Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01222/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th June 2019

Decision & Reasons Promulgated
On 24th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

M P K E V D
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Mr G Lee, instructed by Rashid & Rashid Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Ghana, appealed to the First-tier Tribunal against a decision made by the Entry Clearance Officer 27th October 2017 to refuse his application for entry clearance to the UK to join his mother (the Sponsor) under paragraph 297 of the Immigration Rules. First-tier Tribunal Judge Stedman dismissed the appeal in a decision promulgated on 31st December 2018. The Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Bruce on 8th May 2019.

© CROWN COPYRIGHT 2019

2. The First-tier Tribunal Judge dismissed the Appellant's appeal. The Judge did not accept that the Appellant's father had died as claimed and dismissed the appeal under paragraph 297 (i) (d) [11-25]. The Judge went on to consider whether the Appellant had demonstrated that the Sponsor has sole responsibility for him under paragraph 297(i) (e) and dismissed the appeal on that basis too.

Error of Law

3. Five Grounds of Appeal are put forward. These were elaborated by Mr Lee at the hearing. Mr Lee made submissions firstly on Grounds 1 and 5 and, as I consider that these grounds have been made out, I will consider them first.

4. It is contended in the first ground that the judge made a material misdirection in that she directed herself at paragraph 4 that, under Section 84(4) and (5) of the Nationality, Immigration and Asylum Act 2002, she could only consider the circumstances appertaining at the time of the decision. Mr Less submitted that this is a misdirection as it fails to take account of the amended Section 84 introduced from 20th October 2014 by the Immigration Act 2014, which means that this appeal is grounded on the claim that the decision is unlawful under Section 6 of the Human Rights Act 1998. He submitted that, contrary to the Judge's direction at paragraph 4, the effect of this is that the appeal is no longer limited to consideration of the circumstances at the date of the decision. Mr Lee accepted that he would have to show that this was a material misdirection, but in his submission this misdirection is interconnected with the other grounds.

5. Whilst I accept that the misstatement of the law at paragraph 4 may not necessarily be a material error, it appears from the body of the decision that the judge considered the circumstances at the time of the decision rather than at the time of the hearing. I accept that at paragraph 5 the judge set out that the basis of the application was that the Appellant's biological father is said to have died on 13th September 2014 and that he was being looked after by his maternal aunt and maternal grandmother, but that the maternal aunt had married and moved away and the grandmother had suffered a decline in her health and could not care for the Appellant.

6. However the Judge failed to deal with these recent events in the substance of the decision. At paragraphs 26 to 39 the judge considered the issue of sole responsibility under paragraph 297(i)(e) of the Immigration Rules. She accepted at paragraph 30 that the Appellant's father has not been present in his life for the past few years since around the end of 2012 and that he has essentially abdicated any responsibility for his child by disappearing or taking no part in the child's upbringing. The judge took into account what happened in the past at [32] where she set out that the Sponsor left her son aged 3 in Ghana to come to the UK and saw him in 2007 and 2008 and did not see him again until 2016. The judge accepted the Sponsor's role with the Appellant's life on an ongoing basis at paragraph 33. The judge went on to deal with financial contributions accepting that the remittances thus far in 2016 and 2018 are sufficient to demonstrate that the Sponsor was financially supporting the Appellant. However, there is no engagement with the evidence at paragraphs 50 to 54 of the bundle which includes a statement dated 1st November 2018 from the Appellant's grandmother who said that since her daughter moved out of Accra she was finding it

difficult to cope with her grandson; a medical report dated 30th November 2018 stating that the grandmother was unable to give the Appellant the necessary assistance; and a letter dated 10th November 2018 from the Appellant's maternal aunt saying that she had married and moved out of Accra and was unable to take care of the Appellant any longer. All of this evidence showed the material change of circumstances in the period between the decision in October 2017 and the hearing on 11th December 2018.

7. In my view, reading paragraph 4 along with the reasons section, in failing to engage with the evidence as to the current circumstances, the judge appears to have considered that she was bound to consider the circumstances at the date of the decision rather than at the date of the hearing. This is a material error.

8. It is contended in Ground 5 that the judge's conclusions in relation to the Appellant's schooling was not fully considered. Mr Lee referred to paragraph 34 of the decision where the First-tier Tribunal Judge said:-

> "As his mother, I accept that the Sponsor has stayed in touch with her son and no doubt had discussions with him about life, but I was not presented with any evidence that she took anything near an active or assertive role in his life or decisions made for him, including his education. It struck me that in the letter from the Appellant's housemaster, Justice Blay, that he stated 'through [the Appellant], I got in touch with [the Sponsor], his mother' giving the impression that he was only aware of the Sponsor through the Appellant. The headmaster similarly did not mention his knowledge of the Sponsor in circumstances where, had the Sponsor been responsible for his educational choices – especially from abroad, she would surely have made numerous contacts with the boarding school. Even if I am wrong about this more minor feature, the evidence as a whole did not explain what specific responsibilities the Sponsor was taking as regards the Appellant's upbringing. It showed an ongoing involvement and interest, but nothing more".

9. In Mr Lee's submission this failed to take account of the letter from the school at page 48 of the Appellant's bundle where, as well as saying that he had been in contact with the Sponsor through the Appellant, the housemaster went on to say that the Sponsor:-

> "…contacts me most weekends to speak with her son …. She also discusses with me her son's academic performance and his domestic life. She transfers money to me through Western Union every term to pay for her boy's extra tuition and buy the things he needs in school for his upkeep and welfare".

Mr Lee submitted that the judge erred in failing to take into account relevant evidence.

10. In response Ms Everett contended that in paragraph 34, even though it appears that the judge seems to have ignored part of the letter from the school, he put his finding in the alternative and this is sufficient to mean that the error is not material. In her submission when read as a whole paragraph 34 shows that the judge concluded that the Sponsor had ongoing involvement with the Appellant but nothing more. She accepted that it does appear that the judge made one slip, but, in her submission, as

the judge assessed all of the evidence in the round and gave careful reasons there is no material error. In her submission the judge was not impressed with the claim that the Sponsor has an active role with the Appellant.

11. In my view the judge did make a material error at paragraph 34. In the first sentence the judge said that she was not presented with any evidence that the Sponsor took anything near an active or assertive role in the Appellant's life or made decisions for him including his education. The judge went on to quote an extract from the letter at page 48 of the Appellant's bundle, but failed to address the evidence from the housemaster that the Appellant contacts him most weekends to speak with her son and to discuss his academic performance and his domestic life and transfers money to pay for his extra tuition and buy the things he needs in school for his upkeep and welfare. This evidence is contrary to the judge's assertion that she was not presented with any evidence about the Sponsor's role in the Appellant's life or decisions made for him including his education. I further note that the Appellant made a witness statement at pages 1 to 5 of the Appellant's bundle. The Appellant said at paragraph 7 that his mother is responsible for his education, wellbeing and upbringing, that she is well-known by his teachers and gets feedback about his behaviour, schoolwork and results. The judge did not consider this piece of evidence in reaching the conclusion about the Sponsor's involvement in the Appellant's education.

12. It is contended in the grounds of appeal, as developed by Mr Lee at the hearing, that the judge made further errors in the assessment of issues under paragraph 297(i)(d) of the Immigration Rules. It is contended in Ground 2 that the judge materially erred in her assessment of the Sponsor's evidence. The judge dealt with this at paragraphs 12 -15. I accept that, when it is broken down it appears that the judge made an adverse credibility finding based on only one factor arising from the Sponsor's oral evidence. The judge did not draw any adverse inferences from the Sponsor's demeanour or manner in giving evidence [13]. She drew no adverse conclusions from the Sponsor's delay in answering a question about when her ex-brother-in-law had first contacted her [14]. Further, she failed to find reference to a first incident where the Sponsor's initial response to a question was in the present tense [15]. In the end the judge relied on one aspect of the Sponsor's oral evidence which the judge considered damaged her credibility [15]. However, it is clear from reading paragraphs 16 to 23 that the judge did not make a conclusive finding that the Sponsor was not credible based only on the one response set out at paragraph 15. The judge went on to consider the death certificate, the evidence from the witness, the photographs of the funeral and the evidence about that. The judge then concluded at paragraph 25 that, taking a holistic view of the evidence, she did not accept that the Appellant's father had died as claimed and that the Appellant could not then satisfy the requirements of paragraph 297(i)(d) of the Rules. This was a finding open to the judge on all of the evidence.

13. It is contended in Ground 3 that the judge failed to provide adequate reasons for rejecting the evidence of the witness who was said to have obtained the death certificate in Ghana. However, the judge set out the witness's evidence at paragraph 20. There is no challenge to the accuracy of what the judge noted. The judge concluded that the witness gave four separate dates and, whilst she would not have

expected her to remember the precise date, she could not accept that the witness would not remember the year she met him. The judge found the evidence inconsistent and did not believe the evidence of the witness. In my view this was a conclusion open to the judge for which she gave adequate reasons.

14. Ground 4 contends that the judge's conclusion about the photographs of the funeral was irrational. The judge dealt with this at paragraphs 22 to 24 of the decision where she said that there was nothing linking any of the photographs to the deceased, that the Appellant did not appear in any of the photographs, and that she rejected the explanation as to why he did not appear. In my view these conclusions were all open to the judge on the evidence before her.

15. Grounds 2, 3 and 4 all go to the judge's conclusion that she does not accept that the Appellant's father had died as claimed and that the Appellant can not therefore meet the requirements of paragraph 276(i) (d) of the Rules. In these circumstances I find that those conclusions are safe and should stand.

16. In light of my findings above in relation to Grounds 1 and 5 I find that the judge's findings under paragraph 297(i) (e) of the Rules are not safe. This is because the judge took an erroneous approach in failing to appreciate that the circumstances at the date of the hearing were relevant to the determination of the human rights appeal. The judge also erred in failing to take into account all of the contents of the letter from the Appellant's school in reaching the conclusions at paragraph 34 and the totality of the evidence as to the Sponsor's current role in relation to the Appellant's education. In these circumstances and for these reasons I set aside the conclusions in relation to paragraph 297(i) (e).

17. I indicated at the hearing that if I found an error in relation to 297(i) (e) and, if I were able to remake the decision on the basis of the evidence before me, I would go on to do so. In my view I am and I go on to remake the decision on the basis of the evidence before me.

Remaking the decision under paragraph 297 (i) (e)

18. Paragraph 297(i) (e) provides that the requirements to be met by a person seeking indefinite leave to enter the UK as the child of a parent present and settled in the UK are that:-

> "(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing".

19. Guidance as to the approach to this paragraph is set out in the case of **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**. The relevant guidance is set out at paragraph 52 of the Tribunal's decision as follows:-

> "52. 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 in fact is exercising responsibility for the child. That responsibility may have been for 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 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"."

20. The judge's finding that the Appellant's father has not been present in his life since around 2012 and has abdicated any responsibility taking no part in his upbringing has not been challenged [30]. I therefore proceed to analyse the evidence before me to consider whether the Sponsor has "continuing control and direction" over the Appellant's upbringing, including making all the important decisions in his life.

21. In his witness statement the Appellant describes ongoing contact with the Sponsor. At paragraph 5 the Appellant said that after his parents divorced he moved in with his grandmother and maternal aunt. He said that he attends boarding school and whenever he is off school he lives with his grandmother. He described ongoing contact between himself and his mother. He said at paragraph 7 that his mother has always been involved in his life and is responsible for his education, wellbeing and upbringing. At paragraph 10 the Appellant said that his aunt started a relationship a few years ago with her now husband and she moved out of Accra and was unable to take him with her and that left him with his grandmother who is 82 years old. At paragraph 11 he describes how his grandmother is weak and frail due to numerous

illnesses including diabetes and bilateral osteoarthritis and that she finds it difficult to take care of him now. At paragraph 16 the Appellant states that at the time of his application he was in a junior secondary school but that on 11th September 2017 he moved to a boarding school and that, as they are not allowed to have mobile phones, he and his mother call each other only at weekends out of school term or any time he gets authorisation from the housemaster. He said that his mother calls the housemaster's phone through which they have conversations. He said that the money sent by the mother is budgeted according to her instructions and include cover for food, electric, water, phone bills and his daily school allowance.

22. The Sponsor provided a witness statement. She said that she is involved in the Appellant's education and upbringing. She too said that her sister has moved out of Accra with her family, that the Appellant stays with his grandmother during holidays or when he is off school, but that the grandmother is unwell and is unable to take care of him.

23. The school provided a letter dated 22nd November 2018 which confirms that the Appellant started attending that school on 11th September 2017. As set out above the letter states that the Sponsor is in contact with the housemaster most weekends to speak with her son and discusses with him her son's academic performance and his domestic life and transfers money to pay for his extra tuition and buy the things he needs in school for his upkeep and welfare.

24. It is clear from the statements of the Appellant and the Sponsor as well as the letter from the school that, since September 2017, the Appellant has been spending most of his time in school. It appears from the letter from the school that the Sponsor is the person who has contact with the school and has responsibility for the fees and his academic and domestic life there.

25. I have also taken into account the evidence in relation to the Appellant's maternal grandmother. In her letter of 1st November 2018 she said that her daughter moved out of Accra and that she finds it difficult to cope with the Appellant as she is not in a good position to look after him due to her age and health. She submitted a medical report dated 30th November 2018 confirming that she has diabetic mellitus, bilateral osteoarthritis of the knees and congestive cardiac failure and hypertension. The letter states that these have resulted in progressive deterioration of her physique over the past years and she is unable to give her grandchild the necessary assistance required by a guardian.

26. I also take into account the letter from the Appellant's maternal aunt dated 10th November 2018 confirming the evidence put forward by the Appellant and the Sponsor that she is now married and lives with her husband and has moved out of Accra and is no longer able to help her mother look after the Appellant.

27. I have taken into account the evidence of transfers from the Sponsor. I note that these show frequent transfers throughout 2018 which I accept are consistent with the evidence from the school and from the Appellant and Sponsor that she has been financially supporting the Appellant.

28. I have taken into account the wording of paragraph 297(i) (e) which requires that one parent must show that she "has had sole responsibility for the child's upbringing". There is no requirement that this should have been throughout the child's life, as set out in paragraph 52 ii of **TD** the sole responsibility may have been for a short duration in that the present arrangements may have begun quite recently. In my view the evidence is sufficient to demonstrate on the balance of probabilities that, since her sister left her mother's home, and certainly since the Appellant started boarding school in September 2017, the Sponsor has had sole responsibility for the Appellant's upbringing. In these circumstances the Appellant has demonstrated that he meets the requirements of paragraph 297 (i) (e) of the Immigration Rules.

29. This is a human rights appeal and the Immigration Rules in this area are broadly compliant with Article 8, accordingly the interference with the right to family life of the Appellant and his mother as a result of the refusal of entry clearance is not outweighed by the public interest in the maintenance of effective immigration control. In these circumstances, as the Appellant has demonstrated that he can meet the provisions of paragraph 297(i)(e), it is appropriate to allow the appeal on human rights grounds.

Notice of Decision

30. The decision of the First-tier Tribunal contains a material error of law in the decision under paragraph 297(i) (e) of the Immigration Rules. I set that part of the decision aside (paragraphs 26 to 39 of the decision). I maintain the decision under paragraph 297(i) (d) of the Rules.

31. I remake the decision under paragraph 297(i) (e) and allow the appeal on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 17th June 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award because the appeal was allowed on the basis of evidence submitted after the decision and just prior to the hearing in the First-tier Tribunal.

Signed Date: 17th June 2019

A Grimes
Deputy Upper Tribunal Judge Grimes