Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000267
HU/02657/2021

THE IMMIGRATION ACTS

Heard at Field House on 23 May 2022 (as a hybrid hearing)	**Decision & Reasons Promulgated on 13 July 2022**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

JUDITH AFRIYIE KODUAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr C Rahman, Counsel, instructed by Rahman & Co Solicitors
For the respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Colvin ("the judge") who, in a decision promulgated on 31 December 2021, dismissed the appeal of Judith Afriyie Koduah ("the appellant") against a decision of the Entry Clearance Officer ("the respondent") dated 24 March 2021, refusing his entry clearance application under paragraph 297 of the Immigration Rules (which was considered as a human rights claim).

Background

2. The appellant is a national of Ghana. At the date of the judge's decision she was 13 years old. On 3 December 2020 she applied for entry clearance to join her biological father, Yaw Owusu Koduah ("the sponsor"), a Ghanaian national lawfully settled in the UK. Her application was refused as the respondent was not satisfied the sponsor had sole responsibility for the appellant. The appellant appealed this decision to the First-tier Tribunal under s.82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

The decision of the First-tier Tribunal

3. The principle issue in contention before the First-tier Tribunal was whether the sponsor had sole responsibility for the appellant. Paragraph 297(i)(e) of the Immigration Rules requires, in the context of a minor child seeking to join a parent settled in the UK, that:

> 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;

4. The judge had before her a bundle of documents prepared on behalf of the appellant which included, inter alia, a statement from the sponsor and a brief letter from the appellant's mother dated 19 October 2020. The bundle additionally included a letter dated 13 October 2020 from Victor Frimpong and Mabel Agyemang (the mother's sister-in law and her partner) with whom the appellant was living at the date of the application and decision, and a letter dated 14 October 2020 from Ama Abrafi Amo, a pastor with whom the appellant lived for 8 years until approximately February 2020. The bundle of documents additionally included some money remittance slips showing funds remitted from the sponsor to Ms Amo, Ms Agyemang and Mr Frimpong. The bundle additionally included a letter from Frank Owusu, Administrator of the 'New World Living School' dated 28 October 2020 and some screenshots of Yahoo Mail email correspondence.

5. There was no Presenting Officer hearing. The judge heard oral evidence from sponsor and asked questions in order to seek clarification of some of the sponsor's evidence.

6. Having summarised the Reasons For Refusal Letter, and having set out the submissions from Mr Rahman, and having accurately directed herself in respect of the relevant statutory provisions and legal principles, the judge set out her findings of fact. At [19] the judge set out a number of concerns she had with the evidence before her. This included a "significant disparity" between the evidence given by the sponsor and the evidence contained in the letters from the pastor and the appellant's current carers relating to where the appellant was living at particular times. The sponsor and oral evidence said that the appellant had been living with her present carers for three years since

about November 2018, and that she had been living with them when he visited Ghana in 2019, but this was inconsistent with the letters from the pastor and the current carers which indicated that the appellant had lived with the pastor until approximately February 2020 when she went to live with her current carers.

7. The judge was additionally concerned that the sponsor was unable to give certain information relating to the appellant on what she considered to be important matters. The sponsor was unable to name the school that the appellant currently attends or name the headmaster with whom he claimed to have regular contact. Although the sponsor claimed to pay the appellant's school fees he had not submitted the receipt that he claimed had been given to the present carers. Nor was there any evidence that the sponsor had any contact with any doctors seen by the appellant. The judge stated that there were no documents before her recording regular communications between the appellant and the sponsor despite his evidence at the hearing that they spoke every other day.

8. The judge specifically noted the statement from the appellant's mother supporting the application, but commented that it was brief "… with inadequate details of the circumstances of the appellant since she was born." The judge additionally noted from the statements of both the pastor and the present carers that the appellant's parents jointly approach them respectively to take on the caring responsibilities for her. The judge additionally noted that the present carers were family members of the appellant's mother, who remained in contact with the appellant.

9. Having assessed this evidence "in the round" the judge concluded that she was unable to rely on it as "… showing the true circumstances of the appellant in terms of her living arrangements in the past and at present and the nature of her relationship with her father, the sponsor." Whilst the judge accepted that the sponsor had given some financial support there was little other evidence to show that he had taken responsibility for her upbringing, let alone sole responsibility.

10. The judge dealt with Article 8 ECHR briefly. At [23] she stated:

> "as stated above I have concerns as to the nature of the appellant's relationship with the sponsor for the reasons given above. However even if it is accepted that Article 8 is engaged I find that there is insufficient reliable evidence on which to base a best interests assessment on family or private life grounds as a minor child. Further I do not find that there was evidence before me to suggest that there are exceptional circumstances in this case that would result in unjustifiably harsh consequences for the appellant if the refusal decision is upheld."

11. The appeal was dismissed.

The challenge to the judge's decision

12. The grounds of appeal firstly contended that there was procedural unfairness because of the absence of the respondent and a respondent's bundle of documents. The grounds secondly contend that the judge made factual inaccuracies by referring at some points to Nigeria instead of Ghana, and that the judge did not make "any kind of findings" in relation to the financial support provided by the sponsor. The judge "overestimated the role of the appellant's mother in assessing sole responsibility simply because she provided a witness statement and other witnesses have stated that she was involved in making arrangements for the appellant's care in Ghana." The grounds contend that the judge did not make any proper reasoned credibility findings in relation to the sponsor's evidence and that no proper reasons were given. The third ground contends that the judge failed to properly consider Article 8 ECHR given that the appellant's mother resided in Germany and in circumstances where the relationship between the appellant and her father had not been challenged. It was necessary for the judge to undertake a proper analysis of Article 8 ECHR and a best interests assessment of the appellant.

13. Judge of the First-tier Tribunal Thapa granted permission to appeal but she considered there to be no merit in the first two grounds. Judge Thapa however considered it was unclear from the decision whether the judge found that Article 8 was engaged and it was not apparent than an assessment of the appellant's best interests as a minor had been undertaken. Judge Thapa did not expressly limit permission to appeal and, following Safi and others (permission to appeal decisions) [2018] UKUT 00388 (IAC), the appellant proceeded in her 'error of law' decision on all of the grounds.

14. Mr Rahman provided a skeleton argument for the error of law hearing and made submissions that were broad in nature but which essentially reflected his written grounds of appeal. He argued that, having regard to the letter from the appellant's mother, taken in conjunction with the financial support provided by the father and evidence which he maintained showed communication between the appellant and the sponsor, the judge was not entitled to find that the sponsor did not have sole responsibility. Mr Rahman submitted that the judge had undertaken an insufficient best interests assessment and that, given that the appellant is a 13 year old with both her parents living outside of Ghana, it was in the interests of justice that the matters should be considered again given that this case concerned exceptional circumstances, and that the sponsor could not relocate to Ghana because he was settled in this country with his own family.

15. I reserved my decision.

Discussion

16. In assessing whether the judge erred in law in her approach to the question of sole responsibility, I remind myself of the questions that a

tribunal should consider, as set out in **TD (Paragraph 297(i)(e): 'sole responsibility") Yemen** [2006] UKAIT 00049

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. Having regard to the above guidance I can detect no ever on a point of law in the judges assessment of the issue of sole responsibility.

18. There is no merit whatsoever in the procedural unfairness argument detailed in the first ground. The fact that there was no presenting officer at the hearing did not mean that the hearing was unfair. It remains unclear to me whether the judge did have access to a respondent's bundle, as one was contained in First-tier Tribunal's electronic database, but even if this was the case, the judge had before her all the relevant documents necessary for a just determination of the claim. When I asked Mr Rahman what impact the

absence of a Home Office bundle had in the First-tier Tribunal hearing he said the bundle was “not a big issue.” He was unable to identify any documents that were contained in the Home Office bundle that were either not before the judge or which could arguably have altered the judges decision in anyway. Nor is there any merit in the fact that the judge inaccurately referred to Nigeria instead of Ghana at certain points in her decision. This was a mere slip and did not materially undermine the decision, even taken together with all the other matters upon which the appellant relies. It is apparent, reading the decision as a whole, that the judge was aware that the appellant lived in Ghana and that proper account was taken of that fact.

19. The second ground of appeal is essentially a disagreement with an assessment lawfully undertaken by the judge. Contrary to the assertion in the grounds, the judge clearly accepted that the sponsor provided some financial support to the appellant. Financial support however is not to be conflated with sole responsibility. The judge took this into account in her assessment. The judge demonstrably had regard to the written evidence before her from the appellant’s mother, from the pastor and from the appellant’s current carers. The judge was unarguably entitled to find that there were significant disparities in the evidence before her relating to the dates when the appellant lived with the pastor and with her current carers. No challenge has been raised in respect of this aspect of the decision. The judge was additionally entitled to hold against the sponsor his inability to name the school that the appellant had attended for the last 2 to 3 years and his inability to remember the full name of the head teacher, with whom he claimed to have regular contact. These were relevant considerations when assessing whether the sponsor was indeed the only parent providing direction and guidance in respect of the appellant’s upbringing. It is irresistibly implicit in the judges decision, read as a whole, that he rejected the sponsors evidence in this regard.

20. The judge was additionally entitled to find the evidence relating to the alleged non-involvement of the appellant’s mother in her life to be unreliable. The letter from the appellant’s mother was extremely vague and failed to give any account of her alleged detachment from the appellant’s life. The judge was entitled to infer from the fact that it was both the sponsor and the appellant’s mother who together approached first the pastor and then the current carers with a view to the appellant residing with them, that the mother continued to have involvement in making the responsible decisions in respect of the appellant’s life.

21. It was open to the judge to find that the sponsor did not have sole responsibility because of a dearth of evidence of communication between him and the appellant. Whilst the bundle of documents before the judge did contain some screenshots from Yahoo Mail communication between “Chief Koduah” (it was unclear who this

individual was but I will proceed on the basis that it is indeed the sponsor) and Mr Frimpon and Ms Agyeman, some of which contained photos of medical documents that appeared to relate to the appellant, and one set of messages on 12 June 2020 that appeared to come from the appellant, there was no other evidence capable of supporting the sponsor's claim that he communicated with the appellant every other day.

22. The judge demonstrably had regard to the evidence before her and she engaged with that evidence. Given the concerns that she identified it was rationally open to the judge to conclude that the appellant's true circumstances in terms of her living arrangements and in terms of her relationship with her father had not been established and that there was insufficient evidence that the sponsor had sole responsibility for the appellant.

23. The judges assessment of Article 8 ECHR is succinct. The judge specifically considered the issue of the best interests of the appellant, but concluded at [23] that there was "insufficient reliable evidence" to enable her to make a best interests assessment on family or private life grounds. Given the unreliability in the evidence that had already been considered by the judge, this conclusion was both unsurprising and rationally open to her.

24. In any event, when assessing whether the judge would have been, on any rational view, entitled to allow the appeal on Article 8 ECHR grounds, it is necessary to have regard to her general factual findings and to the evidence of the relationship between the sponsor and the appellant.

25. The sponsor had entered the United Kingdom in November 2010, he married a Dutch national in October 2011, and he was granted an EEA residence card in June 2013. The couple divorced on 23 May 2017 and the sponsor was granted indefinite leave to remain in June 2018. Given that the appellant was born in September 2008, it is apparent, when assessing the impact on the relationship between the sponsor and the appellant of the refusal of entry clearance, that the vast majority of the relationship has been maintained through remote means of communication. The assessment of proportionality must be approached with this in mind. The decision under appeal will not prevent this communication from continuing.

26. Mr Rahman made some general submissions concerning the sponsor's concern for the appellant's welfare, but there was little if any evidence before the judge that the appellant's safety and welfare was being undermined or threatened by the refusal of entry clearance. It is apparent from the limited medical evidence (as disclosed in email photographs) that the appellant does receive medical care and attention, and there was no detailed medical report indicating that she has any particular vulnerability or any significant medical concerns. Nor is there any psychological report describing the impact

that a refusal of entry clearance would have on the appellant. The appellant continues to attend school, and there is nothing to indicate that there are any adverse conditions in respect of her accommodation. Nor was there any independent evidence before the judge to suggest that the appellant's current carers were not ensuring her safety and welfare. I additionally note that there is very little information concerning the circumstances of the appellant's mother in Germany and her contact with the appellant (I note that during the hearing the sponsor gave evidence that the appellant does call her mother "once in a while" which suggests that the mother is more involved in the appellant's life). Even if it was in the best interests of the appellant to live with her sponsor in this country, in light of the judge's findings relating to the relationship between the appellant and the sponsor, and in light of the fact that the appellant did not meet the immigration rules for entry clearance, a point that must be given 'appropriate weight' in deciding whether interference with an article 8 relationship is proportionate (Hesham Ali [2016] UKSC 60), I am satisfied that the judge's decision was sufficiently reasoned and that she did take into account all relevant considerations when assessing whether the impact on the appellant of the refusal of entry clearance would result in unjustifiably harsh consequences for her.

Notice of Decision

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

The appeals are dismissed

Signed D.Blum Date: 24 May 2022

Upper Tribunal Judge Blum