Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: OA/08377/2015**

OA/08384/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 4 July 2017	**On 19 July 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ABIMBOLA ADEWALE AYODELE
VICTOR ADEWALE AYODELE

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr O Adebayo of David & Vine Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Nigeria. They are twins who were born on 9 June 1997. They applied for entry clearance under para 297 of the Immigration Rules (HC 395 as amended) to join their father, Felix Babatunde Ayodele who is settled in the UK. On 23 April 2015, the Entry

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Clearance Officer ("ECO") refused each of the applications. On 25 August 2015, the Entry Clearance Manager confirmed those decisions.

2. The appellants appealed to the First-tier Tribunal. In a determination sent on 29 September 2016, Judge Frazer dismissed the appellants' appeals under Art 8 of the ECHR. The appellants sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal but on 24 March 2017 the Upper Tribunal (UTJ Eyre QC) granted the appellants permission to appeal on the basis that, in reaching her decision under Art 8, the judge had failed to consider the application of para 297 of the Rules to the appellants.

3. On 13 April 2017, the ECO filed a rule 24 notice seeking to uphold the judge's decision.

The Hearing

4. At the hearing, I initially heard submissions from both representatives on whether the judge had erred in law in failing to consider para 297 of the Rules. At the conclusion of those submissions, I indicated that I was satisfied that there was a material error of law and both representatives agreed that I should remake the decision. As a consequence, I heard oral evidence from the sponsor and further submissions from both representatives in respect of Art 8.

Error of Law

5. Before the First-tier Tribunal, the evidence was that the sponsor had moved to the United Kingdom in 1996. A month after he did so, he discovered that his girlfriend in Nigeria was pregnant with the appellants. They were born in Nigeria on 9 June 1997 whilst the appellant was living in the UK. In 2003, the appellants' mother moved to the north of Nigeria to live with her new boyfriend. At that time, the appellants went to live with their paternal grandmother (the sponsor's mother). They lived with her until her death in 2012. After the death of their grandmother, the appellants went to live with their maternal uncle in Lagos.

6. In 2013, the sponsor travelled to Nigeria and saw the appellants for the first time. He again visited Nigeria in 2014.

7. The sponsor gave evidence that he sent money to the appellants on a regular basis and that he spoke to them on the telephone. It was his support that provided clothing, money for food and money for the appellants' school fees.

8. The evidence was that when their uncle travelled, the appellants stayed with friends.

9. At the time of the ECO's decisions, the appellants were 17 years and 10 months old. At the date of the hearing, the appellants were 18 years and 3 months old.

10. The judge accepted the evidence before her, including that of the sponsor. The judge made a number of findings.

11. First, she did not accept that the relationship between the appellants and the sponsor amounted to 'family life' within Art 8 (see para 22). Secondly, in any event, the judge found that even if family life had been established, the refusal of entry clearance was proportionate.

12. In reaching that latter finding, the judge accepted a submission made on behalf of the ECO, that the appellants could not succeed under para 297 of the Rules because they were over the age of 18 (see paras 17 and 24). Before me, Mr Adebayo submitted that was an error.

13. One of the requirements in para 297(ii) is that the individual "is under the age of 18". In applying para 297, however, the relevant date is the date of the ECO's decisions which was 23 April 2015. At that date, as I have already noted, the appellants were, in fact, under the age of 18; they were 17 years and 10 months old. Consequently, contrary to the submissions made by the ECO before the judge, this was not a basis upon which para 297 could be said not to apply to them. Indeed, even if they had reached the age of 18 by the date of the hearing, providing they were under 18 at the date of application, by virtue of para 27 of the Rules they would be treated, in effect, as if they were under 18 years of age.

14. Mr Adebayo submitted that this error was material to the judge's decision as she had not dealt with the substantive requirements of para 297 namely whether the sponsor had "sole responsibility" for the appellants (para 297(i)(e)) or whether there were "serious and compelling family or other considerations which make exclusion of the child undesirable" (para 297(i)(f)).

15. Mr Mills submitted that any error was not material as the judge had found that no "family life" had been established between the appellants and sponsor and consequently he could not rationally have found that the sponsor had "sole responsibility" or that there were "serious and compelling family or other considerations" in para 297(i)(e) and (i)(f) respectively.

16. For the reasons I will give shortly, the appellants did not have a right of appeal on the basis that they met the requirements of the Immigration Rules. Nevertheless, in determining Art 8 it was incumbent upon the judge to consider whether the appellants met the requirements of the Rules and, if they did not, whether there were "compelling circumstances" such as to outweigh the public interest and justify the grant of leave outside the Rules (see R (Agyarko and another) v SSHD [2017] UKSC 11 at [47]-[48]). The judge simply made no relevant findings in relation to the substantive requirements of para 297 on the basis that she wrongly considered that it had no application because of the appellants' ages at the date of the hearing. It would appear, on that basis, that the sponsor was not asked about, and as a result his evidence not directed towards, the issues relevant as to whether he had "sole responsibility" as set out in

the well known case of TD (Yemen) (Paragraph 297(i)(e): sole responsibility) [2006] UKAIT 00049. The judge's adverse finding in relation to 'family life' must, in my judgment, also be seen in the light of the fact that the sponsor (who appeared in person before the judge) may well have not appreciated the nature of the issues relevant to para 297 and by extension then to Art 8.

17. In the circumstances, I do not accept Mr Mills' submission on materiality. I cannot be confident that the judge would necessarily have made an adverse finding, in particular in relation to the issue of "sole responsibility" under para 297(i)(e).

18. Thus, as I indicated at the hearing, I am satisfied that the judge materially erred in law in dismissing the appellants' appeals under Art 8.

Discussion

19. I now turn to remake the decision.

The Scope of the Appeal

20. At the hearing, I explored with the representatives the scope of the appellants' rights of appeal in this case; in particular whether the right of appeal was limited to Art 8 alone as a result of the amendment to s.82 of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") by s.15 of the Immigration Act 2014. Both representatives, having considered the relevant commencement provisions, accepted that the appellants' rights of appeal were limited to Art 8 of the ECHR. That is the effect of Art 9 of the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (SI 2014/2771) as amended by the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371), Art 8.

21. The effect of Art 9(1)(c) of the Commencement No. 3 Order can be summarised as follows. Where an application for entry clearance was made before 6 April 2015 but a decision on that application is made on or after 6 April 2015, the applicable appeal rights are those in s.82 of the NIA Act 2002 in force prior to its amendment by s.15 of the Immigration Act 2014. However, if the decision is also "a refusal of an asylum, protection or human rights claim", then the appeal rights are governed by s.82 in force as a result of the amendment by the Immigration Act 2014.

22. The applications for entry clearance were made before 6 April 2015 but the decisions were reached after 6 April 2015. However, an application for entry clearance under para 297 falls within Part 8 of the Rules and is deemed to be a "human rights application" by the Secretary of State (see Home Office, "Rights of Appeal" (version 3.0) at page 9). Consequently, the new version of s.82 of the NIA Act 2002 applied to these appeals and, therefore, in effect the appellantS only had a right of appeal under Art 8. The earlier appeal rights which would have included a ground that the

decision was not in accordance with the Immigration Rules did not apply to them.

Paragraph 297

23. Nevertheless, for the reasons I have given above, whether the appellants did or did not satisfy the requirements of para 297 was relevant in determining their Art 8 claim.

24. The relevant provisions of para 297, which I have referred to already above, are found in para 297(i)(e) and (i)(f). It was not suggested that any of the other requirements of para 297 were in issue. Paragraph 297, so far as relevant provides as follows:

> "The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative 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; …"

25. In this appeal, Mr Adebayo placed much reliance upon the submission that the sponsor had "sole responsibility" for the appellants. Guidance on the meaning of "sole responsibility" can be found in the AIT's decision in <u>TD</u> at [52] as follows:

> "Questions of "sole responsibility" under the immigration rules should be approached as follows:
>
> i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
>
> ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who <u>in fact</u> is exercising responsibility for the child. That responsibility may have been a short duration in that the present arrangements may have begun quite recently.
>
> iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.

iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and the child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole"."

26. When an appeal lay on the ground that a decision was not in accordance with the Immigration Rules, and when that decision was an entry clearance decision, the facts had to be ascertained as at the date of decision (see s.85A(2) of the NIA Act 2002 prior to amendment by the Immigration Act 2014). The facts were not to be taken as at the date of the Tribunal hearing. Even if Art 8 was relied upon, since the appeal was against a refusal of entry clearance, the same limitation applied.

27. Under the current appeal provisions in the NIA Act 2002 following its amendment by the Immigration Act 2014, in determining whether a decision (whether a refusal of entry clearance or otherwise) breaches Art 8, the Tribunal may now consider any matter which it considers relevant to the substance of the decision including a matter arising after the date of decision (see s.85(4)).

28. Consequently, whether a breach of Art 8 is established must be decided upon the facts as they are at the date of the hearing. It may well be that that also means that, unlike the earlier position, whether the Rules are or are not met must also be decided as at the date of decision since its relevance lies in determining whether a breach of Art 8 is established. In this case, however, it is not suggested that the factual situation has materially changed since the date of decision other than whatever relationship exists between the appellants and sponsor has continued.

Findings

29. The evidence before the judge was, as I set out above, that the appellants lived in Nigeria initially with their mother between 2003 and 2012, with their paternal grandmother after their mother left, and after their paternal

grandmother's death in 2012 they lived with a maternal uncle. The sponsor did not see the appellants until he visited Nigeria in 2013 when they were 14/15 years old. He has seen them on a further occasion in 2014. In his evidence before me, the sponsor said that each visit was about two weeks in duration.

30. Before the judge, the evidence was that the sponsor provided financial support for the appellants which covered clothing, food and school fees. The judge accepted this evidence. There was no evidence before the judge as to what other, if any, involvement the sponsor had in their lives.

31. In his evidence before me, the sponsor said that he did have 'sole responsibility' for them since they were born. The sponsor said that he had made decisions about the children long before he had met them. When they were living with their mother, he had communicated with her and he had chosen the school. He told me that he communicated with the school and paid the school fees. He said that he chose the courses for them and he bought clothes and sent money for them. He told them which church to attend and, when they were younger, he told them when to go to bed to sleep. He told me that when the appellants' grandmother died, he agreed that they could live with their maternal uncle. He said that he did not meet their uncle before they went to live with him but the children had told him about their uncle. He had spoken to the uncle on the telephone and had done so regularly before the appellants' grandmother died. He told me in his evidence how, when he went to Nigeria in 2013, he had met the uncle and gone to his home where he met his own children for the first time.

32. The sponsor said that he spoke to the children about every two days calling the number of the uncle or friends. He told me that the children, when they finished their education next month, needed to know about IT and would do a one year college course before going to university. He said that his daughter wanted to be a lawyer and his son wanted to be an engineer but he was also keen on football and becoming a footballer.

33. In his evidence, the sponsor accepted that there was no evidence from the school concerning any contact with them and there was nothing from the appellants' uncle.

34. Mr Adebayo invited me to find the sponsor to be credible. He pointed out that the judge had made no negative findings in respect of the sponsor. He invited me to place weight on the evidence given orally before me. He submitted that the sponsor made the key decisions for the appellants, for example where they were to live when their grandmother died and he had been responsible for their choice of school. In addition, he provided the financial support which the judge had accepted. He submitted that the sponsor had 'sole responsibility' for the appellants.

35. Mr Mills accepted the sponsor provided financial support but, following TD "that was not in itself enough to establish sole responsibility." Mr Mills relied on the fact that the sponsor had not met his children until 2013

when they were about 16 years of age. They had spent virtually all of their childhood without their father and, he submitted, that should present rather more of an uphill struggle to establish sole responsibility than if he had been with them in Nigeria and had left.

36. Mr Mills invited me to take into account that the sponsor's evidence about the appellants' uncle was vague and, although he had ultimately said that he had decided whether they should live with the uncle, he was initially unable to give his full name and had accepted that he had not met the uncle prior to the appellants going to live with him.

37. Mr Mills pointed out that there was no supporting evidence from the appellants' uncle or their school as to his involvement. It was reasonable, Mr Mills submitted, to expect him to produce supporting evidence of that nature. Mr Mills submitted that the sponsor was little more than an absent father who provided financial support and had visited them, during the course of their whole lives, only for about four weeks. Mr Mills submitted that the evidence was not sufficient to establish that the sponsor had sole responsibility for the appellants.

38. It is clear from the case law, summarised in TD, that the touchstone of "sole responsibility" is the continuing control and direction by the parent in the UK in respect of the "important decisions" about a child's upbringing. Whilst the parent in the UK may have sole responsibility, the day-to-day care may well reside with the carers abroad.

39. As I have already indicated, there was no evidence before the judge that the sponsor made any "important decisions" in the appellants' lives. I accept that evidence of that nature may well, given the judge's view that para 297 did not apply and the sponsor appeared in person, not have led to relevant questions being asked. Before me, the sponsor contended that he did have sole responsibility (he said so in express terms) and that he made decisions, for example as to which school they should attend and, in their earlier years, when they should go to bed at night. He also decided that they should live with their maternal uncle when their grandmother died in 2012.

40. The burden of proving that the sponsor had sole responsibility for the appellants lies upon the appellants on a balance of probabilities. There is little evidence of any substance that the sponsor was actively involved in the appellants' lives between 1996 when he came to the UK and 2003 when their mother left and the appellants went to live with their paternal grandmother. The sponsor said, in cross-examination, that he had communicated with their mother when she was alive and he had chosen the school. However, there was no supporting evidence from the school in relation to that or the subsequent period since 2003. The appellants are now legally represented and it would be reasonable to expect supporting evidence could be obtained from the school showing contact with the sponsor and his involvement in any decisions relating to their schooling. Its absence is relevant as to whether I accept his evidence on this matter (see TK (Burundi) v SSHD [2009] EWCA Civ 40).

41. Whilst, as Mr Mills acknowledged in his submissions, it is in some respects supportive of the sponsor's claim to have sole responsibility that the appellants went to live with his mother when their own mother left, the fact remains that apart from financial support, there is a complete paucity of independent evidence concerning his involvement with decisions made about the children prior to their grandmother's death. I have already dealt with the matter of their schooling. The sponsor's evidence that he made the decision (as I understood his evidence) each day as to when they would go to bed is simply not credible. Indeed, it contradicts his evidence that he spoke to them regularly but not every day. In relation to his statement that he chose which church they should attend, again there is no supporting evidence.

42. The sponsor also said that, when their grandmother died, it was he who chose that they should live with their maternal uncle in Lagos on the advice of the appellants. The reason for that was he did not really know and had never met their uncle. Again, there is no supporting evidence from the appellants' uncle as to the sponsor's relationship with the appellants either before 2012 or thereafter since they have been living with him. Given the sponsor's claim that he is in contact with their uncle, there is no doubt that such evidence could be readily obtained and it would be reasonable to expect it. There is no evidence from the appellants themselves who are now 20 years of age. Likewise, it would be reasonable to expect this. Its absence is telling. Apart from financial support, the entirety of the appellants' case rests upon the evidence of the sponsor.

43. I had no doubt that the sponsor had and has a relationship with his children and is in contact with them and provides them with financial support. He has, however, on the evidence not established on a balance of probabilities that he has sole responsibility for them. At best, responsibility for the appellants has been shared first with their mother, then with their grandmother and latterly with their uncle. I do not accept that it is established that the sponsor makes all the important decisions in their lives.

44. For that reason, I am not satisfied that the appellants meet the requirements in para 297(i)(e) of the Rules.

45. In his oral submissions, Mr Adebayo did not specifically address the requirement in para 297(i)(f), namely whether there were serious and compelling circumstances which made exclusion of the appellants undesirable. For the reasons I give below, in considering whether the appellants can succeed outside the Rules under Art 8 on the basis that there are "compelling circumstances", I conclude that the requirement in para 297(i)(f) is not met on the evidence before me.

46. I turn now then to consider Art 8. In doing so, I apply the 5-stage test in R (Razgar) v SSHD [2004] UKHL 27 at [17].

47. First, although the contact between the appellants and sponsor is, on the evidence, limited to telephone calls and two visits in 2013 and 2014 of around two weeks' duration each, I bear in mind that the sponsor provides financially for his children. I apply the approach set out in the well-known case law summarised in Rai v ECO [2017] EWCA Civ 320 at [17]-[20]. It is a fact-sensitive assessment having regard to all the circumstances. In those circumstances, I am content to accept that there is family life with them despite the fact that they are now, albeit just, adults. Of course, the maintenance of the decisions to refuse entry clearance will not affect that position. However, Art 8 also protects further development of family life which, I accept, would be likely if the appellants came to the UK. For these reasons, therefore, I accept that Art 8.1 is engaged.

48. Secondly, as regards Art 8.2, the respondent's decisions are clearly in accordance with the law, namely the Immigration Rules and the decisions are in pursuance of a legitimate aim, namely effective immigration control.

49. Thirdly, the crucial issue is that of proportionality. That issue requires a fair balance to be struck between the public interest and the rights and interests of the appellants and sponsor protected by Art 8.1 (see Razgar at [20]). In R (MM) (Lebanon) and Others v SSHD [2017] UKSC 10 at [43], the Supreme Court reminded us that the "central issue" is:

> "Whether a fair balance has been struck between the personal interests of all members of the family in maintaining their family life ... and the public interest in controlling immigration."

50. In carrying out that balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the consideration set out in s.117B of the NIA Act 2002.

51. There is a public interest in effective immigration control given that the appellants cannot meet the requirements of the Rules (see s.117B(1) of the NIA Act 2002). The public interest is entitled to "considerable weight" (see MM at [75]; and also Hesham Ali v SSHD [2016] UKSC 6 at [46] and Agyarko at [46]-[48]). In respect of s.117B, no evidence was led before me as to whether the appellants speak English. However, even if they do, at best that is a neutral factor applying s.117B(2) (see Rhuppiah v SSHD [2016] EWCA Civ 803 at [59]-[61]). As regards the appellants' "financial independence", there was no evidence that they would be financially independent in the UK but rather that they would, as they are in Nigeria, be financially dependent upon the sponsor. Their stated aspiration of being students is entirely consistent with that view. Because of that third party support, the public interest set out in s.117B(3) applies (see Rhuppiah at [63]). The remaining provisions in s.117B(4), (5) and (6) do not apply in this entry clearance case.

52. The search is for "sufficiently compelling" circumstances to outweigh the public interest because the refusal of entry clearance would result in "unjustifiably harsh consequences" (see Agyarko at [48]).

53. Both appellants are now adults. They have lived their entire lives in Nigeria and have only seen their father, the sponsor for four weeks in their whole lives. The evidence is that he provides financial support and this provides for the necessities of life and that accommodation is available from their uncle. No doubt, financial support could also fund accommodation in Nigeria. There was no evidence before me to suggest otherwise. In short, there is nothing in the evidence to suggest that the appellants have not been able to live successfully, including being educated, in Nigeria since 2003 without a parent but with support from other family in Nigeria and the sponsor's financial support from the UK. Although they have continuing financial dependence upon the sponsor, there is no reason to conclude that their lives could not continue as before without any demonstrated harm or detriment to them as (now) young adults. Continuing contact with their father can be maintained, as it has been effectively for over a decade, by regular telephone contact and visit (perhaps more regularly than in the past) by the sponsor to Nigeria.

54. Applying the approach set out in Agyarko, the refusal of entry clearance to the appellants does not produce unjustifiably harsh consequences such that there are compelling circumstances which outweigh the public interest. Thus, I am satisfied that the respondent's decisions do not breach Art 8 of the ECHR.

Decision

55. For the above reasons, the First-tier Tribunal's decision to dismiss the appellants' appeals under Art 8 involved the making of an error of law. That decision is set aside.

56. I remake the decision dismissing the appellants' appeals under Art 8.

57. No anonymity direction was requested.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 18, July 2017

TO THE RESPONDENT
FEE AWARD

As the appeals are dismissed, no fee award is made.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 18 July 2017