Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/13028/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2016	**On 20 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

LATEEFAT ONYINYE SALAMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER- SHEFFIELD

Respondent

Representation:

For the Appellant: Mr T Bahja of Counsel instructed by Samuel Ross, solicitors
For the Respondent: Mr T Melvin of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant, Lateefat Onyinye Salami, is a citizen of Nigeria born on 30 March 1999. She sought entry clearance to join her parents in the United Kingdom and is sponsored by her father, Saka Oyesola Salami. He and his wife, Joy Nkemdim Salami, have two daughters. The elder is said to be

married and living with her husband in Nigeria with his two younger brothers in the same house.

2. The Appellant's parents state they have three other children who are deceased, most recently a son in 2013.

The Respondent's decision

3. On 1 September 2014 the Respondent refused the Appellant's application under paragraph 297 of the Immigration Rules because she was not satisfied that the Appellant and her father were related as claimed; that he had sole responsibility for her upbringing or that there were serious and compelling family or other considerations making exclusion of the Appellant undesirable. She also considered the Appellant would not be adequately maintained and accommodated without recourse to public funds. On receipt of the appeal the Entry Clearance Manager on 17 December 2014 reviewed the decision and noted that no additional evidence had been provided and that there were no particular circumstances which amounted as sufficient to justify a separate consideration of the Appellant's claim outside the Immigration Rules by reference to Article 8 of the European Convention, after having regard to any extended duty of care the Respondent might have to the Appellant.

The Original Appeal

4. On 15 October 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are generic and formulaic. Reference is made to amplified grounds to be submitted but none have.

The First-tier Tribunal Proceedings

5. By a decision promulgated on 10 September 2015 Judge of the First-tier Tribunal Kennedy found that there was adequate maintenance and accommodation without recourse to public funds available to the Appellant if she came to the United Kingdom.

6. The Judge went on to consider the issue of sole responsibility at paragraphs 48-52 of his decision and whether there were any serious and compelling family or other considerations making exclusion undesirable under paragraph 297(i)(f). Having made certain findings of fact, he dismissed the appeal under the Immigration Rules and went on to a consideration of the claim under Article 8 of the European Convention outside the Immigration Rules and found there was insufficient reason to proceed on that basis. In the alternative he concluded the decision was proportionate to the need to maintain immigration control and having regard to the public interest considerations, he went on to dismiss the appeal.

7. On 17 February 2016 Judge of the First-tier Tribunal Pooler refused the Appellant permission to appeal.

Application to the Upper Tribunal for Permission

8. The Appellant renewed her application for permission to appeal. The grounds are the same as the grounds before Judge Pooler with additional grounds challenging the decision of Judge Pooler.

9. On 6 April 2016 Upper Tribunal Judge McGeachy granted permission to appeal on the ground that it was arguable the Judge h erred in law when considering the issue of sole responsibility and serious and compelling reasons for exclusion. Further, it was arguable he had erred by placing insufficient weight on the presence in the United Kingdom of the Appellant's mother with limited leave to remain.

The Hearing

10. The Appellant's parents were present and I explained the purpose and procedure to be followed at an error of law hearing. Mr Bahja identified two issues to be considered, whether the Judge had erred in his consideration of the matter of sole responsibility or whether there were compelling reasons why the Appellant should not be excluded from the United Kingdom. He asked me to note the Respondent had failed to file a bundle. The Judge had accepted the Appellant's father had subsequent to her mother's departure in 2009 to join him in the United Kingdom made transfers of money for her benefit. At paragraph 44 the Judge had referred to the Respondent's acceptance in the Notice of Decision that money transfers had been made. He also referred to the Judge's conclusion at paragraph 40 of his decision, that he was unable to make extensive findings of fact because of the absence of supporting documentation and this included a full bundle from the Respondent, the lack of which the Judge identified at paragraph 8.

11. He referred to paragraph 20 of the determination in *OA (ECO: service of documents) Nigeria [2007] UKAIT 00009* which states:-

> Where an Immigration Judge is faced with a party's failure to comply with directions, his first question must be whether he has sufficient material before him to enable him to determine the appeal, notwithstanding such failure. The absence of respondent's documents, as in this appeal, causes particular difficulties in assessing whether the decision reached by the Entry Clearance Officer is sustainable in law, but documents submitted by the non-defaulting party may enable the appeal to be determined. Whether that is so in any particular appeal is a question for the Immigration Judge hearing the appeal.

He also referred to the determination in *Cvetkovs (Visa – no file produced – directions) Latvia [2011] UKUT 00212 (IAC)* which states:-

> 10. For the future, we consider that Immigration Judges of the First-tier Tribunal, Immigration and Asylum Chamber are entitled to be robust in determining Entry Clearance appeals where the Visa Officer is not satisfied as to the purpose of the visit from the documents produced but fails to provide those documents to the Tribunal. We trust that Visa Officers will give effect to Rule 13 and provide the application documents. The importance of doing so will become even more apparent when s.85A of the Nationality Immigration and Asylum Act 2002 inserted by s.19 of the UK Borders Act 2007 comes into force on 23 May 2011. That section has the effect of significantly reducing the opportunity for supply of documents that were not before the decision maker at the material time.
>
> 11. In our judgment, where the Visa Officer has not provided the documents that he is required to provide, it is open to the First-tier Judge to issue directions that if such documents are not provided within a prompt timetable the appeal will be decided on the basis that the Visa Officer no longer opposes the appeal or supports any contention that he makes in the decision letter. The appeal can then be decided on the papers, and in the absence of evidence of some mandatory ground for refusal it is likely that the appeal will succeed.

He submitted that as the Respondent had failed to provide a bundle the Judge should have adjourned the hearing and made directions.

Submissions for the Respondent

12. Mr Melvin submitted it was clear from the Notice of Decision that what documents had been provided and that those which had been provided were not considered sufficient to establish either that the Appellant's parents had had sole responsibility or that there were compelling circumstances that the Appellant's exclusion was undesirable. The Judge at paragraphs 36ff. had made a clear finding on the limited evidence before him that the Appellant had never lived with her father. The Judge had noted the lack of evidence for the Appellant and had nevertheless given a detailed decision making clear findings of fact. In short, the appeal was simply an attempt by the Appellant to re-argue her case. The Judge's fully reasoned decision disclosed no error of law and should stand.

Response for the Appellant

13. Mr Bahja accepted that the Judge had referred to some of the documents which were before the Respondent and in the Appellant's bundle. Although the Judge had had the Appellant's bundle before him, he had had no bundle from the Respondent and without the Respondent's bundle his decision was based on mere speculation. Mr Melvin noted there was no evidence what documents had been submitted to the Respondent other than those mentioned in the decision. Mr Bahja referred to documents which had been handed to him just before the hearing and which he wished now to submit as evidence. These were various photographs, letters, receipts and school certificates. I enquired whether these included

a copy of the Appellant's Visa Application Form and he stated that they did not.

14. Mr Melvin referred to the copy of the Appellant's on-line application of three pages of which there was a copy in the Tribunal file. I enquired of Mr Bahja whether there were any reasons why these documents should be accepted so late as evidence, particularly having regard to the principles in *Ladd v Marshall [1954] 1 WLR 1489* and *E v SSHD and R v SSHD [2004] EWCA Civ 49*. Mr Bahja submitted the documents were before the Respondent when the application was originally decided. I noted that neither the original grounds of appeal nor the two applications for permission to appeal the First-tier Tribunal's decision referred to these documents.

15. I reminded myself that the purpose of the hearing was to establish whether there was a material error of law in the Judge's decision and considered that although it was regrettable the Respondent had failed to file a full bundle, there was insufficient evidence to show that the documents had been produced to the Respondent with the application. If they had been produced with the application there was no explanation why the bundle which was evidently in the possession of the Appellant's parents could not have been produced to the First-tier Tribunal. If the Judge's decision contained a material error of law then the issue of their admission in evidence could then be considered. I therefore refused to admit them at the hearing before me.

Consideration

16. The burden of proof before the Judge was on the Appellant. It was for her to show that she and her parents satisfied the requirements of the relevant Immigration Rules on the balance of probabilities. Mere assertion with a lack of documentary evidence which without too much difficulty can be obtained will in many cases be insufficient to discharge the evidential burden. For these reasons I do not accept the submissions in paragraphs 10 and 11 of the skeleton argument for the Appellant.

17. Paragraph 12 of the Appellant's skeleton argument refers to the Judge's mention of the absence of photographs of the wedding of the Appellant's elder sister. These might have assisted the Judge because they would have gone someway to supporting the assertion that the Appellant's older sister was married and living with her husband and his two younger brothers. There was little, if any, evidence to support the assertions of the circumstances of the Appellant's older sister and her husband. More importantly the Judge at paragraph 45 referred to the lack of evidence of the involvement of the Appellant's parents in her life.

18. Paragraph 13 of the skeleton argument fails to explain whether there is any material difference between the wording used by the Judge at paragraphs 49 and 50 and the extract from the determination in *TD (Para 297(i)(e): sole responsibility) Yemen [2006] UKAIT 00049*.

19. Taking account of paragraphs 31-46 of his decision, the Judge at paragraph 51 summarised the reasons for his conclusion that the Appellant's parents had not had sole responsibility for the Appellant for which he gave sustainable reasons.

20. Paragraph 14 in the skeleton argument is based on a challenge to what the Judge found at paragraphs 36 and 44 of his decision. It is to be noted that these paragraphs relate only to the transfer of funds. The transfer of funds does not in itself support or corroborate the other claims made by or for the Appellant's father which paragraph 14 then repeats.

21. The Judge had in mind the relevant burden and standard of proof as set out at paragraph 22 of his decision. Paragraph 15 of the skeleton argument together with the determination in *Cvetkovs* does not address the fact that although the Judge noted there was no bundle from the Respondent (but he was incorrect to state that there was no copy of the Entry Clearance Manager's review because I found one in the file when I prepared it for the hearing) he was satisfied the Appellant's bundle contained sufficient for him to decide the appeal which indeed he did. I read the opening part of paragraph 55 of the Judge's decision in the light of the standard and burden of proof to which he had referred at paragraph 22 as tantamount to a finding that the Appellant had failed to discharge the burden of proof upon her to the requisite standard.

22. Paragraph 16 of the skeleton argument again relies on the assertions of the Appellant's father and fails to address the fact that there was insufficient evidence before the Judge to satisfy him that the Appellant through her father had discharged the burden of proof on her.

23. The consequence is that I find that the decision of Judge Kennedy did not contain a material error of law such that it should be set aside. It shall therefore stand.

Anonymity

24. The Appellant is a minor. There was no request for an anonymity order and having read the papers in the Tribunal file and considered the appeal, I find there is no need for an anonymity order.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain a material error of law and shall stand.

The effect is that the Appellant's appeal is dismissed.

Signed/Official Crest Date 19. v. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal