Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14539/2016

THE IMMIGRATION ACTS

Heard at Parliament House, Edinburgh	**Decision & Reasons Promulgated**
On 24 June 2019	**On 23 September 2019**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C. M. G. OCKELTON, VICE PRESIDENT

Between

YD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Katani, Katani & Co Solicitors
For the Respondent: Mr Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

A. Introduction

1. The appellant, a citizen of China born on 6 April 2007, appeals against the decision of First-tier Tribunal Judge Doyle who, following a hearing in Glasgow on 9 November 2017, dismissed the appellant's appeal against the respondent's refusal to grant her entry clearance to the United Kingdom, in order to join her mother (the sponsor), a person present and settled in this country. The judge's decision recorded that the respondent was not satisfied the sponsor had sole responsibility for the appellant; or

that adequate arrangements had been made for the appellant in the United Kingdom; or that there was adequate evidence of suitable provision for the appellant's accommodation. The judge concluded that the appellant had not shown, on balance, that she met the requirements of the relevant Immigration Rules (paragraph 297 of HC 395) and that she had not shown the respondent's decision would breach the United Kingdom's obligations under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

2. Paragraph 5 of the judge's decision describes what happened at the hearing:-

> 5.(a) The respondent was represented by Mr A Govan, a Home Office Presenting Officer. When this case called in the morning, the sponsor was present and the appellant was represented by [A] of Katani & Co, solicitors. [A] made an application to adjourn. No steps have been taken to prepare for this hearing. [A] conceded that the sponsor received notice of the hearing in August 2017, but told me that the sponsor then instructed solicitors in Portsmouth, despite the fact that she lives in Aberdeenshire. [A] told me that last week the appellant was told by the English agents that they cannot appear before the tribunal in Glasgow. On Friday 3 November the sponsor contacted Katani & Co, and at 6pm yesterday [A] met the sponsor for the first time.
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> (b) The application to adjourn was made in identical terms to the application to adjourn made in writing on 7 November 2017, which was refused on 8 November 2017. No new argument was advanced. I refuse the application to adjourn because there has been adequate time to prepare. The decision in this case is dated 10 May 2016. The notice of appeal was lodged by the sponsor on 6 June 2016. The notice of hearing was posted to the sponsor who did not have a representative on 30 May 2017. There is nothing on the tribunal's file to show that a representative has been instructed prior to the involvement of Katani & Co this week.
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> (c) I put the case to the end of the list to allow the sponsor and her solicitor time to prepare a witness statement. The case called again at 2:30pm. [A] renewed his application to adjourn, & a witness statement for the sponsor was tendered. [A] told me that he had many documents (there appeared to be hundreds of documents on his desk) which he wanted to tender as if they were in a bundle. What [A] had was not a bundle there was no index, the documents were not attached to one another, nor were they paginated. The Home Office presenting officer had not seen the documents. I refused the application to adjourn and I refused to accept the documents that he wanted to tender as a bundle.
>
> (d) [A] then withdrew from acting, & the sponsor indicated that she was leaving with [A]. Before the sponsor left, I was able to tell her that I will determine the case on the papers before me."

3. The judge made the following findings of fact:-

> "10.(a) The appellant is the daughter of the sponsor. The appellant's parents divorced in 2007, when she was only five months old. The appellant's mother (the sponsor) was granted custody of the appellant. Her father was ordered to

pay child maintenance. There has been no contact between the appellant and her father since 2007.

(b) The appellant has always lived with her maternal grandparents. In July 2010 her mother moved into the property and stayed with the appellant and the sponsor's parents until August 2010, when the sponsor decided to come to the UK. The sponsor has lived in the UK since then. She works and has never relied on benefits. The sponsor owns the property that she lives in. There is a school nearby, and the sponsor has made enquiries about a place there for the appellant.

(c) The arrangements for the appellant's day-to-day care are made by her maternal grandparents. Since coming to the UK, the sponsor has sent money to her grandparents to contribute to the appellant's maintenance and accommodation. The appellant is a native Chinese speaker. She is only 10 years old. She attends school in China. She is well provided for by her grandparents.

(d) The sponsor and the appellant are in regular contact. The sponsor returns to China from time to time to visit the appellant. The sponsor and the appellant are in regular internet contact. The sponsor discusses the appellant's welfare with the sponsor's parents and joins with them in making decisions for the appellant."

4. Having made those factual findings, the judge reached the following conclusions regarding the issue of whether the appellant had shown that she met the requirements of the Immigration Rules:-

"11.(a) In R v IAT ex parte Ramos 1989 Imm AR 148 the Court of Appeal said that the phrase "sole responsibility was not to be construed literally because the situation presupposes a child and parent living in the different countries. Evidence to show financial support and continuing interest and affection may be enough". In TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 the Tribunal said that "Sole responsibility" is a factual matter to be decided upon all the evidence. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life.

(b) The appellant cannot succeed under the immigration rules. On the facts as I find them to be the appellant's mother has not had sole responsibility for the appellant. In the penultimate paragraph of her witness statement the sponsor says

> My parents helped me when I was not able to raise her alone. And now, I tried my best to prepared everything. It's the time to let my parents rest and let my daughter has a real mum.

The sponsor candidly admits that she does not have sole responsibility for the appellant. The sponsor is clearly looking to the future and understandably wants to have her daughter with her, but that is not the test. It is to the sponsor's credit that she

acknowledges the significant contribution her parents have made by looking after the appellant.

(c) There is a dearth of evidence of maintenance and accommodation, so that the appellant and sponsor cannot discharge the burden of proving that all of the requirements of paragraph 297 of the immigration rules are met. Neither compelling nor compassionate circumstances are pled. On the limited evidence placed before me, the appellant cannot meet the requirements of paragraph 297 of the immigration rules."

5. Finally, the judge considered the appellant's position by reference to Article 8 of the ECHR. The judge's findings on this matter were as follows:-

"12. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed …"

13. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

14. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

15. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the cases of ZH (Tanzania) v SSHD [2011] UKSC 4. I remind myself of the cases of Azimi-Moayed and others (decisions affecting children: onward appeals), [2013] UKUT 00197 and PW [2015] CSIH 36.

16. Family life exists because the appellant is the sponsor's daughter, and it is clear from the evidence that the sponsor has contributed to the appellant's welfare and

upbringing. It is also clear from the evidence that the sponsor has regularly visited the appellant.

17. The respondent's decision is not a disproportionate breach of the right to respect for family life because family life has been pursued between the appellant and the sponsor at a distance as a matter of choice. The component parts of the family life enjoyed consists of the sponsor's financial contribution, her enduring interest in the appellant and regular visits to the appellant in China. That is the family life that was established by choice. The respondent's decision does nothing to interrupt or interfere with that established family life.

18. In Kugathas v SSHD [2003] INLR 170 Arden LJ said that it is not essential for members of the same family to be in the same country for family life to exist albeit that Arden LJ thought that it would "probably be exceptional" for family life to exist in such circumstances. In SM and Others (Somalia) [2015] EWCA Civ 223 Bean LJ said it was far from clear that the refusal of entry clearance to the family reunion child appellants constituted serious interference with family life at all.

19. Even if family life within the meaning of article 8 of the 1950 Convention exists, the respondent's decision is not a disproportionate breach of the right to respect for family life, because it does not prevent enjoyment of the chosen pattern of family life.

20. The respondent's decision is made in the interest of preserving fair and effective immigration control. In so far as it might be argued that the decision is a breach of the appellant's article 8 rights, it cannot be a disproportionate breach because it allows the respondent to pursue a legitimate aim without detracting from the manner in which the appellant's family life has been pursued throughout her childhood. The decision does not separate the sponsor from the appellant. That separation was the result of a choice made by the sponsor several years ago."

6. At paragraph 21, the judge made the following observations:-

"21. It is clear from what was said on the sponsor's behalf that the sponsor has now gathered a significant amount of documentary evidence. It is a shame that that documentary evidence was not exhibited to the respondent well in advance of the date of this hearing. This is a sad case where I have no doubt that the sponsor has the appellant's best interests at heart, but there was no proper engagement with the tribunal process. It may be that the appellant and sponsor will want to consider submitting a fresh application exhibiting the documentary evidence the sponsor now has."

B. The challenges to the judge's decision

7. On behalf of the appellant, Katani & Co applied for permission to appeal to the Upper Tribunal. The grounds contained the following:-

"The appeal was lodged by the appellants mother (the sponsor), who then instructed a firm of immigration solicitors in Southampton to prepare the appeal on behalf of her daughter. These solicitors initially accepted instructions, but then advised the sponsor

on 3rd November 2017 that they were unable to appear at the hearing in Glasgow and withdrew from acting. The sponsor then instructed present agents on 7th November 2017, two days prior to the hearing, who sought an adjournment on the basis that agent's had only just received instructions, and required time to peruse and collate extensive evidence the sponsor sought to lodge with the Tribunal prior to the appeal. On the evening before the hearing the sponsor produced over 600 pages of original documents they wished to intimate to the respondent and lodge for the hearing. On the day of the hearing the Tribunal refused a further motion to the adjourn the hearing to allow agents time to prepare and to marshal the papers and collate them into bundles, and also refused to admit into evidence the original documentary evidence the sponsor sought to produce. A hand-written letter from the sponsor was the only document accepted into evidence by the Tribunal, and agents withdrew from acting. The Tribunal proceeded to hear the appeal 'on the papers'.

Grounds of Appeal

1. The Tribunal materially erred in refusing to adjourn the appeal hearing. (expand legal error) [sic]

2. The Tribunal materially erred in refusing to accept the appellant's bundle of documents into evidence (expand legal error) [sic]

3. The Tribunal materially erred in finding that the appellant cannot succeed under the Immigration Rules. (expand legal error) [sic]".

8. As can be seen, the grounds are seriously problematic. They seem to be no more than a working draft, unless the intention really was for the recipient of the grounds to make up the missing reasons for the alleged legal errors. At all events, First-tier Tribunal Judge Frankish refused permission on 12 June 2018. As will become relevant later, that was some six months after the grounds had been submitted to the First-tier Tribunal by Katani & Co.

9. Judge Frankish concluded that no arguable error arose from the judge's refusal of the adjournment application or from his refusal to admit "an unpaginated, unindexed and unconsidered box of hundreds of pages … of documents as a bundle". On the evidence before the judge, the latter did not arguably err in law, according to Judge Frankish, in finding that the appellant had not shown that the sponsor had sole responsibility or that the respondent's refusal constituted a breach of Article 8 of the ECHR.

10. On 27 June 2018, Katani & Co submitted, on behalf of the appellant, an application to the Upper Tribunal for permission to appeal. Again, it was asserted that the First-tier Tribunal Judge had erred in law in refusing to adjourn. Reference was again made to a "hand-written letter from the sponsor" as being the only document accepted into evidence by the judge. The description of the statement as "hand-written" is problematic, given that page 90 of the "second inventory of productions" to which we shall return shortly, is a type-written document, signed by the sponsor and dated 9 November 2017. The fact that this text was before the First-tier Tribunal Judge is

put beyond doubt by the fact that the extract quoted by the judge in paragraph 11(b) of his decision features verbatim in the statement.

11. As well as complaining about the failure to adjourn, the grounds submitted to the Upper Tribunal contended, again, that the judge erred in failing to accept the appellant's bundle of documents into evidence. As to this, the ground said:-

> "The evidence of the appellant's sponsor sought to rely on at the hearing have (sic) now been collated into bundles and lodged with this application for permission to appeal. In refusing to consider this evidence the Tribunal have arguably affected one parties (sic) right to a fair hearing."

12. The grounds went on to say that the First-tier Tribunal Judge had erred in finding that the appellant could not succeed under the Immigration Rules. Although noting what the judge had quoted from the sponsor's statement in his decision, the grounds asserted that "this is not what the witness statement says. It says that "*my parents helped me when I was not able to raise her alone*"".

13. Having asserted that sole responsibility was a factual matter to be decided on all the evidence, the grounds submitted that the sponsor

> "has produced a large amount of evidence (which the Tribunal refused to consider) which clearly shows the sponsor's communications with the appellant's teachers and her engagement in the decision-making process relating to the child's extra-curricular activities. She has produced evidence of continuing control and direction over the child's life with the appellant's grandparents providing very much a care-taker/supportive role. Had the Tribunal allowed this evidence to be lodged, and then taken into consideration, the appellant had real prospects of succeeding under the Immigration Rules".

14. Upper Tribunal Judge Macleman granted permission to appeal on 13 August 2018. He noted that the appeal "was on human rights grounds only, not in terms of the Immigration Rules, but if there was an error on that issue, it might be material". However, having noted the challenge to the refusal to adjourn, Upper Tribunal Judge Macleman observed that "if it was right not to adjourn, it is very doubtful whether there was an error of law or procedural impropriety in declining to admit a mass of disorganised documents into evidence at the last moment".

15. We have already referred to the second inventory of productions, which runs to 600 pages. Both this and the first inventory of productions, running to 173 pages, were sent to the Upper Tribunal by Katani & Co under cover of a letter dated 13 December 2017.

16. At paragraph 6 of his decision, Upper Tribunal Judge Macleman said:-

> "6. Even as now tendered, in support of this application, the documents are in two inventories of 173 and 600 pages, loose leaf and not attached together, vaguely indexed, with no guide to how they are to be made comprehensively relevant."

17. His grant of permission ended as follows:-

> "7. The appellant's case needs to become much better focused if it is to have any chance of eventual success."

C. Proceedings in the Upper Tribunal

18. On 5 October 2018, the Upper Tribunal sent directions to the parties, consequent upon the grant of permission to appeal. Direction 4 reads as follows:-

> "4. There is a presumption that, in the event of the Tribunal deciding that the decision of the FtT is to be set aside as erroneous in law, the re-making of the decision will take place at the same hearing. The fresh decision will normally be based on the evidence before the FtT and any further evidence admitted … together with the parties' arguments. The parties must be prepared accordingly in every case."

19. The Upper Tribunal hearing took place on 24 June 2019, over eight months after the sending of the Upper Tribunal's directions. On 20 June 2019, Katani & Co had, under cover of a letter of that date, sent to the Upper Tribunal what they described as a "second inventory of productions" in connection with the hearing. This inventory, which runs to 39 pages, included an undated witness statement of the sponsor. Paragraphs 2 to 9 of this statement described the inter-relationship between the sponsor, the appellant and the latter's grandparents. Amongst other things, the sponsor said that she took "full responsibility for the decisions in my daughter's life from what she eats to what school she attends" and that she had "a massive say in the upbringing of her. My parents take my opinion seriously and I stipulate when bedtime is and what routine she has". She also described herself as being "the sole carer for my daughter. I go back to China regularly to visit once a year for a full month".

20. Beginning at paragraph 10, the sponsor's witness statement dealt with the circumstances surrounding the hearing before the First-tier Tribunal. The sponsor said that after receiving the refusal letter, she went to "an immigration interpreter/paralegal" and asked her to find someone to do the appeal for her. We are not told when the sponsor received the refusal but her notice of appeal to the First-tier Tribunal is dated 6 June 2016.

21. The appellant's statement continued by saying that the interpreter/paralegal passed her file to "a girl in London", whom the appellant thought was a paralegal, and that this individual was asked to prepare "everything for me".

22. After the sponsor received the hearing date for the hearing in the First-tier Tribunal, she asked the individual if she had arranged a solicitor to represent the sponsor in court. The sponsor was told that at this stage it was too early. That was three months before the hearing. In this regard, we note from the file that the notice of hearing was sent to the sponsor at her address in Scotland on 30 May 2017, which was over five months before the hearing..

23. About two weeks before the First-tier Tribunal hearing, the sponsor was given a phone number for "a solicitor but she never gave me the name". The sponsor called

the number and found out that the lawyer was named DP. We have redacted his name but the statement gives it in full. DP apparently asked the appellant for all the documents in her case. The sponsor sent these by email.

24. The sponsor was then contacted by "the solicitor" who said that "he cannot do my hearing because it is in Scotland and he also had a case on the same day in England". The sponsor asked "if he knew any good lawyers that he could refer me to in Scotland. He provided me with Katani & Co. I called Katani & Co and they got me an appointment with a solicitor".

25. The sponsor said that the appointment with A of Katani & Co "was made one day before the hearing" and that as a result A "had very little, if any time to look at my documents". However, by the time they went to the hearing, A "had printed off all of my documents but had not looked at them as he had not had enough time because I only saw him at 6pm the night before".

26. The statement ends by stating that A tried to ask for an adjournment but it was rejected. The statement is said to have been given in Glasgow on 12 June 2019 with the assistance of a Mandarin interpreter. It had been read back to and approved by the sponsor.

27. We have referred to the "second" inventory of productions, sent on 20 June 2019. On 14 June 2019, Katani & Co had sent what they described in the covering letter as "first inventory of productions". This comprised caselaw and an extract from the Presidential Guidance Note No. 1 of 2014 of the First-tier Tribunal, Immigration and Asylum Chamber.

28. Mr Katani made submissions to us on behalf of the appellant. It soon became apparent that Mr Katani intended only to seek to persuade the Upper Tribunal that the First-tier Tribunal Judge had been wrong to proceed as he did and that, accordingly, his decision should be set aside and the matter remitted in its entirety to the First-tier Tribunal. Mr Katani was, however, entirely unable to explain why, in the period of over eighteen months since the date of the First-tier Tribunal hearing, no attempt had been made to contact DP, in order to ask for confirmation that he had behaved as alleged, and if so what explanation he had for that; or any attempt made to contact the other individuals concerned with assisting the appellant with her case. Instead, Mr Katani made the remarkable assertion that the sponsor was a "victim" of what had happened and should therefore be treated in the same way "as a victim of assault" would be.

29. Mr Katani said that he did not know the circumstances in which the sponsor had instructed his firm. The solicitor A, was no longer with Katani & Co. Mr Katani nevertheless asserted that, in the run-up to the hearing, the sponsor was doing everything that she needed to do. Mr Katani said that the first meeting with A and the sponsor had been on 6 November 2017.

30. The Upper Tribunal asked Mr Katani what documents in the 600 page inventory of productions, he was relying upon on behalf of the appellant, in order to show that

the sponsor had had sole responsibility. Mr Katani responded, even more remarkably, that he did not have this inventory. He reiterated that the hearing before the First-tier Tribunal Judge had been unfair and that we should accordingly remit the matter for a full hearing.

31. The Tribunal drew the attention of Mr Katani to paragraph 4 of the Upper Tribunal's directions, as described earlier. It appeared that Mr Katani could not find these amongst the papers he had at the hearing.

32. We asked why, if Mr Katani no longer had a copy of the 600 page inventory, he had not asked the Tribunal for its assistance in obtaining one from it. We were concerned that, as principal of the firm, Mr Katani could have no knowledge of its contents. Mr Katani responded by saying that he did not know when A had left the hearing before the First-tier Tribunal and therefore did not know "which bits were taken out by the judge". The only safe way of proceeding was to "start from scratch".

33. The Upper Tribunal pointed out to Mr Katani that the judge's decision recorded that the sponsor had left the hearing with A. There was also nothing in the sponsor's statement made on 12 June 2019 to suggest that she remained behind after A had left.

34. Mr Katani said that the 600 page bundle might, in fact, have been produced in England. It was possible that his firm had not put it forward.

35. The Upper Tribunal was puzzled by this suggestion of Mr Katani. It was pointed out that Katani & Co would, presumably, have records, including whether they had charged the sponsor for producing the inventory.

36. Mr Katani responded that, with almost 100 percent certainty, the bundle would not have been produced by his firm.

37. The Upper Tribunal noted that, at paragraph 17 of the sponsor's statement of 12 June 2019, she had stated that A "printed off all of my documents but had not looked at them". Mr Katani responded that that was his firm's policy. His firm would not act for a client at the hearing if they could not prepare the case for that person properly.

38. The Upper Tribunal pointed out that the judge had taken the appellant's witness statement of 9 November 2017 into evidence. The Upper Tribunal asked Mr Katani if a copy of this had been kept by his firm. Mr Katani responded that he did not know. A had been suspended by Mr Katani because of his record keeping and shortly after that he had resigned from Katani & Co.

39. The Upper Tribunal suggested to Mr Katani that he was seeking to place complaints about the conduct of A on the shoulders of the First-tier Tribunal Judge. Mr Katani said that when his firm took over the matter at the last minute the firm's policy was to ask for an adjournment and withdraw if they did not get it on behalf of their client. In the present case the judge had proceeded notwithstanding that the issues had not been capable of being properly decided on the evidence. There had been much

caselaw on the question of sole responsibility. It was, accordingly, impossible in the circumstances to expect a solicitor "to perform miracles".

40. Asked why A could not have obtained a statement from the appellant when she came to see him on 6 November 2017, Mr Katani said that this was "just an initial meeting" and that she had had to go back to work. He reiterated that it was his firm's policy that, in a case of late instruction, Katani & Co would ask for an adjournment and then withdraw if they did not get it. Out of 100 or so cases, Mr Katani said that the present case was the only one where there had been a refusal to adjourn. Numerous other judges behaved in "a completely different manner" from that of the First-tier Tribunal Judge in the present case.

41. Mr Katani said that he was unaware there had been any attendance note kept at the meeting between A and the sponsor on 6 November 2017. He was unable to tell us whether a client care letter had been issued by Katani & Co to the sponsor. He reiterated that it was the firm's policy that if instructions were "too late" they would ask for an adjournment.

42. Mr Katani told the Upper Tribunal that he had informed the sponsor that the appellant could make a fresh application for entry clearance. It was put to Mr Katani that, given the lapse of time, that would have been an appropriate course of action on the part of the sponsor.

43. Mr Katani responded that, if the decision of the First-tier Tribunal Judge had not been challenged, then an Entry Clearance Officer could use that refusal in order to refuse any new application. The Upper Tribunal pointed out, however, that in the present case the judge had not been able to deal with the matter in any detail, having regard to the evidence before him. The point about making a fresh application had been highlighted by the First-tier Tribunal Judge himself, at paragraph 21 of his decision.

44. Mr Katani said that Entry Clearance Officers could "pick and choose" within the findings of a First-tier Tribunal.

45. According to the First-tier Tribunal Judge in the present case, the sponsor had "made an admission". Regardless of whose fault it was, the appellant had not obtained a fair hearing.

46. For the respondent, Mr Govan submitted that, contrary to the assertion made in the grounds of application, the First-tier Tribunal Judge had considered the case of TD and applied it correctly. The appellant could have spoken to her statement and been cross-examined on it but she did not do so. Mr Govan also pointed out that the sponsor had not dealt with the concerns of the respondent regarding a combination of maintenance.

47. So far as complaints about poor legal assistance were concerned, Mr Govan submitted that there had been no attempt to contact the individuals concerned in order to put these complaints to them. Overall, the First-tier Tribunal Judge had

given matters careful thought. There was no error in his decision. Nothing prevented the appellant from making a fresh application for entry clearance.

48. In reply, Mr Katani said that, having taken instructions from the sponsor (who was present at the hearing) he had been told that it was she who had produced the list at the beginning of the 600 page inventory of productions. The Upper Tribunal expressed surprise at this, given that the sponsor had had to produce her most recent witness statement with the assistance of an interpreter.

49. A said that, at the hearing, the sponsor had pulled out her statement (now at page 90 of the inventory) "in desperation". She could, in fact, speak some English.

50. The Upper Tribunal noted that the judge's Record of Proceedings indicated that A had sought leave to lodge the bundle later and that the judge should "part-hear the case today". This suggestion had been put by the Presenting Officer.

51. The Upper Tribunal asked Mr Katani whether the sponsor's statement at page 90 had not been a considered view on her behalf.

52. Mr Katani said that the judge, had in effect, had held a gun to A's head that made it absolutely clear that he was going to go ahead on the basis described.

53. The Upper Tribunal asked Mr Katani specifically about the fact that the inventories of 600 and 173 pages had been sent by Katani & Co under cover of a letter of 13 December 2017. Mr Katani responded that there were "bags in my firm with bits and pieces in it". The Upper Tribunal asked, what, therefore, Mr Katani would do if the case were in fact remitted. Mr Katani was asked, in particular, how he could advise his sponsor client whether it was worth going ahead with a remitted hearing, if he had not seen these materials.

54. Mr Katani responded that it would, in those circumstances, be necessary to "start from scratch".

55. The Upper Tribunal sought confirmation that no one in Katani & Co had formed any view since 9 November 2017 on whether the materials in question had any bearing on the appellant's case.

56. Mr Katani said that he had made his position "absolutely clear". He had not yet looked at the documents. He was asked how, in that eventuality, he could say that his client's case could possibly succeed and why, in that event, any remittal would be remotely worthwhile.

57. Mr Katani confirmed that he had not looked at this matter. He then said that he was "not seeking to rely on this evidence today".

D. Discussion

58. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides as follows:-

> "2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> …"

59. "Dealing with the case fairly and justly" involves striking a proper balance between the legitimate needs of a particular party (whether appellant or respondent) and not only those of the other party in the particular proceedings in question but also those of others who may be indirectly affected. If a particular case is adjourned, there may be delay in the hearing and disposing of another case that is awaiting hearing. Although an individual adjournment may have an immaterial effect in itself on the functioning of the overall appellate system, it is axiomatic that any system which takes an unduly lenient view of applications to adjourn will become problematic for all its users.

60. The fact that immigration and asylum appeals raise issues of profound significance for those concerned in them is, of course, to be taken into account in deciding whether to adjourn. Nevertheless, the point just made holds good.

61. In the present case, the First-tier Tribunal Judge acted entirely compatibly with his duty under rule 2. The judge had proper regard to the submissions made by A of Katani & Co. However, the judge was entitled to take account of the fact that the notice of appeal had been filed by the sponsor as long ago as 6 June 2016. The judge acted appropriately in putting the case back in order to enable A and the sponsor to produce a witness statement from her. Whether that statement was hand-written or in typescript is immaterial. It is plain that the judge saw a statement in the very terms in which it appears at page 90 of the 600 page inventory.

62. The sponsor was in a position to give evidence, as per her statement. No suggestion had been made that, despite the fact that her more recent statement is said to be compiled with the assistance of an interpreter, an interpreter had been requested in connection with the hearing on 9 November 2017 or that the sponsor was unable to give adequate evidence in English. Indeed, the terms of the statement of 9 November 2017 show the contrary.

63. The reason for the request for the adjournment appears to have been that Katani & Co had been instructed late. But, as the judge explained, that was not, in the circumstances, a sufficient reason. So far as one can see, A would not have withdrawn from the hearing if, in addition to putting in the witness statement, the sponsor had also been able to put in evidence the large amount of documentation

which, it would now seem, comprised the 600 and 173 page inventories. But, however, quite apart from the Presenting Officer not having had a chance to see these documents, the stance of Katani & Co, on behalf of the appellant, is that A had not been able, over the weekend which intervened between A's meeting with the sponsor on 6 November and the hearing on 9 November, to form any view of the relevance of the materials in question.

64. Indeed, astonishingly, over eighteen months after the hearing before the First-tier Tribunal Judge, Katani & Co apparently remained in ignorance of what was in these inventories. That is plain from what Mr Katani told us. Despite the fact that A, who was still with Katani & Co in December 2017, sent the materials to the Tribunal under cover of a letter of 13 December, Katani & Co have not only kept no copy of the materials; they have not seen fit to ask to see them.

65. In the circumstances, the fact that the judge declined to look at these materials has not been shown to have had any material bearing whatsoever. The judge has not been shown to have acted unfairly in proceeding to take account of the witness statement of 9 November and the other materials before him, but not those described in paragraph 5(c) of his decision.

66. For these reasons, there is no merit in the grounds which allege that the First-tier Tribunal Judge acted unfairly in refusing to adjourn or in refusing to accept the materials described in paragraph 5(c) of the decision.

67. The grounds that contend the First-tier Tribunal Judge was wrong to find, on the evidence before him, that the appellant had failed to show sole responsibility are, likewise, misconceived. The passage in the statement which was quoted by the judge was, plainly, significant in that it indicated not only that the sponsor had been helped in raising the appellant but that that situation continued to pertain.

68. The real point being made by the sponsor, according to her statement, was that she now considered her parents were too old and frail to be expected to continue to assist in looking after the appellant. At best, reading this statement as a whole, it is plainly equivocal on the issue of sole responsibility. Given that the burden lay with the appellant to show, on balance, it was more likely than not that the requirements of the Rules were satisfied (and, hence, that it would be a disproportionate interference with the appellant's Article 8 rights to refuse admission in those circumstances), the judge was not wrong in law to dismiss the appeal. In so doing, the judge had proper regard to TD.

69. As will be apparent from what we have said, we have very serious concerns about the conduct of Katani & Co in this case. Mr Katani, on several occasions during his lengthy submissions to us, made it perfectly plain that his firm has a policy, when it considers it has been instructed "late" by a client, of seeking an adjournment which, if not granted, results in the firm withdrawing representation.

70. The fact that such a "blanket" policy is intensely problematic is borne out by the facts of the present case. As immigration solicitors, Katani & Co can be expected to know

what needs to be shown in order to establish sole responsibility under the Immigration Rules. Katani & Co were instructed on 6 November 2017, when A met the sponsor. Given that the sponsor was able, with assistance, to produce a witness statement on 9 November 2017, it is difficult, to say the least, to understand why such a statement could not have been drafted at or following the client consultation on 6 November. Furthermore, it should have been possible to peruse the documentation, in order to gain a general impression of whether it advanced the appellant's case.

71. If, following such endeavours, Katani & Co had reached the view that the appellant was unable, on the current evidence, to achieve success, the sponsor could have been advised to seek to withdraw the appeal, without the need for a hearing and subsequent decision. If, on the other hand, those endeavours had led to the conclusion that the appellant had a case worthy of going before the First-tier Tribunal, that case could and should have been advanced. Instead, as we have already noted, Katani & Co persuaded the sponsor that they should adopt their policy of seeking an adjournment on the basis that they had been instructed too late to do anything else that might be meaningful.

72. Before us, Mr Katani displayed a marked ignorance of the way in which appeals are decided in the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007 and the Practice Directions and Statements of its Immigration and Asylum Chamber. He also had paid no regard to Direction 4, issued by the Upper Tribunal on 5 October 2018. Mr Katani advanced no explanation as to why he did not have the Directions in question before him at the hearing.

73. In any event, it should have been obvious to Mr Katani that the grounds he was seeking to advance required him at least to have seen the materials in the 600 and 173 page inventories. As we have already noted, remarkably, he and his firm had made no effort to retain a copy of the materials or, failing that, to request them from the Upper Tribunal.

74. Mr Katani also appears to consider it irrelevant that neither he nor the sponsor had bothered in the eighteen months since the First-tier Tribunal hearing, to contact the individuals whom the sponsor said had, in effect, let her down; in particular, the solicitor in the south of England identified as DP. Nevertheless, the Upper Tribunal was urged by Mr Katani to take the sponsor's word that the solicitor and (perhaps) others had acted unprofessionally. It would be quite wrong for us to do so. Save in exceptional circumstances, the Tribunal will not take account of an allegation of professional malpractice against a person's former representatives in immigration and asylum proceedings, unless those representatives have been made aware of the allegation and given a proper opportunity to respond.

75. The present case also highlights the difficulty where representatives find themselves having to give evidence about what is alleged to have occurred at a hearing at which they represented an individual. A firm that finds itself in such a position should not continue to act as the representatives.

76. Mr Katani had no coherent response to the question of why, particularly given the lapse of time, the sponsor had not re-applied on behalf of the appellant for entry clearance. Whilst we accept that judicial findings regarding an earlier application may influence the view of an Entry Clearance Officer considering a fresh application, each case turns on its own facts. It would, in particular, be a breach of section 6(1) of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way that is incompatible with the ECHR, for an Entry Clearance Officer to place reliance on previous judicial findings where it was apparent that, on the material now available, the applicant was properly entitled to entry clearance.

77. In any event, no one acting for the appellant appears to have considered whether, looked at properly in the way described above, the First-tier Tribunal Judge's decision was, on its own terms, legally erroneous and, therefore, whether it was worth expending time (and the sponsor's money) in seeking to challenge it. We should also mention that the issue of maintenance and accommodation, in respect of which the respondent also found against the appellant, does not appear to have been addressed.

78. Mr Katani appears to have had no regard to the sponsor's most recent statement, given on 12 June 2019, since paragraphs 2 to 12 of this are also, at best, entirely equivocal as to whether the sponsor is, in truth, asserting that she has sole responsibility for the appellant. For example, paragraph 4 describes the sponsor's father as the appellant's "guardian", which suggests a degree of involvement going beyond mere physical needs. By the same token, paragraph 7 is equivocal in contending that the sponsor has "a massive say in the upbringing of [the appellant]", whereas the sponsor's "parents take my opinions seriously".

79. It is plain that Mr Katani has not seen it necessary to form any view as to whether the appellant's appeal might succeed on the basis of the evidence now adduced. Nevertheless, his stance remained that the whole matter should be remitted to the First-tier Tribunal.

80. It will be evident that we find Mr Katani's submissions in this appeal to be seriously worrying on a number of levels. We trust that he will pay very careful regard to what we have said. In particular, he would be well advised to reconsider his firm's policy regarding applications to adjourn.

E. Decision

The appeal fails on the grounds advanced. The grounds advance no challenge to the assessment made by the First-tier Tribunal judge of the evidence that was before him, correctly applying the relevant law. As Upper Tribunal Judge Macleman pointed out, although the appeal lay on human rights grounds only, compliance with the Rules was obviously relevant to that issue. The challenge to the refusal of the First-tier Tribunal judge to adjourn is devoid of merit, as is apparent from what we say above.

The decision of the First-tier Tribunal therefore does not contain an error of law, such that we should set that decision aside.

The appeal is dismissed.

Signed

Date
23 September 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber