Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22208/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th July 2016	**On 27th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

E S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Callaghan, Counsel for Ravi Sethi Solicitors, Hounslow
For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the USA born on 13th August 2009. He appealed against the decision of the Respondent dated 8th May 2014 refusing to grant him leave to remain in the United Kingdom outside the Immigration Rules. His appeal was heard by Judge of the First-tier Tribunal Baldwin on 21st January 2015 and 19th June 2015 and dismissed under the Immigration Rules and on human rights grounds in a decision promulgated on 22nd June 2015. An application for permission to appeal was lodged and permission was refused by Designated First-tier Tribunal Judge McCarthy on 23rd September 2015. A further application for permission to appeal

was lodged with the Upper Tribunal and permission was granted by Upper Tribunal Judge Plimmer on 27th October 2015. The permission states that it is arguable that the judge's findings are unsupported by evidence and constitute speculation, particularly as the welfare of a young child is in issue. It states that the First-tier Tribunal must take particular care to ensure that its findings are evidence based. The Appellant and the Respondent are expected to make detailed enquiries into the evidence which was available to the Family Court when it granted a residence order in favour of the Appellant's aunt and the reasons for this. The Respondent also put on notice that this may be an appropriate time for further enquiries to be conducted relevant to the child's current circumstances and likely circumstances in Sierra Leone. The permission goes on to state that no doubt appropriate case management directions can be given if the Upper Tribunal decides there has been an error of law and both parties should be prepared to update the Tribunal on relevant enquiries.

2. There was a Rule 24 response lodged on 2nd February 2016. This states that there is an agreed Protocol arrangement between the Tribunal and the Family Court and the Respondent asks the Upper Tribunal to make enquiries with the Family Court again, regarding the residence order. There is at present no agreement between UKVI and the Family Court for disclosure of information but the Appellant's aunt is best placed to provide the original and supporting evidence that was provided to CAFCASS and to the Family Court. The solicitors who were dealing with the matter in the Family Court ought to provide any documentation available to assist the Tribunal in making its decision.

3. There is a decision by Deputy Upper Tribunal Judge Latter on file, promulgated on 14th March 2016 relating to this case. The hearing before him was a first-stage error of law hearing. In this he states that he was not satisfied that the First-tier Judge had adequate evidence before him to make an informed decision of what the best interests of the child are. He found that there are material errors of law in the First-tier Judge's decision, firstly because he failed to exercise his discretion to adjourn and give directions, in an attempt to obtain sufficient evidence to enable a proper assessment to be made of the Appellant's best interests and, secondly, by failing to take into account a number of relevant factors in the assessment he did carry out. The decision states that the First-tier Judge's decision has to be set aside and should be remade in the Upper Tribunal. He states that the parties should carry out further enquiries and should file further evidence relating to the Appellant's best interests.

4. The Presenting Officer raised a preliminary matter, referring to last minute evidence having been produced. He referred to paragraph 298 of the Immigration Rules and submitted that the Respondent had tried to get the matter of the residence order revisited but this was not achieved and in the circumstances there seems to be no reason why I cannot be the primary decision maker in this case and so the hearing can proceed on submissions only.

5. Paragraph 298 of the Immigration Rules states that leave can be granted inside the Rules where a relative is settled in the United Kingdom and there are "serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care". It is

clear that in spite of the changes introduced to the Rules on 9th July 2012, paragraph 298 continues unabated. It survives the changes wrought by Appendix FM to other categories of leave. It is not affected. It seems that the Respondent has not considered paragraph 298 at all.

6. Counsel for the Appellant submitted that based on the evidence before me the residence order in favour of the Appellant's aunt is genuine, as shown by the CAFCASS report.

7. The Presenting Officer asked about sleeping arrangements in the Appellant's aunt's house and was told that his aunt sleeps in bedroom 1, her two daughters sleep in bedroom 2 (aged 16 and 13), and the Appellant sleeps in the sitting room on a mattress. The house is not overcrowded under the terms of the Housing Act.

8. Counsel for the Appellant referred me to paragraph 298(i)(d). He submitted that the terms of this part of paragraph 298 have been satisfied. The Sponsor in this case, being the Appellant's aunt, is British and she has a residence order for the Appellant.

9. He submitted that there are other compelling reasons why the Appellant should be allowed to remain in the United Kingdom in his aunt's care. Although the child is an American citizen he has no-one in America as he does not know his father who is not even mentioned on his birth certificate. He submitted that the Appellant's mother is from Sierra Leone but has been working for the UN as a project manager in South Sudan and based on the objective evidence at the present time this is not a safe place. Counsel submitted that what has to be considered are Section 55 of the Borders, Citizenship and Immigration Act 2009 and the relevant Immigration Rule. He submitted that the position in Sierra Leone has to be considered. The evidence is that the Appellant's mother is not there and his aunt, who used to be there, has died. A death certificate has been provided.

10. Counsel submitted that the Appellant's mother had to make a choice. Her present partner was not unwilling to look after the Appellant but his family would be unhappy if they knew that she had had a child out of wedlock so his mother arranged for the Appellant to move to the United Kingdom. He submitted that his mother has not abandoned him. She keeps in touch with him but her choice was to continue her relationship with her husband and the Appellant's aunt in the United Kingdom is happy to support the Appellant and look after him. I was referred to Macdonald's Immigration Law & Practice 9th Edition at 11.94 which refers to voluntary abandonment.

11. Counsel submitted that when the Rule is properly considered, voluntary abandonment of a minor is likely to make the circumstances of that minor compelling. He submitted that the factors that have to be considered are whether there is an adult overseas who is willing and able to look after the child and that his living conditions are satisfactory. He submitted that there is no-one else to look after the child. His mother is in South Sudan and the Appellant is vulnerable. He submitted that the Appellant has a loving aunt in the United Kingdom and lives with her in safety, with his two cousins who are very close to him.

12. I was then referred to Section 55 of the 2009 Act and Article 8 of ECHR and Counsel submitted that the relevant Immigration Rule encompasses both of these. He submitted that if the case succeeds under the relevant Rule, Article 8 bleeds into this.

13. I was referred to the said Upper Tribunal decision by Deputy Upper Tribunal Judge Latter. Counsel submitted that it is now accepted that the residence order is genuine and there is a plausible explanation of why the Appellant is in the United Kingdom. The Appellant is doing well at school and has a good relationship with his aunt and his cousins and he submitted that paragraph 298(i)(d) has been satisfied.

14. The Presenting Officer accepted that paragraph 298 has been satisfied. He submitted that what is important is whether there is a compelling and serious argument for the Appellant to be in the United Kingdom and he submitted that the residence order is sufficient for this. Responsibility has been given to the Appellant's aunt in the United Kingdom. He submitted that for the residence order to have been granted, the Family Court must have found there to be compelling reasons for the Appellant to be here with his aunt, so paragraph 298(i)(d) is satisfied. He submitted that if the Appellant's aunt decides to relinquish her care of the Appellant, the matter will require to go back to the Family Court.

15. The Presenting Officer submitted that the Appellant is under the age of 18 and legally came to the United Kingdom on a visit visa. He made his further application on time. He submitted that the Respondent accepts that the accommodation is satisfactory and is satisfied with the bank statements and pay slips and accepts the Appellant's aunt's employment. He submitted that it is clear that the Appellant is not leading an independent life.

16. There is no reason why I cannot be the primary decision maker in this case as the Respondent was not successful in getting further information from the Family Court within the required timescale.

17. Additional evidence has now been produced by the Appellant's representative. Counsel has submitted that paragraph 298(i)(d) has been satisfied as the Appellant is the child of a relative present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care. I find that all the criteria of this paragraph of the Rules have been satisfied. The Appellant's aunt is present and settled in the United Kingdom and is British and there appear to be serious and compelling family or other considerations which make exclusion of the Appellant undesirable. His mother lives in a dangerous country. He has no-one in Sierra Leone. His mother's new partner and family do not know that the Appellant exists. He is not a Sierra Leonean national. He cannot reside in the United States because he has no-one there. Suitable arrangements have been made for his care and the Family Court has approved the situation and granted a residence order. The terms of the Immigration Rules have been satisfied. I find that his Article 8 rights are also engaged and it would be a disproportionate interference to remove him from the United Kingdom. Section 55 of the 2009 Act and the welfare of the child is a primary consideration and an important aspect of Article 8. The decision

refusing to vary the Appellant's leave under Article 8 is disproportionate and cannot stand.

18. The Respondent has accepted that the terms of paragraph 298 have been satisfied.

Notice of Decision

19. The Appellant's appeal under the Immigration Rules and on human rights grounds is allowed.

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 him or any member of their 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.

Signed Date **27th July 2016**

Deputy Upper Tribunal Judge I A M Murray