



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

Appeal Number: HU/25014/2018

THE IMMIGRATION ACTS

**Heard at Field House
19 February 2020**

**Decision & Reasons
Promulgated
On 20 April 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WF

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Not represented – Sponsor appears

DECISION AND REASONS

The appellant in these proceedings is the Secretary of State, but for convenience I refer to the parties as they were before the First-tier Tribunal.

The appellant is a citizen of Cameroon born on 19 October 2007. She made an application on 27 February 2018 for entry clearance pursuant to paragraph 297 of the Immigration Rules (“the Rules”) for settlement as the child of a parent present and settled in the UK. That application was refused in a decision dated 30 November 2018.

The appellant appealed against that decision and her appeal came before First-tier Tribunal Judge Shore (“the Ftj”) at a hearing on 3 September 2019 resulting in the appeal being allowed. This is the Secretary of State’s appeal against that decision.

The Ftj’s Decision

The Ftj identified the issues in dispute as being of ‘sole responsibility’ (para 297(i)(e)) and whether there were serious and compelling family or other considerations making the appellant’s exclusion from the UK undesirable (para 297(i)(f)).

The Ftj summarised the basis of the refusal of entry clearance and the basis of the appellant’s claim to be entitled to entry clearance. At [11] - [12] he identified the documentary and other evidence before him, including witness statements. He summarised the oral evidence between [14] and [28]. He set out in detail the parties’ submissions.

In making his findings the Ftj referred to various authorities, both in relation to the application of the Rules and in relation to Article 8.

He made the following findings. He found that the evidence of the appellant’s father (sponsor) VF, his wife (the appellant’s stepmother) FT, and that of the appellant’s paternal grandmother, TC, along with the documentary evidence provided, did not establish on a balance of probabilities that the sponsor had sole responsibility for the appellant. He gave a number of reasons for coming to that conclusion. In summary, they are as follows:

The sponsor had left the family when she was an infant and she had never lived with him.

No court or other documents were produced to show that the sponsor had legal custody or responsibility for the appellant.

Organisations like the appellant’s school and her church, and her doctor, could and should have been able to provide documents evidencing who has parental control.

The sponsor’s mother said that she made the decisions with regard to the appellant’s upbringing.

Given that the sponsor knew exactly why entry clearance had been refused, he did not find plausible the excuse for the failure to produce bank records, the explanation being that it was an attempt to keep the bundle as short as possible. The Ftj said that he would have expected to see all bank records showing payments made for school fees, doctor’s bills, maintenance, costs for food and clothing, and such other items. He would also have expected to see invoices and receipts from the organisations who were paid.

He would have expected to see a witness statement from whoever received the bank transfers but no details or evidence was produced.

All the statements were very light on detail as to how the sponsor has sole responsibility. No specific examples were given in the written evidence. In his closing submissions the sponsor only spoke of the decision to educate the appellant in English.

The appellant produced no evidence that met the balance of probabilities standard that the socio-political position in Cameroon justified a grant of entry clearance.

The letter from the appellant's mother was not very detailed. He expressed concern that the appellant's grandmother said that the appellant had lived with her maternal grandmother until 2012 but the letter from the appellant's mother was silent on that detail.

Although he accepted that the appellant's mother has leave to remain in Poland until 7 September 2021, it was not shown that her mother plays no part in the direction of her life.

The XL spreadsheet was not explained at all in the witness evidence or skeleton argument. As a document, it had no provenance and had virtually no evidential value. (The XL spreadsheet was said to be of transactions between 2012 and 2015, highlighting payments to the appellant).

The photographs that have been produced may have shown contact between the sponsor and the appellant but do not establish sole parental control.

The FtJ did accept, however, that the sponsor is the biological father of the appellant, a matter which was not disputed. He also accepted that the sponsor maintained regular contact with the appellant via electronic means and regular visits to Cameroon.

At [47] he said this:

"I find that, on balance, the witnesses were not credible on the issue of sole parental control and serious and compelling reasons, because, although I am sure they were genuine in their expressed love for the Appellant and in their wish to have the Appellant join her father in the United Kingdom, their written and oral evidence and the documents did not go far enough to establish on the balance of probabilities that the sponsor has continuing control and direction in important decisions in the Appellant's life. I should stress that I am not saying that the sponsor or any of the witnesses were being untruthful."

Next, at [49], referring to the decision in *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049 the FtJ concluded that the appellant had not shown on a balance of probabilities that her mother had abdicated any responsibility for her and that her grandparents were merely acting at the

direction of the sponsor, and that her mother was otherwise totally uninvolved in the appellant's upbringing. This was not a situation in which the mother and/or grandparents were doing nothing other for the child beyond the bare fact of living with her on reasonably good terms (as described in *Alagon v ECO, Manila* [1993] Imm AR 336).

As regards para 297(i)(f) (serious and compelling family or other considerations), and referring to the decision in *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 88 (IAC), he found that there was no evidence of neglect or abuse and no unmet needs that should be catered for. He said that he saw no compelling medical evidence about the appellant. He further found that there were stable arrangements for the appellant's physical care.

In the same paragraph, the FtJ said that the assessment involved consideration of whether the combination of circumstances was sufficiently serious and compelling to require admission to the UK. He found that the best interests of the appellant are best served by being with both, or at least one, of her parents and that continuity of residence was another factor that needed to be considered. He concluded that the best interests of the appellant are to be with her biological father, her sister and her stepmother. He then said at [50] that:

"As her father and sister are British citizens and cannot be compelled to leave the United Kingdom, I find that the appellant's appeal should succeed on this ground."

He thus concluded that the appellant had shown, on a balance of probabilities, that there were serious and compelling family or other considerations which made the appellant's exclusion undesirable.

The FtJ then referred to *T (s.55 BCIA 2009 - entry clearance)* Jamaica [2011] UKUT 00483 (IAC) to the effect that although s.55 of the Borders, Citizenship and Immigration Act 2009 did not apply to children who are outside the United Kingdom, the spirit of the statutory guidance should be applied. He found that the best interests of the appellant were to be reunited with her father and half-sister in the United Kingdom.

The FtJ next turned to s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He found that there was no evidence that the appellant could speak English, apart from the written and oral evidence of members of her family who want her to be granted entry clearance. He said that a letter from the school would have been enough. He also found that the appellant had not shown that she would not be dependent on State benefits.

In considering para GEN.3.2(2) and Article 8 outside the Rules, and referring to various authorities, the FtJ said that he had taken into account the rights of the appellant's father, half-sister and stepmother. He concluded that the interference with the appellant's right to respect for her private or family life was not proportionate to the legitimate aim sought, although he said that he had given that legitimate aim considerable weight. The adverse findings were outweighed by the family life that would be established by the appellant with

her family in the UK when weighed against her family in Cameroon. He referred again to the appellant's best interests. He also said that he took into account "the best interests of the Appellant's half-sister, father and stepmother" and found that the desirability of them developing a relationship with the appellant outweighed the public interest on its own, or in combination with the other Article 8 factors raised on behalf of the appellant. He then said that: "There are no insurmountable obstacles on my findings of fact."

Lastly, at [57] he concluded as follows:

"I find that the decision appealed against would cause the United Kingdom to be in breach of its obligations under Article 8 of the ECHR because the Appellant has shown exceptional circumstances as set out in my findings above, and refusal would not result in unjustifiably harsh consequences for the Appellant such that refusal of her application would not be proportionate" (sic).

The Grounds and Submissions

In summary, the Secretary of State's grounds contend that the FtJ failed to apply the decision in *Mundeba* in terms of the best interests of the appellant. Likewise, in relation to what was said in *SG (child of polygamous marriage) Nepal* [2012] UKUT 265 (IAC), when concluding that there were serious and compelling family or other considerations making the Appellant's exclusion undesirable.

Similarly, the FtJ had failed to identify the serious and compelling factors which he found would make the appellant's exclusion undesirable. The grounds point out that the FtJ found that there were no present issues with the appellant's current care in Cameroon, the sponsor has never lived with the appellant, and there was no evidence to demonstrate that he has any parental rights or legal custody for her. The FtJ had failed to attach "the appropriate weight" to the importance of the appellant's continuity of residence and current care arrangements. The FtJ's decision implies that the FtJ felt that the educational advantages and the economic betterment of the appellant in the UK amount to the compelling circumstances making her exclusion undesirable.

Further, it is argued that the FtJ did not provide any reasons to support the finding that it was in the best interests of the appellant to live in the UK with her father, half-sister and mother other than that they are British citizens and cannot be expected to leave the UK. Again, in the context of the appellant having never lived with her father, the sponsor, and he not having any legal custody or parental responsibility for her, the FtJ erred. The best interests of the appellant in this appeal are to remain in Cameroon with the continuity of the care arrangements already in place.

In her submissions, Ms Fijiwala relied on the grounds. It was submitted that the FtJ's decision is devoid of any reasoning in terms of why the appellant could not remain in Cameroon in the circumstances in which she presently lives. It was also relevant that the FtJ dismissed the appeal in terms of sole responsibility.

That was inconsistent with the later finding that there were serious and compelling circumstances making her exclusion undesirable.

Although the FtJ had assessed the appellant's best interests as requiring her to be admitted to the UK, a child's best interests are but one factor to be taken into account. The matters that the FtJ found at [50], for example no evidence of neglect or abuse, or unmet needs, and so forth, all needed to be taken into account.

In his arguments before me, the sponsor referred to the skeleton argument that he had prepared for the hearing. That skeleton argument refers to the decisions in *Mundeba* and *SG*. Reference is made to Article 8 and the issue of the need for there to be a legitimate aim. To summarise, the skeleton argument contends that there is no public interest in Article 8 terms in the appellant's exclusion.

The sponsor pointed out that the appellant was not living with any parent and they were seeking to exercise their right to family life. It was argued that the appellant's best interests are not served by living with a grandparent. Her best interests needed to be considered first. There was no public interest or legitimate aim in refusing her entry clearance.

I was referred to the decision in *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095, in particular at [24] in terms of the best interests of a child. In that paragraph it states that:

“Finally, any specialist decision maker approaching this case would know that the best interests of the children were a distinct, primary consideration. What is in the best interests of the children is also not dependent on the public interest but needs to be decided in the context of where the parents are expected to be: see *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, at [58].”

It was also submitted that the appellant should not be punished for the fact that her parents are not together because they do not get along, citing *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53.

I have also taken into account the written closing submissions provided by the sponsor which, in addition to the matters already referred to in the skeleton argument and his oral submissions, refer to the socio-political situation in the English-speaking regions in Cameroon.

The sponsor argued that even if there is any error of law in the FtJ's decision, the error of law is not material and does not require the decision to be set aside.

Assessment of error of law issue

The Ftj clearly gave detailed consideration to the appellant's appeal and referred to relevant authorities. However, I am satisfied that the respondent's grounds, for the most part, are made out.

In the first place, the Ftj concluded that the appellant had not established that the sponsor has had sole responsibility for the appellant. His findings in that respect, amongst other things, included that the sponsor left the family when she was an infant, she has never lived with him and that there are no court or other documents to show that he has legal custody or responsibility for her. He concluded that the appellant had produced no evidence that showed, on a balance of probabilities, that the socio-political position in Cameroon justified a grant of entry clearance, and he concluded that the appellant had not shown that her mother, who lives in Poland, played no part in the direction of her life. Those findings on sole responsibility were relevant to the issue of whether there were serious and compelling family or other considerations making the appellant's exclusion undesirable, albeit that it must be the case that that subparagraph of the Rules is an alternative basis a grant of entry clearance, and upon which an appeal may succeed. That is not to say, however, that the earlier findings in relation to sole responsibility are not relevant. They plainly are.

When the Ftj went on to consider serious and compelling family or other considerations under para 297(i)(f), he found that there was no evidence of neglect or abuse and no unmet needs of the appellant that needed to be catered for. There was no compelling medical evidence in respect of the appellant and there were stable arrangements for the appellant's physical care.

However, in concluding at [51] that the appeal should succeed under para 297(i)(f), the Ftj said as follows at [50.5]:

"The best interests of the Appellant are best served by being with both or at least one of her parents. Continuity of residence is another factor that I have to consider. A change in the place of residence where a child has grown up for a number of years when socially aware is important. I find that the best interests of the Appellant are to be with her biological father, her sister and her step-mother. As her father and sister are British citizens and cannot be compelled to leave the United Kingdom, I find that the Appellant's appeal should succeed on this ground."

In other words, it is clear that the Ftj equated the appellant's best interests, without more, with the conclusion that there were serious and compelling family or other considerations making her exclusion undesirable. Even on the assumption that the Ftj was entitled to conclude that her best interests were served by leaving the country in which she has lived all her life and where she has a caring and stable upbringing, that does not automatically mean that there are serious and compelling family or other considerations making her exclusion undesirable.

At [34] of *Mundeba*, it says as follows:

“In our view, ‘serious’ means that there needs to be more than the parties simply desiring a state of affairs to obtain. ‘Compelling’ in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. ‘Serious’ read with ‘compelling’ together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.”

Thus, in *Mundeba* it was said that the threshold for finding serious and compelling family or other considerations is a high one. I respectfully agree with that analysis. It is not possible to conclude on the facts as found by the FtJ, that there were either ‘serious’ or ‘compelling’ family or other considerations, let alone both, which is what is required.

The effect of the sponsor’s arguments is to suggest that where a child is not living with a parent and has a parent in the UK, that is sufficient to meet the requirements of the Rules. Self-evidently, with reference to para 297(i)(f), that is not the case. There has to be more than the mere fact of one parent being present and settled in the UK.

In the circumstances, I am satisfied that the FtJ erred in law in his conclusion in respect of para 297(i)(f). That is quite apart from the inconsistency that is apparent between [47] and [50] and [51]. The latter two paragraphs find that there are serious and compelling family or other considerations, but at [47] the FtJ, after assessing the issue of sole parental responsibility, found that “the witnesses were not credible on the issue of sole parental control and *serious and compelling reasons*” (emphasis added). It seems, therefore, that at [47] the FtJ actually concluded the opposite of what he found at [50] and [51], although admittedly not using the precise phraseology of para 297(i)(f).

It is not entirely clear why, given that the FtJ allowed the appeal under the Rules with reference to para 297, he went on to consider the appeal with reference to para GEN.3.1 - 3.3, which applies where the requirements of the Rules under Appendix FM or Part 9 of the Rules are not met. Para 297 is neither within Appendix FM nor Part 9 of the Rules. Regardless of that, even if otherwise GEN.3.2 would apply, it would only apply where the Rules are not met. Similarly, there was no need for the FtJ to consider Article 8 outside the Rules in circumstances where he had concluded that the requirements of the Rules were met.

In any event, I am satisfied that the same legal error that I have identified in terms of the FtJ’s reasoning with reference to para 297 applies in terms of his findings in relation to Article 8. The conclusion that the refusal of entry clearance would amount to a disproportionate interference with family life is infected by the error of law in relation to para 297.

The only additional reasoning to be found in the FtJ’s Article 8 assessment is in the conclusion that the best interests of the appellant’s half-sister, father and stepmother are to be taken into account, along with the desirability of them

developing a relationship with the appellant. That, he concluded, outweighed the public interest. However, the appellant does not need to be in the UK for the relationship to be developed between her and any of the persons identified by the Ftj, albeit that a long-distance relationship is plainly not the same. In any event, the Article 8 conclusion is infected by the error of law which I have identified.

Lastly, it is not clear what the Ftj meant at [56.5] when he said that: “There are no insurmountable obstacles on my findings of fact”. That conclusion does not appear to relate to any of the Ftj’s findings and is not in any event a relevant consideration.

In the circumstances, I am satisfied that the Ftj’s decision must be set aside for error of law. It was accepted on behalf of the appellant that in those circumstances the decision could be re-made on the basis of the evidence before the Ftj (to which I would add, taking into account the written arguments on behalf of the appellant).

Re-making the decision

The Ftj found that the appellant had not established that the requirements of para 297(i)(e) (sole responsibility) were met. His conclusions in that respect are not infected by the error of law and therefore stand.

As regards para 297(i)(f) (serious and compelling family or other considerations), none of the evidence put before the First-tier Tribunal establishes that that requirement of the Rules is met and there was no additional material put before me. The findings made by the Ftj which are not infected by the error of law, even accepting his conclusion in relation to the appellant’s best interests, do not reveal the serious and compelling family or other considerations necessary for the Rule to be met. He found that there was no evidence of neglect or abuse and no unmet needs of the appellant that needed to be catered for. There was no compelling medical evidence in respect of the appellant and there are stable arrangements for the appellant’s physical care. As I said at [35] above, it is not possible to conclude on the facts as found by the Ftj, that there are either ‘serious’ or ‘compelling’ family or other considerations, let alone both, which is what is required. The necessary high threshold is not demonstrated on the evidence.

So far as Article 8 is concerned, the issue is one of proportionality. The appellant was found by the Ftj, at least by implication, to have family life with the sponsor in the UK. I accept that the decision represents an interference with his right to family life with her.

Although the sponsor sought to persuade me that there was no legitimate aim in refusing entry clearance, that argument, with respect, is misconceived. The maintenance of immigration control is a feature of the legitimate aim of the economic wellbeing of the country, as has long been recognised. I need say no more about that argument.

So far as the appellant's best interests are concerned, I do not accept the proposition that her best interests are to leave Cameroon and come to the UK. She is living in a stable, loving environment with which she is familiar and where she has lived since birth. Decisions about her welfare, upbringing and day-to-day life have been made by her grandparents, with whom she lives. Whilst she maintains contact with the sponsor and he visits her in Cameroon, the appellant has never lived with the sponsor. Whilst I accept that ordinarily it is in a child's best interests to live with a parent, that does not necessarily always follow. Stability and continuity of residence are important considerations.

Even if it could be said that the appellant's best interests are to leave Cameroon and come to the UK to live with the sponsor and other family members, those best interests are not determinative of the appeal. They are a primary consideration but not a paramount consideration.

In the proportionality assessment, the fact that the appellant does not meet the requirements of the Immigration Rules is a weighty factor to be taken into account. Sole responsibility does not rest with the sponsor and there are no serious and compelling family or other considerations which make her exclusion undesirable. I cannot see that there are any other considerations in this case, not catered for within the requirements of the Rules, which make the decision to refuse entry clearance a disproportionate interference with the right to family life of the appellant or the sponsor, or indeed of her half-sister (even if it could be said that she has family life with her).

In those circumstances, I am not satisfied that the decision represents a breach of Article 8.

Accordingly, the appeal is dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal on all grounds.

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 her or any member of her 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.



Upper Tribunal Judge Kopieczek

6/04/20