



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005093
First-tier Tribunal No: HU/04675/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AN ENTRY CLEARANCE OFFICER (SOUTH AFRICA)

Appellant

and

CODY ETHEN CAMPBELL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr McVeety, a Senior Home Office Presenting Officer.
For the Respondent: Ms A Choudhry, instructed by UK Migration Lawyers.

Heard at Phoenix House (Bradford) on 18 October 2023

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals with permission a decision of First-tier Tribunal Judge Farrelly ('the Judge'), promulgated on 23 August 2022, in which the Judge allowed Cody Campbell's appeal against the refusal of his application for entry clearance as a dependent of his father, David MacVay ('the Sponsor'). Both are citizens of South Africa. The appellant's date of birth is 1 March 2007.
2. The Sponsor lives in the UK with leave to remain valid to 9 May 2023, but advised the Judge he intended to remain on a permanent basis.
3. The application was refused as the ECO did not consider the relationship requirements of paragraph E-ECC.1.2 to 1.6 were met, did not find the Sponsor has sole responsibility for Cody's upbringing or that there was anything exceptional which would render refusal a breach of Article 8, that there were no serious or compelling circumstances that would make his exclusion undesirable, or any compassionate factors justifying the grant of entry clearance outside the Immigration Rules.
4. The Judge's findings are set out from [19] of the decision under challenge. At [27] the Judge finds it is in Cody's best interests to be with the Sponsor in the UK although there was a need to have regard to the immigration rules and immigration control.
5. The Judge finds at [29], by reference to a High Court agreement referred to early in the determination as well as the history, that Cody's mother has had involvement in his life.

The Judge finds the evidence does not indicate this is a situation where Cody's mother has absolutely no involvement in his upbringing but that it is a situation of shared responsibility albeit the Judge accepts the sponsor is the one engaged in most of the decisions [29].

6. Between [31 – 35] the Judge writes:

31. On balance, my conclusion is that the appellant's sponsor has been the one who was primarily responsible for the overriding decisions, such as his schooling and his involvement in cricket for instance. I also accept that the sponsor has continued to monitor the appellant's situation, for instance, his Internet usage.

32. I have not heard directly from the appellant's mother. I accept at some stage she did have drug issues. This is because of the condition in the agreement. The agreement does not say she is the one with drug issues but in this regard I accept the sponsor's evidence. I also accept that she has to work and will be away at times on business. Having regard to these factors I will be prepared to accept that effectively, at the time of the application, the sponsor was the person who was (sic) sole responsibility for his son.

33. If I am wrong in this conclusion then in the alternative the appeal succeeds on the basis exclusion of the appellant's undesirable and suitable arrangements have been made for his care. The legislation refers to serious and compelling family and other considerations. The other considerations I read in light of the preceding notion of something very compelling.

34. The evidence does indicate the appellant's primary day-to-day carers are his grandparents. Undoubtedly they provide care but ultimately he is his parents responsibility. The appellant is in his situation because of the actions of his parents. He is not the one who has brought about the situation. It is my conclusion that there are compelling circumstances that justify allowing the appeal.

35. As a final point I acknowledge the existence of family life between the appellant and sponsor. Because of my conclusion under the immigration rules, I do not need to make a freestanding article 8 assessment.

7. The ECO sought permission to appeal asserting the Judge had made a misdirection of law/failure to give adequate reasons. The grounds refer to the Judge's findings at [24] of the determination which demonstrates the Sponsor does not have sole responsibility for the appellant which is shared with the mother.

8. The grounds also assert lack of reasoning for the Judge's finding at [34] especially where the appellant has the benefit of two parents, that he lives part of the time with grandparents who provide good care for him, and that there is nothing on the evidence that shows there are compelling circumstances.

9. Permission to appeal was granted by another judge of the First-tier Tribunal on 11 October 2022, the operative part of the grant being in the following terms:

2. As to the substantive Grounds of Appeal, they are highlighted in red in places. I am not clear as to why that is the case so I ignore this. In essence the Respondent's primary submissions are ones of irrationality on the part of the FtT Judge in respect of the decision she made. This is a very high hurdle to overcome. However, after careful consideration, I do consider that, given the findings made as to fact, it is arguable that the conclusions reached as to the applicability of the Immigration Rules to those circumstances is flawed. I am also satisfied that it is arguable that the reasons given for the findings made, in particular that of there being compelling circumstances, are inadequate.

3. Consequently I am persuaded that it is arguable that the FtT Judge did make a material error of law and permission to appeal is granted. No restriction is placed upon what may be argued.

Discussion and analysis

10. It is settled law that an appellate court should not interfere with the decision of the court below unless it is clear that a genuine legal error material to the decision under challenge has been established.

11. As noted in the grant of permission to appeal, the ECO's primary submission is that the Judge's findings are irrational.
12. The Judge's findings in relation to the child's mother have not been shown to be outside the range of findings reasonably available to the Judge who had the benefit of considering not only the written evidence but also oral evidence from the Sponsor. The Judge's conclusions in relation to the child's mother having drug-related problems is a finding that arises from the assessment of the evidence. The Judge noted in the order from the High Court in South Africa a requirement to take a drugs test at the request of either party. That indicates that issues relating to drug usage/abuse arose in the proceedings relating to the child in South Africa.
13. The Judge at [28] noted the primary issue related to sole responsibility and at [30], having acknowledged involvement both parents, sets out the correct legal self-direction that it is difficult to demonstrate sole responsibility for the purpose of the immigration rules where both parents have involvement. The Judge finds on the facts, this is a case in which it warrants the finding at [31] that the UK-based sponsor is the one who has primary responsibility for the overriding decisions for the child and that he also monitors the child situation in South Africa, for which one example is quoted. The Judge factored into that conclusion the agreement referring to drug issues but also the fact the mother has agreed to the child joining his father in the UK, and that having regard to the cumulative factors was prepared to accept that at the time of the application the Sponsor was the person with sole responsibility. There is nothing irrational in that conclusion when the decision and the supporting evidence is read as a whole.
14. The Judge's findings in relation to whether the exclusion of the appellant is undesirable and a suitable arrangements have been made for him is a findings made in the alternative. The Judge takes into account the fact the child's grandparents provide day-to-day care. Even if it was found the Judge's reasoning on this second point could have been better that does not impact upon the first point in relation to sole responsibility which is determinative of the appeal in any event.
15. I find the ECO has failed to establish that the Judge's findings are irrational or outside the range of those reasonably open to the Judge who had the benefit of considering the evidence and who was clearly aware of the appropriate legal test in relation to an appeal of this nature.
16. As no material legal error is made out I must dismiss the appeal.

Notice of Decision

17. Appeal dismissed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 October 2023