



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04317/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 October 2017

Decision & Reasons Promulgated  
On 29 November 2017

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

FATOU SANNEH  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

**Representation:**

For the Appellant: Mr N Ahmed instructed by Peer & Co (Watford)  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Gambia. She appealed to the Judge of the First-tier Tribunal against the Entry Clearance Officer's decision of 14 July 2015 refusing entry clearance to enable her to join her mother, Ms Sarjo Joof, in the United Kingdom.
2. The respondent was not satisfied that the application was for a purpose covered by the Immigration Rules and refused it under paragraph 320(1) of HC 395. The appellant was born on 4 February 1998 and was under 18 years at the time of the

application on 29 April 2015. The judge accepted the genuineness of the relationship between the appellant and Ms Joof and was also satisfied that there was family life. He noted that there had been visits over a period of three years and photographs and copies of phone messages and he concluded that there was emotional dependence as well as financial dependence.

3. As regards the issue of proportionality, the judge bore in mind the provisions of section 117B of HC 395 and noted that a significantly weighty issue within the proportionality assessment was whether the requirements of the Immigration Rules were met. He noted the terms of paragraph 297 of HC 395 and having said at paragraph 24 that Counsel, Mr Ahmed, had accepted there was no “sole responsibility” argument, went on to consider whether there were serious and compelling family or other considerations which made the appellant’s exclusion undesirable. The judge noted that the appellant was not living in satisfactory conditions with her extended family. She had not been abused physically but she felt left out of things. She had little privacy and was possibly experiencing bullying. However, she had a home with people she knew and had access to money regularly and was accessing education. As a consequence the judge concluded that it was not shown that she was living in circumstances which were so serious and compelling as to make her exclusion undesirable. Referring to the guidance in Mundeba [2013] UKUT 88 (IAC) he concluded that the requirements of the Rules were not met. This weighed heavily against the appellant. The judge bore in mind the appellant’s half-brother but considered in reality the age difference was such that they would not grow up together as siblings. In conclusion he considered that the decision was not disproportionate and that Ms Joof and her husband Mr Silk continue to send money and make visits as they had done since 2013. The appeal was therefore dismissed.
4. Perhaps I need say relatively little about the grounds of appeal as before the First-tier Judge who granted permission, and also the submissions made by Mr Ahmed on behalf of the appellant since Mr Tarlow very fairly and properly took no issue with the points that were made and accepted that there were errors of law in the judge’s decision. It was relevant to note also at this point that most unfortunately the appellant was in a road traffic accident in Gambia on 14 October 2017 and suffered what appear from the evidence that has been provided to me to be serious injuries. In the circumstances Mr Ahmed expressed the hope that a speedy decision could be provided, given the extreme worries and anxiety of the family at present. I was not in a position to do so at the hearing, but this decision is provided as soon as reasonably could be done after the hearing.
5. Mr Ahmed’s main challenges to the decision which clearly need to be borne in mind in the remaking of it, are first that the judge did not deal with the issue of sole responsibility, noting as he did at paragraph 24 there was no “sole responsibility” argument. Mr Ahmed denied that any such concession had been made and said that the only concession that had been made was with reference to the appellant not being able to satisfy paragraph 297(i)(e) on the basis that the appellant’s mother was not present and settled in the United Kingdom.

6. Though I have been unable to locate the skeleton argument to which the judge referred in paragraph 24, I note from Sarjo Joof's statement before the judge at paragraph 2 that she had sole responsibility for the appellant. It would be surprising indeed if Mr Ahmed in his skeleton argument had gone against that clear piece of evidence, and accordingly I accept that there was a confusion and the concession was only with regard to paragraph 297(i)(e).
7. This feeds in to Mr Ahmed's argument that the judge's decision was flawed by failure to make proper findings on relevant issues under the Immigration Rules which were of relevance to the proportionality assessment.
8. Mr Ahmed also argued that this was of relevance to the point ruled out by the judge who granted permission, in concluding that it was not arguable that the judge erred in law in finding there were not serious and compelling reasons making the appellant's exclusion undesirable. He argued that in the absence of a proper finding on sole responsibility that finding was inevitably flawed. Again, I agree with Mr Ahmed's submission. It seems to me that a proper evaluation of proportionality has to take account of all the relevant elements of paragraph 297 and that there may be implications for a finding in respect of paragraph 297(i)(f) where there has been a failure to making a finding on an element of (e).
9. A further point concerns what was said by the Upper Tribunal in SF and others [2017] UKUT 00120 (IAC), which is summarised in the head note as follows:

"Even in the absence of a 'not in accordance with the law' ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."
10. Mr Ahmed argued in that regard that this was relevant to the reasonableness of return of a British citizen child in the context of Article 8. Home Office policy was that it would not be reasonable to expect a British citizen child to leave the United Kingdom and that was exactly the situation as at the date of hearing and it had not been considered by the judge. It should be questioned how family life could be continued outside the United Kingdom if it was unreasonable and this was a factor of fundamental significance which had not been considered.
11. There were also public interest considerations. Though these were mainly neutral there was the question of the best interests of the British citizen child. It was relevant also to note the terms of the decision letter granting leave to the sponsor. It was said at page 3 of 6 (page 12 of the bundle) that there were insurmountable obstacles to her family life continuing outside the United Kingdom. It was a fundamental point which had to be factored into the balancing exercise. It was also relevant to consider

the appellant's circumstances as they were and are in Gambia. It could not be said that family life could continue outside the United Kingdom.

12. In the circumstances of it being agreed there were errors of law in the judge's decision, it was also agreed that the matter would be remade in the Upper Tribunal.
13. As noted above, I bear in mind the errors of law in the judge's decision in the proportionality evaluation. In particular, when remaking the decision I must bear in mind that it is claimed on the appellant's behalf that her mother has sole responsibility for her, and it is necessary to take into account Home Office policy on the reasonableness of return of a British citizen child and the terms of the letter of the grant of leave to the sponsor.
14. As the judge pointed out in his decision, the question of whether the requirements of the Immigration Rules are met is a significant and weighty issue within the proportionality assessment. If they are met the public interest in maintaining immigration control is weakened.
15. It is necessary therefore to consider the provisions of paragraph 297 of HC 395. It states as follows:

“(i) is seeking leave to enter to accompany or join a parent in one of the following circumstances:

...

- (e) one parent is present and settled in the United Kingdom ... and has had sole responsibility for the child's upbringing; or
  - (f) one parent or a relative is 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; and
- (ii) is under the age of 18; and
  - (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
  - (iv) can, and will, be accommodated adequately by the parent the child is seeking to join without recourse to public funds in accommodation which the parent ... owns or occupies exclusively; and
  - (v) can, and will, be maintained adequately by the parent without recourse to public funds”.

16. The judge left aside the financial and accommodation requirements as, it was said the sponsor had no status to make the application because she cannot meet the requirements of paragraph 297(e) as she did not have settled status.
17. The point Mr Ahmed makes on this is that the appellant's mother had limited leave to remain as a partner under Appendix FM and therefore met the requirements of E-ECC.1.6. of Appendix FM with regard to relationship requirements which states as follows:

“One of the applicant's parents must be in the UK with limited leave to enter or remain, or be applying or have applied, for entry clearance, as a partner or a parent under this Appendix (referred to in this section as the 'applicant's parent'), and

  - (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
  - (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or
  - (c) 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”.
18. I accept that potentially the appellant can come within this provision subject to a finding either that her mother has had and continues to have sole responsibility for her upbringing, or that there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for her care.
19. As noted above the sponsor's evidence was that she has sole responsibility for the appellant. She said the appellant's father does not have any contact with the child nor does he play any role in the child's life. The appellant's mother, Ms Joof, left Gambia in December 2000 to come to London to study and according to her statement left the appellant under the care of her mother. Subsequently, as her mother became ill Ms Joof's aunt, her adopted uncle's wife, took her in for a year and thereafter the appellant stayed with Ms Joof's late father and mother. The aunt moved back to Gambia in July 2006 until August 2008 and was then looked after by a friend for a year until the aunt came back to the Gambia in 2009. She stayed with that aunt until 2010. The appellant then stayed with her aunt's niece from September 2011 to August 2012. Her mother managed to put her through school in the Gambia. Her husband went to Gambia to see the appellant in 2013 and saw what a difficult life she was living. It seems from the evidence of Mr Silk, the appellant's stepfather, that the appellant had no stability and was vulnerable to changes of carers. He felt that she was sometimes used as a house servant and not treated as an equal in the household she was living in and people moved in and out and pushed her down the

pecking order (she shares accommodation with five other girls) and that he thought this built up to a form of mental abuse.

20. It seems therefore that the appellant, since her mother left, has lived with a number of family members and friends during that time. The evidence of her mother is that the appellant's father is completely out of the picture and that she is the one who has represented the element of continuity in her life. She herself had gone to Gambia in 2015 for the appellant's graduation when she stayed at a hotel. Her concerns for the appellant were mainly emotional.
21. I accept on the basis of this evidence that the appellant's mother had sole responsibility for her. Also I accept that she continues to have sole responsibility for her. The issue of serious and compelling family or other considerations making exclusion of the child undesirable that suitable arrangements having been made for her care is an alternative under paragraph E-ECC.1.6., and therefore I do not need to make any findings in that regard. The other requirements of the Rule concerning support and accommodation I also find to be met. It is clear from the evidence of Mr Silk that he has sufficient financial resources to make sure the appellant would not make calls on the public purse and he will not require any further financial support from the UK Government upon her arrival in the United Kingdom. There is evidence of his financial circumstances in the bundle which shows that he is earning over £60,000 a year. His only other responsibilities are for his wife and their infant child. It is clear that the appellant has not formed an independent family unit living as she does with several other young people in accommodation in Gambia and she is not married or in a civil partnership and is not leading an independent life. These are all relevant factors to be placed into the proportionality evaluation.
22. In addition it is clearly relevant to bear in mind the respondent's policy that a British citizen child could not reasonably be expected to leave the United Kingdom as would be the case of the appellant's stepbrother. His best interests are required to be considered and those clearly are that he remains with his parents. It is the respondent's policy that it would not be reasonable to expect him and them to relocate to the Gambia.

### **Notice of Decision**

23. It is clearly weighty in evaluating the proportionality of the decision when challenged, that I find the requirements of the relevant Immigration Rules to be satisfied. As it is an entry clearance case, I bear in mind the guidance in SS (Congo) [2015] EWCA Civ 387 at paragraphs 39-42.
24. In essence, where an applicant for leave to enter can show that compelling circumstances exist (which are not sufficiently recognised under the Rules) it may be appropriate to grant leave.

25. In my view such circumstances have been made out in this case, bearing in mind also that I have found the relevant requirements of the Rules to be satisfied and my findings on the evidence above. On any remaking of the decision, I allow the appeal under Article 8 of the European Convention on Human Rights.
26. No anonymity direction is made.



Signed

Date

Upper Tribunal Judge Allen