



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00820/2016

THE IMMIGRATION ACTS

Heard at Newport
On 20th November 2018

Decision & Reasons Promulgated
On 19th December 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

[C O]

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Shoroye of Counsel, instructed by Graceland Solicitors

For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 9th January 2007. She sought to apply under the Immigration Rules for entry clearance so that she may join her father in the United Kingdom. The application was refused on 9th December 2015.
2. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Suffield-Thompson on 7th August 2017. In a subsequent determination promulgated on 16th August 2017 the appeal was dismissed.

3. Thereafter the appellant sought to challenge that decision and leave to do so was granted to the Upper Tribunal. Thus, the matter came before me on 17th August 2018 and it was my finding that the principle of **TD (Paragraph 297(i)(e) "sole responsibility") Yemen [2006] UKAIT 49** had not been properly applied. Consequently, I set aside the decision of the First-tier Tribunal to be remade in the Upper Tribunal. I gave directions for the evidence to be obtained and indicated that the focus of consideration would be on **TD** in particular.
4. At the subsequent hearing, a supplementary bundle of documents was presented, making some attempt to meet the evidential issues which I have raised, although perhaps not entirely meeting them.
5. [VE], the sponsor, adopted his witness statement of 7th August 2018 and gave evidence at the hearing. The appellant was conceived in the course of the relationship between the sponsor and [CA]. They were too young to care for her and so the decision was made that she would live with the sponsor's parents.
6. The sponsor came to the United Kingdom, since when he has become a British citizen. He is married with two children and earns some £42,000 a year as a mental health care assistant. He has been undertaking this task for some seven years.
7. As a father he has provided the emotional support, affection and the interest in the appellant's welfare and wellbeing. He has provided the funding for his parents' home and for the appellant's education. He keeps in very regular contact with the appellant and his parents, as demonstrated by the many telephone calls through Lycamobile that have been exhibited in these proceedings. The documents have been presented in the first appeal bundle, which include phone records, phone cards, wage slips of the sponsor, money transfer receipts.
8. The sponsor came to the United Kingdom in 2011 and before that lived with his parents in Nigeria and therefore saw the appellant every day. Since he has come to the United Kingdom there have been visits and everyday phone contact. In particular copies of the sponsor's passport showing visits on 12th September 2015 to 6th October 2015, 2nd February 2016 to 3rd March 2016, 10th October 2016 to 19th October 2016 and 16th January 2018 to 6th February 2018. In addition, the sponsor has visited for three days in June 2018 and for five days in September 2018.
9. The appellant lives with her grandparents in a two bedroomed house in Ilorin which is a small town. She goes to the local school. She has just finished primary school and is starting secondary school. The decision as to which school to go to was made as being the school nearest where she lives because of transport problems. The sponsor chose the school and pays the fees of the school and receives school reports as to her progress. The appellant attends a Catholic Church and loves playing football. However, with the grandparents not being able to drive, such does restrict where she can go. Speaking to the appellant she wants more of a social life and feels very restricted at home.

10. Part of the problem is that the grandparents are getting elderly and are in bad health. Indeed, the grandfather is almost blind. Indeed he slipped and fell injuring his back in June, which ended with him being taken into the hospital for a week. It was that accident that prompted the visit in June 2018. The sponsor's mother needed help and also needed money to pay for medical attention. The grandmother has a number of ailments and cannot walk for long distances. Although his father is back at home the sponsor indicated that he was largely bedridden because of what had happened to him.
11. The appellant fainted and collapsed in September 2018 and had to be taken to hospital. That incident is what prompted the visit in September and again the sponsor paid the medical fees. She was put on a medical drip and a diagnosis of acute asthma was made.
12. Various documents were presented further to those at the original hearing, being letters relating to the junior and secondary school. Also, affidavits from the grandparents as to the nature of their health and various up-to-date payslips and telephone records.
13. The evidence of the sponsor is that the appellant is feeling increasingly isolated and in effect had become a carer for her grandparents, it was affecting her ability to interact with other people of her own age.
14. In terms of other support available to the appellant there is an affidavit from her natural mother sworn before the magistrate in Lagos of 4th October 2018. The mother had kept in contact with the appellant. She however is in a new relationship and lives in Lagos which is far away from Ilorin. She does not have the capacity to take care of the appellant and indeed, because she was born out of wedlock, her husband has refused to accept her daughter into his home since he believes that her presence would threaten the marriage. She has given consent for the daughter to be allowed to come to the United Kingdom.
15. There would also seem to be in the area an elder sister of the appellant. She has a family and three children of her own and lives some nine hours away from Ilorin and would not be able to assist in taking in the appellant.
16. It is the case for the sponsor that, throughout his time in the United Kingdom and to the present time, that he takes all the major decisions affecting the appellant. He pays all the bills including medical bills. He was in contact with the appellant's mother and she also visited from time to time. In terms of direction as to school choices and life events it was the sponsor who made those decisions. There is some discussion with the appellant and with his parents.
17. There is some medical evidence relating to the health of the grandparents, particularly a letter from Ilorin Teaching Hospital in February 2016 as to the

grandmother. She is stated as being a 67 year old with degenerative disease of both lumber spine and knees with obesity. This has caused handicap limitations to her condition. Similarly there is a letter from the first eye clinic concerning the grandfather being then described as 74 years old with chronic glaucoma with a visual disability of 95%. There were no up-to-date medical reports although there was an affidavit from the grandparents speaking as to their age and illness.

18. Having heard the sponsor and indeed having looked at a number of documents as relied upon, I find that he is a credible witness as to the circumstances which he seeks to describe.
19. The case of **TD** to which reference has been made, it indicates that “sole responsibility” is a factual matter to be decided upon all the evidence. This is whether the appellant 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 would be exceptional that one of them will have “sole responsibility”. As the sponsor indicated, although the appellant’s natural mother has contact, the responsibility for what is done for the appellant falls upon his shoulders.
20. The relevant matters are set out in Rule 297, essentially those in 297(1)(e) whether or not the sponsor has sole responsibility for the child’s upbringing or:
 - (f) there are serious and compelling family or other considerations which make the exclusion of the child undesirable and suitable arrangements have been made for the child’s care.’
21. It is not in issue otherwise than that the sponsor would meet the entry requirements. He is a British citizen, there is accommodation available to the appellant and he is earning well above the minimum to meet the financial requirements.
22. It seems to me that the matter can be resolved on both ingredients. The burden of proof is upon the appellant to show on the balance of probabilities that she meets the requirements of the Immigration Rules. I find that the sponsor, her father has had sole responsibility for her upbringing.
23. Further I am mindful of the comments made in the decision of **MM (Lebanon) [2017] UKSC 10** that there is a deficiency in the Immigration Rules, in that there is a failure to take into account Section 55 namely the wellbeing or the best interests of the child. Although no doubt the appellant enjoys the love and support of her grandparents she is feeling increasingly isolated and restricted in what she can do. In the United Kingdom she has a family and two half-siblings with whom she can grow up in a more natural and open environment. As the grandparents become increasingly infirm and housebound, such will create a very lonely environment for the appellant and I consider that there are serious and compelling family or other considerations which make the exclusion of the appellant undesirable and that suitable arrangements have been made for her care.

24. This is an appeal by way of Article 8 of the ECHR. I find that the appellant now meets the Immigration Rules relating to entry clearance. I bear in mind that her best interests are to be with her father and extended family in the United Kingdom. I find in particular that her development will be greatly assisted in that process. There is adequate accommodation and family support and there is very little that can be put in the balance against the grant of entry clearance in this particular case. No criticism in immigration terms has been made of the sponsor nor of the appellant. There seems to be very little ground for the contention that it would be in the public interest to maintain exclusion of her in all the circumstances. I find therefore that the public interest and indeed proportionality should be resolved in her favour such that entry clearance be granted. I find that to continue to deny her entry clearance would constitute a breach of her fundamental human rights as under Article 8, notwithstanding the proper consideration which should be given to the public interest in maintaining sound and fair immigration control.

Notice of Decision

25. In the circumstances the appellant's appeal is allowed on the basis of Article 8 of the ECHR.

26. No anonymity direction is made.

Signed

A handwritten signature in black ink, appearing to read 'P. King', is enclosed within a thin black rectangular border.

Date 17 December 2018

Upper Tribunal Judge King TD