Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15615/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 6th February 2019

Decision and Reasons Promulgated
On 14th February 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

A M W
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr I Ali, Counsel, instructed by Trent Chambers
For the respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant, born on 1 August 2009, is a national of Malawi. He applied on 23 March 2016 for entry clearance in order to join and settle with his mother, hereinafter referred to as his sponsor.

2. The application was refused by the entry clearance officer under paragraph 320(1) of the immigration rules on 20 May 2016.This was on the basis the application being sought was for a reason not covered by the rules. The refusal letter refers to his sponsor as having discretionary leave and states that as a consequence she did not have sufficient status to sponsor her son under the rules.

3. The grounds of appeal referred to paragraph 301 of the rules and stated the appellant's sponsor had been given further leave to remain under the 10 year settlement route. The grounds contend that the entry clearance officer was wrong to conclude the sponsor was not entitled to bring dependents to the United Kingdom. The remainder of the grounds then seek to address the requirements of paragraph 301, suggesting they are met.

4. The decision was reviewed by the entry clearance manager in light of the grounds of appeal. The reconsideration continued to maintain the application did not fall under any category in the rules as the sponsor had only limited leave. The manager stated that the sponsor had been granted limited leave to remain on human rights grounds as a parent of a child here. The sponsor had been in the United Kingdom since 2003 at which stage the appellant was 3. There was insufficient evidence that she had been involved in his life. It was felt that the current arrangements could continue and did not justify the grant of entry clearance outside the rules.

The First tier Tribunal

5. The appeal was heard by First-tier Tribunal Judge Bannerman on 23 October 2017. In a decision promulgated on 15 November 2017 the appeal was dismissed.

6. The parties were represented. The appellant's sponsor gave evidence, stating she came to the United Kingdom in March 2003 and had returned to Malawi on 3 occasions, the last time being in March 2016. She stated that the appellant had been cared for by her own mother but she has suffered a series of strokes. He was presently being looked after by a friend. She said that she sent him money and maintained regular contact.

7. At hearing the appellant's representative again raised paragraph 301 and referred to the decision of TD Yemen [2006] UKAIT 49 on the question of sole responsibility.

8. At paragraph 39 the judge said that paragraph 320(i) did not assist the appellant on the basis the evidence had not established sole responsibility. The judge accepted that the sponsor's mother had suffered a stroke in December 2015. However, it was pointed out that the sponsor had only visited once since then. The judge did not see evidence that the appellant was suffering because of the current care

arrangements. The judge took the view that the sponsor had only recently been involved in the appellant's care and she had not had sole responsibility for him.

9. At paragraph 52 the judge stated the sponsor made a choice in pursuing her life in the United Kingdom. The judge then referred to looking at matters outside the rules and did not find anything which assisted the appellant. The judge then refers to dismissing the appeal under the rules.

The Upper Tribunal

10. Permission to appeal was granted on the basis it was arguable the judge misdirected himself or failed to give adequate reasons, particularly in concluding that the sponsor did not have sole responsibility. The Judge had referred to paragraph 320(1) but there was no reference to paragraph 301.

11. At hearing, Mr Diwnycz, acknowledged that neither the primary decision-makers nor the judge appeared to have adequately considered 301(1)(b). Mr I Ali relied upon his skeleton argument. He said that the reasons for the refusal was expanded upon by the entry clearance manager but that the application of paragraph 301 was not considered, either by the respondent or the judge. I was referred to paragraphs 29, 30,31 of the decision and it was submitted there had been no reasoning on the question of sole responsibility. He went on to say that the appellant's grandmother was unwell and that the school report indicated a deterioration in his condition.

Consideration

12. The file contains a screen-print of the content of the application. The application was made on 23 March 2016 and was for settlement of the sponsor's child. Mr Diwnycz was unable to advise me if there is a generic application form or whether the individual had to indicate if the application was being made under any particular rule. This is relevant to the refusal decision which states the application was considered under paragraph 320(1) of the rules. If that rule is considered it relates to the grounds on which entry clearance is to be refused. It is not an enabling provision.

13. The refusal states that the appellant's sponsor has discretionary leave which does not entitle her to bring any dependants to the United Kingdom. However, paragraph 301 does provide for leave with a view to settlement as a child of a parent who in turn has limited leave. Paragraph 301 (i)(b) covers the situation where one parent has been given limited leave to remain with a view to settlement and has had sole responsibility for the child or alternatively, (c), there are serious compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements for the childcare have been made.

14. It is my conclusion that the Judge's decision has been skewed by 2 events. The 1st of these is the refusal decision which was based upon the sponsor not having settled status and asserting therefore she could not sponsor. This is incorrect and her status was not bar her from acting as sponsor for an application under paragraph 320. It seems likely that the basis for the refusal well have influenced the way the judge approached the appeal.

15. The 2nd distortion is that the judge does not appear to have appreciated there was a limited right of appeal. In this case the appeal was concerned with the appellant's article 8 rights. The first issue to determine was whether family life within the meaning of article 8 existed, given the long separation between the appellant and his sponsor. If family life existed then a Razgar sequential approach could have been anticipated. On this basis the judge could have progressed to the proportionality issue when matters are looked at least initially through the prism of the rules.

16. I am mindful that the appeal concerns a young child and the approach taken by the entry clearance officer and the judge may have distorted the consideration of his best interests. I find there was a material error in the concluding the sponsor did not have the status to so act. There is also an inadequacy of reasoning in the assessment of the question of sole responsibility and whether there were other compelling circumstances. Consequently, the decision is remitted for a de novo hearing in the first-tier Tribunal.

Decision.

The decision of First-tier Tribunal Judge Bannerman materially errs in law and is set aside. The appeal is remitted for a de novo hearing in the First-tier Tribunal.

Francis J Farrelly
Deputy Upper Tribunal Judge.

Directions.

1. Relist for a de novo hearing in the First-tier Tribunal Birmingham. This location will convenience the sponsor.
2. The appellant's representatives are to update the appeal bundle. At hearing it was indicated his sponsor has now obtained a custody order from the courts in Malawi. They should seek to provide evidence along the lines argued already about sole responsibility and the appellant circumstances.it remains open to them to argue any other matter felt relevant.

3. There is no need for an interpreter
4. The hearing should last no longer than an hour.

Francis J Farrelly dated 10 February 2019
Deputy Upper Tribunal Judge.