Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01217/2015 HU/01219/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 10 May 2017	**On 11 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MARY ACHIENG OOKO
[W A]
(anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFCER (1221771)

Respondent

Representation:

For the Appellant: No appearance.
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge A J Parker ('the Judge') who in a decision promulgated on 16 August 2016 dismissed the appellants' appeal against the refusal of their

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applications for settlement pursuant to paragraph 297 of the Immigration Rules.

2. On 8 May 2017, the sponsor’s solicitors wrote to the Upper Tribunal advising that the sponsor of the appellants’ has indicated in an enclosed witness statement that the hearing is to proceed in her absence, that no new or additional evidence is available, and that “their representation is to rely on the reasons for appealing for permission to appeal”. Reference is made to the sponsor’s witness statement further below.

Background

3. The appellants are citizens of Kenya born on 28 May 1999 and [ ] 2005.
4. The application for entry clearance to settle in the UK was refused by an Entry Clearance Officer (‘ECO’) for the following reasons:

- Effectively, you have been separated from your sponsor for over seven years. During this period your sponsor has travelled to Kenya at least once, as demonstrated by the photographs that you have submitted.
- I am satisfied that your grandmother has been responsible for your day-to-day care since January 2008, when your sponsor travelled to the UK. I also note that your father has written a letter in support of your application. This letter serves as evidence that he plays an active part in your upbringing.
- You have submitted your school report and receipts as evidence that your school fees have been paid. However there is no evidence of any contact between your school and your sponsor with regards to your education. There is no evidence of any contact between your sponsor and any responsible authority with regards to your health.
- I appreciate that there is evidence that your sponsor has sent money and on one occasion clothes and shoes to Christina Onyango in Kenya. Whilst the funds sent may have been used to assist with your upbringing, financial support does not mean that the person providing the funds has sole responsibility for this child. I note that the earliest of the money transfers was in 2013, more than five years after your sponsor arrived in the UK.
- I am not satisfied that, on the balance of probabilities, sole responsibility for you lies with your sponsor. I am satisfied that it is your grandmother who has sole responsibility for you since it is she that you have lived with and who has cared for you for over seven years.
- I am also not satisfied, on the evidence that there are serious and compelling reasons which make the exclusion of the child undesirable. There is no evidence of any reason why you cannot continue to live in Kenya as you have done for your whole life.
- I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant Paragraph of the United Kingdom Immigration Rules.

5. The Judge considered the decision and the documentary and oral evidence provided before noting at [21] that the appellants’ mother came to the UK in 2008 and that the appellants have resided with their grandmother ever since, mainly in Nairobi until January 2016 when they went back to live in the village and that they are currently at boarding school. At [22] the Judge writes:

> "22. The main issue in relation to this case is sole responsibility and whether there are serious and compelling reasons which make exclusion of the child undesirable. The law on sole responsibility above is noted. I now set out the relevant parts of the rule."

6. The Judge's analysis of the issues in the appeal is not disputed and having considered the material by reference to the decision in the case of *TD*, and specifically at paragraph 34 of that decision, the Judge noted at [27] that the crux of the issue was about who makes significant decisions about the child's upbringing and whose obligation it is to make those decisions and where only one parent has an involvement with the child's life, it is likely to be that parent who alone is "responsible" for the child, providing that responsibility has not been relinquished or abdicated. The Judge found there was little evidence that the sponsor makes the significant decisions in this case, that although financial support is provided which may be an indication of an obligation it is not conclusive, and that it was normal to expect considerably more evidence to support the claim the UK-based sponsor has sole responsibility than had been presented in the appeal. At [31] the Judge noted the money transfer receipts mainly post-date the date of decision as did evidence of contact, that the Judge would expect considerably more evidence of the sponsor's involvement in the children's lives, that there was no evidence from the school that the mother does in fact make key decisions, that there was no evidence from the medical authorities that there are problems with the grandmother and no evidence that important medical decisions have been made by the grandmother. At [32] that there was conflicting evidence regarding [WA]'s father who appears to have a role in the children's lives and who it was found has some involvement, partially emotional and partially financial. The evidence suggested the sponsor has a reduced role in the upbringing of the children.
7. At [34] the Judge found the grandmother is reasonably fit and well and can look after the grandchildren as she has done since 2008, as there was no credible evidence she could not look after herself and nothing to indicate the children are destitute. The Judge refers to an email from the sponsor's sister suggesting the appellants' grandmother has done an excellent job in raising the children and questioning the sponsor's involvement.
8. The Judge noted inconsistencies in the sponsor's evidence before concluding at [37] "I find on the balance of probability the sponsor does not have sole responsibility and that there are no serious and compelling reasons which make exclusion of the child undesirable.

Grounds of appeal

9. The appellant maintains in the grounds there was no evidence, written or implied, that the sponsor transferred parental responsibility to relatives or indicated they were to look after the appellants for an indefinite period, as the grandmother was simply a "caretaker". It is

submitted that due to distances involved immediate day-to-day decisions were made by the sponsor's relatives but the ultimate decision about their upbringing was that of the sponsor.

10. Reference is made in the grounds to earlier decisions including the more recent decisions of the Upper Tribunal and it repeats the sponsor's assertion that she has maintained parental control and responsibility for the appellants'.

11. The Grounds also refer to the best interests of the children and claim that permission should be granted on the basis the sole responsibility test was not applied correctly and that the best interests of the children were not given primary consideration.

12. Permission was granted by another judge of the First-tier Tribunal on the following basis:

> "4. It is arguable that the very brief consideration of the best interests of the children at [36] is legally inadequate in that it fails to even mention the normal starting point, namely that it will be in the best interests of children to live with one or both of their parents; and fails to consider the wishes of the children. On the sole responsibility point it is arguable that the judge, despite having set out the nature of the test at [34 – 30] well, then applies a different test, in referring to the children being 'fit and well', not 'destitute', and being housed by their mother. These factors are arguably suggestive of a test akin to that of showing that the applicants were suffering in exceptional compassionate circumstances, or were destitute or in poor health. It is also of note that at [33] the judge appears to omit making findings on the credibility of the mother's oral evidence. Given the gravity of the consequences of children remaining separated from their mother, it is arguable that these matters considered together would amount to legal errors requiring further consideration of the appeals.
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> 5. The first appellant will turn 18 on 28 May 2017 and the representatives should give careful consideration to a further application before this date (as suggested by the judge at [38]), since the points above are separate from the question of any evidential deficiencies; and the eventual outcome of these appeals cannot be predicted, and will almost certainly stretch beyond the relevant date."

13. The respondent in her Rule 24 reply opposes the application asserting the Judge directed himself appropriately. At [3] of the reply it is written:

> "The judge's findings with regard to sole responsibility and the best interests of the children are properly based on the evidence and the law. At paragraph 33 the judge finds that the submission that the oral evidence and statement from the sponsor shows that she has sole responsibility is not supported by the documentary evidence. There were significant inconsistencies in the evidence for example the involvement of the father and a lack of documentary evidence supporting sole responsibility. Clearly the level of involvement of the sponsor in the appellants' lives will be a significant issue feeding into the section 55 consideration."

14. The sponsor's witness statement attached to the solicitor's letter received on 8 May 2017 is in the following terms:

"I, [CO], [ ] Birmingham, and sponsor and mother of Mary Ooko and [WA], the appellants, make this statement below.

Firstly, I am grateful for the permission to appeal being granted.

I however wish that the further hearing is held in my absence.

The emotional trauma that the application and appeals process has had on me has been immense. I was in tears at the hearing.

I am a professional nurse and need to be able to function properly.

I read the response from the Home Office to the Judge's decision and I am not prepared any more for any more grilling as if I were a criminal. Everything I have stated regarding my children have been true. After the last hearing, I was emotionally drained and felt that this was unfair to go through.

I came in lawfully, remained lawfully and have settled here, working hard and paying taxes, so that I can prepare a future for my children. Purchased a property to live with my children, so that they can enjoy the privilege of my hard work. Now the hope of them joining me keeps being dashed.

They kept asking if they had done something wrong for not being allowed to join me.

The effect of leaving them behind has been damaging to their mental health, and the hopes of joining me dashed over and over again, that one of them lost a year from school.

I haven't informed them of this further development as I do not want to raise their hopes again.

The agony of baring all, struggling to be reunited with my children, being taken for a liar is too traumatic to go through. I wish the Home Office would consider my children and myself with great consideration to allow us to unite one with another.

I have informed my representative to forward this statement on my behalf

I also confirm that there is no new evidence that is available to submit.

Yours sincerely"

Discussion

15. The representatives have no doubt explained to the sponsor that the purpose of this hearing is to consider whether the Judge has made an error of law material to the decision to dismiss the appeal based upon the evidence that was provided to the First-tier Tribunal. It is only if such arguable material legal error is made out at the Upper Tribunal has the power to remake the decision.
16. The separation of the appellants from their mother appears to have come about as a result the mother's choice in coming to the United Kingdom in 2008 and leaving the children in Kenya with their grandmother.

17. In relation to the test of 'sole responsibility' In *TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049* the Tribunal said that "Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".
18. In *NA (Bangladesh) v SSHD 2007 EWCA Civ 128* the Court of Appeal said that, where a natural parent continued to live in the same country as the child, it was a necessary part of the reasoning on sole responsibility to consider the position of that parent to determine whether that parent had partial responsibility (which would of course preclude the parent in the UK from having sole responsibility). The Court of Appeal said that the Immigration Judge was wrong to conclude that the requirements of the Rules were met where the parent effectively shared responsibility with his sons here. However, the Court of Appeal also said that the parent could have sole responsibility notwithstanding that the financial consequences of this were shared with his sons. The parent may, as head of the household, be regarded as controlling the disposition of those contributions.
19. In *Buydov v ECO Moscow [2012] EWCA Civ 1739*, as part of their written divorce agreement, the parents had agreed that the mother would have sole responsibility for the claimant's upbringing. The judge found that in practice the claimant's father retained some responsibility. It was held that the judge had misdirected himself when he found that it was necessary to show that the father had abdicated responsibility for the child before the mother could have sole responsibility. The finding that the father had not abdicated responsibility was clearly relevant but that was not the same as treating the finding as conclusive. The residence order for the child was clearly evidence but it would be wrong to treat it is necessarily sufficient evidence to prove sole responsibility. The Upper Tribunal's conclusion that it could not derive assistance from the IDI could not be characterised as an error of law. The Upper Tribunal was entitled to find that the mother did not have sole responsibility.
20. The Judge was clearly aware of the requisite test set down in *TD* but did not find the evidence available supported the sponsor's claim that she had sole responsibility for the children. Whilst it is accepted that the relative with actual care would have to make day-to-day decisions with regard to the children, the Judge examined the evidence to ascertain whether it demonstrated that even though the grandmother exercised such power it could be shown that the sponsor had retain sole responsibility for the appellants' by continuing to maintain an interest and involvement in their lives, including the making or being consulted about involvement in important decisions about the

children's upbringing. The lack of evidence to show the sponsor maintain such a role arguably entitled the Judge to reach the conclusions that he did, that the sponsor had not established that her claim to retain sole responsibility was credible.

21. The reference in the grant of permission to the children's presentation is not an arguable misdirection in law by the Judge but rather a comment from the judge that the children are, on the face of it, in good health and being properly cared for.

22. The Judge also noted an email from the sponsor's sister suggesting the sponsor had a reduced role in the upbringing of the children and that the maternal grandmother was the person who had brought the children up. The issue of destitution related to whether series and compelling reasons which would make exclusion undesirable arose, which were not arguably made out on the evidence.

23. Whilst the grant of permission refers to the benefit to children of remaining with their natural parents there is nothing to suggest that the sponsor could not return to Kenya to live with the children if this was something that she thought was critical to their upbringing. The sponsor clearly left in 2008 and only made the application shortly before the eldest child attained her 18th birthday, at which point the route to settlement pursued will no longer be available.

24. In relation to section 55, no arguable error is made out. The Judge was aware of the need to consider the best interests of the children. There is no need for a judge to set out chapter and verse decided authorities unless there is a real purpose. It is safe to assume that an experienced judge will be aware of the need to consider the best interests of the children as a primary consideration.

25. In this case, it was not made out that the best interests of the children are such that it established serious and compelling reasons which made the exclusion of the children undesirable. It has not been made out that the best interests of the children are the determinative factor. The Judge noted the inability to satisfy the Immigration Rules relating to settlement and thereafter considered section 55 as part of the Article 8 assessment, before concluding that the decision is proportionate.

26. On the facts known to the Judge and findings made, this is a decision that falls within the range of those the Judge was permitted to make on the evidence such that no legal error material to the decision to dismiss the appeal has been made out.

Decision

27. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

Anonymity.

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 1[0t]h of May 2017