept that the evidence of the appellant's learning difficulties and the consequences of that have been manufactured for the purposes of the appeal. I am satisfied, as submitted by Mr Hawkin, that these issues were not explored before the First-tier Tribunal, the judge in that hearing concentrating on the issue of sole responsibility and not the correct legal test. I am satisfied that on the evidence before me the appellant has learning difficulties which have had as a consequence led to him being vulnerable, isolated and bullied in addition to being unable to read and write as well as could otherwise be expected.

9. The issue to be determined is whether there are serious family or other considerations which are such as to render exclusion of the appellant undesirable. I take into account the fact that the appellant was, at the date of application, just short of his 18th birthday. Whilst he was a minor, he was only just a minor; his age is a relevant factor. Circumstances that may be serious for a minor of 10 or 12 may not fall into the same category for an older juvenile. This appellant does however have learning difficulties the exact extent of which is unknown, but they have clearly had a disadvantageous impact not only on his academic ability but also his social and coping skills. He has been physically in the care of his grandmother and I am satisfied that he needed this physical care beyond the age at

which one would expect minors to become more self-sufficient. His grandmother's health has deteriorated and the person who used to help her is no longer available to help. He has no meaningful contact with his aunt who lives just outside Accra and there are no other family members, whether direct or through the marriage of the sponsor, who can assist in any meaningful way. Of considerable importance and of substantial weight is the fact that his aunt in the UK has sole responsibility. Whilst I do not accept that this fact is of itself sufficient to enable the appellant to succeed under the Rules, I do accept that it is a weighty factor. I accept that the appellant requires 'looking after'. This is not merely because he has learning difficulties but because he is plainly isolated and vulnerable. The appellant has had a difficult youth – his mother died when he was young, his grandmother has become increasingly unable to provide him with the daily physical care that he requires, and he has learnt very recently that the man he thought was his father was not – even though he played no part in his life. The one person who has remained constant in his life is his aunt who has sole responsibility for him.

10. It is not reasonable for the sponsor and her husband to relocate to Ghana to look after the appellant.; they have three children here in the UK who, although not minors are still very much a part of the family. Ms Ammah's evidence, which I accept, was that she would provide the appellant with the loving family home that is needed.

11. I am satisfied, taking all the evidence in the round, that the exclusion of the appellant from the UK is undesirable. I am satisfied that he meets the requirements of the Immigration Rules. It follows that the refusal of entry clearance was in breach of Article 8.

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 re-make the decision in the appeal by allowing it.

Date 6th January 2020

Upper Tribunal Judge Coker