Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12710/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 31 July 2019	**On 09 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

BRAHEEM [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr D Balroop, Counsel instructed by Greenland Lawyers LLP
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge M A Khan in which he dismissed the appeal of the Appellant against the decision of the Secretary of State to refuse his application for leave to enter as the dependent child of his mother who is settled in the United Kingdom. The application was made and considered under the terms of paragraph 297 of the Immigration Rules and the appeal is on human rights grounds by virtue of section 82(1)(b) and 84(2) of the Nationality Immigration and Asylum Act 2002.

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2. The application under appeal was refused on 15 April 2018. The Appellant exercised his right of appeal to the First-tier Tribunal. The appeal came before Judge M A Khan on 25 April 2019 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. His application was granted by First-tier Tribunal Judge Hollingworth on 13 June 2019 in the following terms

> "It is arguable that an insufficiently precise distinction has been drawn between the extent of available evidence otherwise not produced and evidence not available at all. It is arguable that insufficient clarification was obtained of this distinction. It is arguable that the judge has attached to much weight to the issue of day-to-day care in the context of assessing sole responsibility. It is further arguable that analysis was required of the factors bearing upon the question of the existence or otherwise of serious and compelling circumstances it is arguable that the credibility analysis has been affected. It is arguable that the outcome has been affected."

Background

3. The history of this appeal is detailed above. The Appellant is a citizen of Jamaica born on 25 August 2000. He applied to join his mother in the United Kingdom as her dependent under paragraph 297 of the Immigration Rules. The Respondent refused the application not being satisfied that the Appellant's mother had sole responsibility for him.

4. In dismissing his appeal and after hearing evidence given by the Appellant's mother (the Sponsor) the Judge found that the Sponsor had not had sole responsibility for the Appellant and that his grandmother has been responsible for the Appellant's day-to-day needs, education and day-to-day care and decision making process.

Submissions

5. At the hearing before me Mr Balroop appeared for the Appellant. Adopting the grounds of appeal, he highlighted three issues. Firstly he said there was a mistake of fact in the distinction between what was and was not available. At paragraph 31 the Judge records that the Sponsor said that she had not seen school reports for 7or 8 years. This conflicts with Mr Balroop's note of the evidence which records that when asked about the school reports the Sponsor said, 'no one asked me to bring them'. The fact that the Judge was mistaken is supported by paragraph 18 where the Judge records that the Sponsor said that she did not know she needed to produce the reports. At paragraph 30 the Judge records that she did know the name of the Appellant's primary school. She was not asked name of school and in any event the reference to primary school is indicative of the

Judge's mistaken recollection since the appellant was 17 years old at the time.

6. Secondly the Judge fails to properly assess the test for sole responsibility. In finding that the grandmother meets the day-to-day care needs and decisions of the Appellant the Judge fails to make a finding whether the parent has continuing control and direction of the child's upbringing. The focus on day-to-day care is wrong. The issue was whether the Sponsor had continuing control and direction.

7. Mr Balroop referred briefly to the third issue being whether there was serious and compelling circumstances and pointed out the letter from Dr Ford which confirms that the grandmother is no longer capable of providing care and protection. The Judge fails to make any finding on this at all.

8. For the Respondent Mr Walker referred to paragraph 29 of the decision in which the Judge said that there was no documentary evidence to support the Sponsor's assertion of daily contact with her mother and son. In fact there were two letters before the Judge, one from the grandmother and one from the Appellant. Mr Walker said that he could not argue against the grounds and there were indeed material errors of fact. Both representatives agreed that I should remake the decision on the evidence that was before the first-tier tribunal.

9. I gave an extempore decision allowing the appeal and setting aside the decision of the First-tier Tribunal. I re-made the decision by allowing the appeal. My reasons are given below.

Decision

10. The Appellant is a citizen of Jamaica who, at the time of the application, was 17 years old and living with his grandmother in Jamaica. The application was made on the basis that his mother, settled in the United Kingdom, had sole responsibility for him. In dismissing the appeal the Judge noted that the Sponsor did not know the name of her son's primary school, that she had not seen her son's school reports for seven or eight years and that there was no documentary evidence to support her assertion that she was in almost daily contact with the Appellant and his grandmother. The Judge took adverse inference from all these matters finding that these suggested that the Sponsor did not have sole responsibility for the Appellant. He found that the grandmother has been responsible for the Appellant's "day-to-day needs, education and day-to-day care and decision-making process".

11. It is accepted by Mr Walker on behalf of the Respondent that the decision is flawed in that the Judge has incorrectly recorded the evidence that was

before him. In fact contrary to the Judge's finding that there was no documentary evidence in support of the assertion that the Sponsor was in day-to-day contact with the Appellant and his grandmother there were two letters, one from the grandmother and one from the Appellant attesting to this fact. The Judge makes reference to the Sponsor not knowing the name of her son's primary school finding that if she was in contact with the primary school she would have known its name. Mr Balroop was the representative before the First-tier Tribunal and said that such a question was not asked and indeed I would find it very strange if the Judge asked the name of the Appellant's primary school when, as a 17-year-old, he would have left that school any years ago. The Judge goes on to say that Sponsor gave evidence that she had not seen her son's school reports for seven or eight years. In fact the record held by Mr Balroop suggests that she said she had his school reports for the last seven or eight years but had not brought them with her. This appears to fit in with the Judge recording elsewhere in the decision that the Sponsor did not know that she needed to bring documents with her. These are all errors of fact which material to the issue of sole responsibility. In assessing whether the Sponsor had sole responsibility the Judge should have focused upon whether the Sponsor had continuing control and direction over the child's upbringing including all the important decisions in the child's life. The Judge finds that the grandmother "has been responsible for the appellants day-to-day needs, education and day-to-day care and decision-making process". In fact, in a sole responsibility case it is always going to be the person in the home country who is responsible for the subjects day-to-day needs and day-to-day care so this is not relevant to the decision-making process. All the above are examples or errors of facts amounting to error of law and of material misdirection. On this basis the decision of the First-tier Tribunal is set aside.

12. In remaking the decision, I consider firstly paragraph 297 (i)(e) of the Immigration Rules which states:

> "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:
>
> > (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 or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; …"

13. In determining whether the Sponsor had sole responsibility the leading case which needs to be considered is still <u>TD (Paragraph 297(i)(e): "sole responsibility") Yemen</u> [2006] UKAIT 00049. Paragraph 52 holds: -

> "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"."

14. The facts pertinent to the issue of sole responsibility can be found in the statement and oral evidence of the Sponsor supported by the letters from the Appellant and his grandmother. The Sponsor is in regular contact with the Appellant, the grandmother and the Appellant's school. The Sponsor received the Appellant's school reports. The Sponsor makes the important decisions concerning the Appellant's life. The grandmother has exercised day to day care and has been responsible for the Appellant's day to day needs. The grandmother, as evidenced by the letter from Dr Ford, is no longer capable of providing care and protection due to her infirmity.

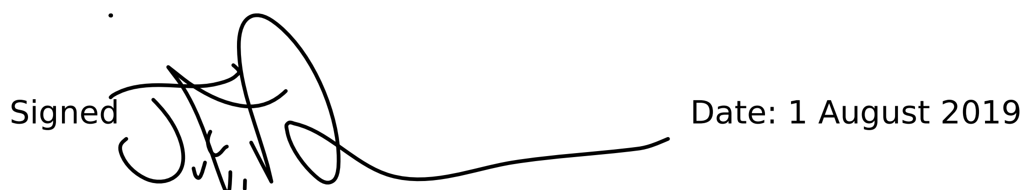
15. Taking all these matters into account it is clear that the requirements of the Immigration Rules are met and, that being the case, and on the basis

that family life exists between mother and son it is disproportionate to the legitimate aim of immigration control to refuse to grant entry clearance. On this basis I allow the Appellant's appeal against the Respondent's decision to refuse entry clearance.

Summary of decision

16. Appeal allowed. The decision of the First-tier Tribunal is set aside.

17. I remake the decision and I allow the Appellant's appeal against refusal of entry clearance.

Signed  Date: 1 August 2019

J F W Phillips
Deputy Judge of the Upper Tribunal