Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17781/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2018	**On 12 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MASTER IKENNA OSAMUDIAMEN AGIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Ti, Solicitor, Kesar & Co Solicitors (Bromley)
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Nigeria born on 4 December 1999 and currently 18 years old. The appellant appealed to the First-tier Tribunal against the decision of an Entry Clearance Officer dated 20 June 2016 to refuse entry clearance to allow the appellant to enter the UK to join his mother, Rita Egwabor (the sponsor). The historical background to this case is that the sponsor arrived in the UK in 2005 and is now a British citizen. The appellant first applied for entry clearance in January 2014 and was refused. His appeal to the First-tier Tribunal was dismissed by Judge Boyes in a decision promulgated on 14 May 2015. It was his further

application for entry clearance made in 2016, refused on 20 June 2016, which is the subject of this appeal.

2. Whilst the respondent accepted that the appellant was the son of the sponsor, the respondent noted that at the time of the previous application the appellant was living in the care of his grandmother, who passed away in August 2014. It was accepted that circumstances had now changed. However, it was not accepted by the respondent that the sponsor had sole responsibility for the upbringing of the appellant, and the respondent asserted that the sponsor also did not have adequate means to maintain and accommodate the appellant without recourse to public funds. The respondent also considered Article 8, ECHR but was not satisfied that there were any exceptional circumstances.

3. In a decision promulgated, on 7 August 2017, Judge of the First-tier Tribunal Siddall dismissed the appellant's appeal on human rights grounds. The appellant appeals with permission from the Upper Tribunal, on the following grounds:

   (a) Error as to finding in previous appeal on sole responsibility;

   (b) Failure to consider material evidence;

   (c) Error relating to tracing of appellant's father;

   (d) Error in application of **Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKAIT 00702**;

   (e) Error in relation to Section 117B.

Error of Law Discussion

4. The key issue in this case is that of sole responsibility. Judge Boyes was not satisfied that the sponsor had sole responsibility for the appellant as at the date of decision in the first application. Firstly, he was not satisfied that the appellant's father had abdicated responsibility for his upbringing as claimed and that no confirmation had been received from him to confirm that he had no involvement in his son's upbringing and the judge was not satisfied that the sponsor had no knowledge of where the appellant's father was, or even if this was true, that she was unable to make enquiries to establish where he is, particularly as she was in a relationship with him before she became pregnant and she knew where some of his family members lived. The judge went on to find, however, that it was more likely than not that at the date of decision the sponsor shared responsibility for the appellant's care with her mother (at [49]). In addition, at [51] the judge considered it:

> "more likely that his maternal grandmother shared responsibility for his care with the sponsor. I am therefore not satisfied the sponsor had sole responsibility for him at the date of decision. For all of the above reasons the appellant has not shown that his mother had sole

responsibility for him at the date of decision, rather than shared responsibility with his father and/or maternal grandmother".

5. It was not disputed that the appellant's grandmother is now deceased. The appellant also provided additional evidence, for the second hearing, from the appellant's school which all showed that the only contact was with the appellant's mother. There was also independent confirmation from the sponsor's partner, which was not specifically disputed that, as at 24 July 2017 the appellant's father had never appeared since the sponsor's partner had known the sponsor and the appellant's partner had never heard anything that suggested that he had taken any interest in the appellant since the appellant went to live with his grandmother. In addition, Mr Patrick Egwabor, the individual with whom the appellant is currently staying confirmed, in an affidavit dated 21 October 2016, that "I do not know Ikenna's father and I have never seen him in my life and to the best of my knowledge Ikenna have not had any contact with his father or family". There was a further letter from Imonegame Gabriel Osigweksa (JP) from the Order of the Knights of Saint Mulumba, Nigeria dated 21 October 2016, confirming that the appellant had attended church frequently and that the individual he was staying with was a member of the church and that: "I do not know Ikenna's father, neither have I seen him." The letter also confirmed that the appellant started living with Mr Patrick Egwabor after the death of his grandmother. There was also fresh evidence from the appellant's school.

6. The Judge of the First-tier Tribunal took into consideration that the First-tier Tribunal Judge was not satisfied that the "appellant's background and upbringing is as presented to the respondent and to the Tribunal" and considered that it was in the appellant's best interests (at paragraph 68 of Judge Boyes' decision) that "there is greater clarity provided regarding the details of his upbringing and his father's involvement in his life before any further entry clearance application is made".

7. Mr Ti submitted that the further information and evidence before Judge Siddall, in relation to independent confirmation of who the appellant had lived with and what contact there was with his father (all the documentary evidence suggested none) was the appellant's attempt to provide that clarity.

8. The fact that the evidence that was provided to the Tribunal was not in the form suggested by the previous First-tier Tribunal Judge did not excuse the First-tier Tribunal from considering whether, following the guidance in relation to **Devaseelan**, the findings of the First-tier Tribunal should be displaced. The Tribunal fell into error in failing to give adequate reasons or indeed any reasons at all, as to why he did not accept, if that was the case, the additional new evidence before the Tribunal from a number of different sources that there was, at the date of the second First-tier Tribunal hearing, no contact with the appellant's father and that he had in effect abandoned his son.

9. In addition, the First-tier Tribunal fell into error in its application of **Devaseelan,** in failing to adequately engage with the finding of Judge Boyes that sole responsibility at that stage was more likely to be shared between the sponsor and the appellant's grandmother. Although he had doubts about the evidence in relation to the father he ultimately reached the conclusion that at that date responsibility was shared between the grandmother and the appellant's mother. Given that finding, and the death of the appellant's grandmother, it was incumbent on the First-tier Tribunal to make a finding as to how that death affected the issue of sole responsibility and to give reasons why, in light of Judge Boyes' findings, the appellant's grandmother's death did not necessitate a finding of sole responsibility passing to his mother.

10. The decision of the First-tier Tribunal contains an error of law and I set it aside.

Remaking the Decision

11. Mr Ti relied on his skeleton argument and indicated that no further oral evidence was required. In addition, Mr Ti relied on a further bundle of documents submitted under cover of a letter of December 2017 which included, but was not limited to, a letter from the appellant dated 13 November 2017, and an affidavit from Mr Egwabor Patrick dated 20 November 2017. This indicated that following a request from the sponsor, the appellant and Mr Egwabor on 8 October 2017, following a request of 7 October, went to try and track down the appellant's father. The affidavit details the efforts, which included confirmation that the appellant's father had moved away in 2003 after the death of his parents but that details were passed on to the appellant and Patrick Egwabor of the appellant's father's cousin. Mr Egwabor then obtained an affidavit from a Ms Isioma Agim, who indicated that she was a first cousin of the appellant's father, Mr Agimma Agim. The affidavit stated that, consistent with the affidavit from Mr Patrick Egwabor, that Mr Agimma's father passed away in February 2002 and his mother in 2003 and that in 2005 she received evidence that the appellant's father, Mr Agimma, took ill and died on 6 August 2004 when crossing from Morocco to Spain. Although the cousin indicated that she went to the registry to register his death in 2006 she was informed that it could not be registered since he had died outside Nigeria.

12. I take into account that the starting point is **Devaseelan**. Judge of the First-tier Tribunal Boyes was that he was not satisfied that the sponsor was telling the truth in relation to the appellant being kidnapped by his father's family and Judge Boyes highlighted inconsistencies in the sponsor's evidence to him. Judge Boyes was not satisfied of the following:

    (a) The history of who has been involved with the appellant's upbringing;

    (b) Who has been responsible for his care throughout the entirety of his upbringing;

(c) What involvement his father has had with his upbringing;

(d) What contact the appellant has had with the appellant's father during his childhood; and

(e) What contact the sponsor has had with his father during his childhood.

13. Although Judge Boyes, for the reasons he gave, was not satisfied that the appellant's father had abdicated responsibility for his upbringing, considering the totality of the evidence, including the evidence produced from independent sources in Nigeria in the church, a JP, the school and now the additional evidence from the appellant's father's cousin and the information she had and that he passed away, I am satisfied on a balance of probabilities that the appellant has had no contact with his father for the majority of his childhood.

14. In reaching this finding I have taken into consideration that Judge Boyes had the benefit of hearing from the sponsor, who was not called before me. However, I am satisfied that this has to be considered in light of the new evidence as follows:

(a) The affidavit from Patrick Egwabor, with whom the appellant has lived since August 2014, stating that he has never seen the appellant's father and to the best of his knowledge the appellant has no contact with his father and that the sponsor makes all the important decisions relating to the appellant;

(b) A letter from the appellant's church, the Order of the Knights of Saint Mulumba, signed by a Justice of the Peace, stating that he knows the appellant and his grandmother since 2005 and the appellant lives with Patrick Egwabor and that he has never seen the appellant's father;

(c) The witness statement from Mr Lawrence Ehiemua, the sponsor's partner, stating that to the best of his knowledge the appellant's father has not appeared since he, Mr Ehiemua, has known the sponsor in 2005. Mr Ehiemua adopted his statement before Judge Siddall and it was not challenged before me that neither the respondent nor Judge Siddall took any issues with this statement;

(d) Letter from the appellant's school stating that the sponsor has been responsible for making decisions concerning him including paying fees;

(e) The appellant's school records, all of which solely name the sponsor as the appellant's parent;

(f) The witness statement of the appellant stating that he had no memory of his father;

(g) The witness statement of the sponsor stating that neither she nor the appellant had had any contact with the appellant's father since the appellant went to live with his maternal grandmother in 2005;

(h) The additional affidavit from Patrick Egwabor dated 20 November 2017 setting out efforts to track down the appellant's father;

(i) The appellant's letter dated 13 November 2017 indicating that he had discovered that his father had died in 2004;

(j) The affidavit of Isioma Agim dated 20 November 2017.

15. I have taken into consideration that I have not had the opportunity to examine any of these witnesses and have therefore given the appropriate weight to this documentary evidence. However, I have also considered that if the appellant's case, that there has been no contact with his father, were not accepted I would have to reach the conclusion that the appellant and the sponsor have fabricated all of the above evidence from a number of different independent sources. I do not find this to be the case.

16. Even if I am wrong in the above I am satisfied that given the death of the appellant's grandmother in 2014, which is not disputed, all the evidence points to the appellant's sponsor having had sole responsibility since 2014.

The Law

17. The burden of proof is with the appellant to establish the facts on a balance of probabilities. By virtue of Section 85(4) of the Nationality, Immigration and Asylum Act, the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision. However, it may not consider a new matter without the respondent's consent. It was not submitted by either party that there were any new matters before me.

18. The only appeal before me is, consistent with the Immigration Act 2014, (which amended the Nationality, Immigration and Asylum Act 2002), under Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 as amended (refusal of human rights claim) is on the grounds provided by Section 84(2), that the decision is unlawful under Section 6 of the Human Rights Act 1998.

19. I have considered the relevant case law including **The Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387**, **Singh & Khalid v The Secretary of State for the Home Department [2015] EWCA Civ 74**, and **Hesham Ali v SSHD [2016] UKSC 60.**

20. When considering the appellant's human rights appeal I must consider the decision through the lens of the relevant Immigration Rules. The relevant Immigration Rules which I must consider at the date of the respondent's

decision are set out at paragraph 397 of the Immigration Rules including as follows:

> "297. 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:
>
> …
>
> (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 UK … 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, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> …"

21. In relation to the maintenance and accommodation grounds there was considerable evidence before me (which Mr Avery did not dispute) in relation to the sponsor's accommodation comprising of a three bedroomed house. There was also evidence in relation to the sponsor's income and that of Mr Ehiemua, who, it was not disputed, contributes financially to the family. Whilst this income cannot be taken into account in terms of maintaining the appellant he clearly provides funds in support of his own children, thus releasing the sponsor's funds to support the appellant.

22. It was not disputed by Mr Avery, who made very limited submissions on the substantive appeal, that the appellant could meet the maintenance and accommodation provisions of paragraph 297. I am satisfied on the basis of the evidence before me that he can. In addition, at the date of the entry clearance decision the appellant was under 18. I am satisfied

therefore, given that I find that the appellant's mother met the sole responsibility requirement, that the appellant met all of paragraph 297 of the Immigration Rules at the date of the respondent's decision.

23. Although neither party raised the matter I indicated that it was clear that the appellant, as of the month before the Upper Tribunal hearing, had reached the age of 18 and I allowed both representatives to make further submissions on this matter. However, other than the appellant reaching the age of 18 there was no evidence before me to suggest that his circumstances had materially changed and I do not consider this fact relevant to the substance of the decision under appeal. I accept that he continues to be dependent financially and emotionally on his mother in the UK, who still makes all arrangements in relation to his accommodation, education and upkeep (see **Kugathas [2003] EWCA Civ 31)**.

24. I have applied the five stage test in **Razgar [2004] UKHL 27**. I am satisfied that family life exists and that the decision to refuse entry clearance given the low threshold may interfere with that family life. I have taken into consideration that the Immigration Rules are satisfied in this case, so arguably the decision is not in accordance with the law. However, I have gone on to consider whether that interference is proportionate.

25. In so doing I have considered Section 117 of the Nationality, Immigration and Asylum Act 2002 which sets out the public interest considerations applicable in all cases under Article 8. I have reminded myself that the maintenance of effective immigration controls is in the public interest. It is also in the public interest that persons seeking to enter the UK are able to speak English. It was not disputed before me that the appellant satisfies this requirement and that he is financially independent, given the evidence produced of the finances available to his mother. I am therefore satisfied that there is no weight to be given to the public interest on these factors.

26. In considering proportionality I have applied the balance sheet approach recommended in **Hesham Ali**. The appellant is now an adult and that therefore the considerations under best interests of the child no longer apply. However, I have taken into consideration the considerable documentary evidence before me which all points to the appellant being in a vulnerable situation following the death of his grandmother. I am satisfied that strong family ties continue to exist between the appellant and his mother and his half-siblings in the UK, albeit that he has never met his half-siblings. I have considered that the appellant is still very young and, in my findings, has no family in Nigeria other than his cousin, who has given reasons in the affidavit provided, (again, which Mr Avery did not substantively challenge) that she cannot be responsible for his care. I have taken into consideration that the appellant remains under the care of Mr Egwabor in Nigeria. I am satisfied, taking into consideration all the evidence, that the respondent's decision is a disproportionate interference with the appellant's family life with his mother, the sponsor, and his half-siblings in the UK.

Summary and Conclusion

27. The decision of the First-tier Tribunal contains an error of law and is set aside. I remake the decision, allowing the appellant's appeal.

Notice of Decision

The appeal is allowed.

No anonymity direction was sought or is made.

Signed Date: 7 February 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought or is made.

Signed Date: 7 February 2018
Deputy Upper Tribunal Judge Hutchinson