Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09125/2019
HU/09126/2019
(R)

THE IMMIGRATION ACTS

Heard at Birmingham CJC
Parties appeared remotely by Skype
On 29th September 2020

Decision & Reasons Promulgated

On 19th October 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MS TRACY [P] (1)
MS ALBRIGHT OPPONG [P] (2)
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Q Ahmed, Counsel instructed by Chipatiso Associates LLP
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The hearing before me on 29th September 2020 took the form of a remote hearing using skype for business. Neither party objected. At the outset, I was informed by

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Mr Ahmed that neither appellant intended to join the hearing remotely and they are happy for the hearing to proceed in their absence. Their mother, the sponsor did join the hearing remotely and was able to see and hear the proceedings. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied the parties had been able to participate fully in the proceedings.

2. The appellants are sisters and are both nationals of Ghana. Their appeal against the respondent's decisions of 2nd May 2019 refusing their applications for indefinite leave to enter the United Kingdom as the children of a parent present and settled in the UK were dismissed by First-tier Tribunal Judge Spicer for reasons set out in a decision promulgated on 24th April 2020.

The decision of First-tier Tribunal Judge Spicer

3. Judge Spicer accepted the appellants are the daughters of Ms [EK] ("the sponsor") who left Ghana and arrived in the UK in November 2003 shortly after the birth of the first appellant. The sponsor was 13 years old when she gave birth to the second respondent and 15 years old when she gave birth to the first appellant. The judge accepted the evidence of the sponsor that following her departure from Ghana, the appellants were cared for by her father ("their grandfather") and that following the

deterioration in his health since 2016, he was assisted by a close family friend Ms Dorcas Berfi. Judge Spicer accepted the appellant's grandfather passed away on 15 April 2018. She also accepted the sponsor sent money to her father between December 2010 up to his death and that there was evidence of money transfers to Ms Dorcas Berfi from 31st May 2017. She noted, at paragraphs [28] and [29] of her decision that the children had attended school and as at the date of the hearing before her, both were Boarders at school.

4. At paragraphs [30] to [44] of her decision, Judge Spicer considered whether the requirement set out in paragraph 297(i)(e) of the immigration rules is met. The issue was whether the sponsor has had sole responsibility for the children's upbringing. At paragraphs [45] to [50], Judge Spicer went on to consider whether the requirement for indefinite leave to enter the UK set out in paragraph 297(i)(f) is met. That is, whether 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.

5. Judge Spicer found the appellants cannot succeed under the immigration rules. For reasons set out at paragraphs [51] to [56] of the decision, Judge Spicer found that it is not in the appellants' best interests to leave Ghana. She went on to address the Article 8 claim outside the immigration rules at paragraphs [58] to [73] of her decision. She found that Article 8 is engaged and the decision not to grant entry clearance to the appellants is an interference with the appellants right to the future development of their family life. Judge Spicer had regard to the public interest considerations set out in s117B of the 2002 Act and at paragraphs [71] to [73] she said:

> "71. I have found that the appellants do not satisfy the requirements of the immigration rules, which carries significant weight in my proportionality assessment.
>
> 72. The respondent's decision maintains the status quo. There is no disruption to the lives of the appellants or the sponsor as a result of the respondent's decision. The sponsor is able to continue to provide financial support to the appellants from the United Kingdom, in the same way as she has done.

> 73. I find that the respondent's decision is not a disproportionate interference in the family life of the sponsor and the appellants."

The appeal before me

6. The appellant advances three grounds of appeal. Permission to appeal was granted by First-tier Tribunal Judge Adio on 15th June 2020. He noted:

> "The grounds in the application for permission to appeal are all arguable. Whilst the Judge recognises the background of the appellants it is arguable that there is improper application of the principles of the case of TD (Yemen) to the facts of the appellants' case namely; significant changes with regard to arrangements for the children once the sponsor's father died; the impact that the sponsor plays with regards to education and finances not fully taken into account; the fact that the sponsor has also visited the children in 2013. The grounds give rise to an arguable error of law."

7. The matter comes before me to determine whether the decision of First-tier Tribunal Judge Spicer is vitiated by a material error of law. The first and second grounds of appeal relate to the finding by Judge Spicer that the sponsor has not had sole responsibility for the children's upbringing, and I consider those two grounds together.

8. The first ground of appeal is that Judge Spicer failed to give due weight to the fact that the sponsor began sending money in 2010 after a period of absence from her children's lives of seven years. It is conceded that the sponsor did not have sole responsibility for her children until 2010. It is said that thereafter, the sponsor began taking some responsibility for her children in Ghana and the arrangements changed. It is said that in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, the Tribunal found that financial support, particularly sole financial support of a child is relevant, since it may be an indicator of an obligation stemming from an exercise of responsibility by a parent. The appellant claims the judge erred in failing to consider the financial support provided by the sponsor as a legitimate and important indicator of sole responsibility.

9. The second ground of appeal is that Judge Spicer accepted the appellants' grandfather died on 15th April 2018 and the evidence from the sponsor was that the arrangements for the children to live with Ms Dorcas Berfi had been coordinated by the sponsor. The appellants claim Judge Spicer failed to recognise the extent of the change in circumstances following the death of the appellant's grandfather and the evidence with regard to the role played by the sponsor since her father's death has been overlooked.

10. Mr Ahmed submits Judge Spicer did not adequately consider the judgement of the Upper Tribunal in TD (Paragraph 297(i)(e): "sole responsibility"), and in particular, the relevance of the financial provision provided by the sponsor. He submits that at paragraph [34], Judge Spicer accepted that the sponsor began to send money to her father in 2010 once she obtained legal status and was able to work in the UK. Judge Spicer found that it is more likely than not that the status quo continued, in the absence of any precipitating factor. Mr Ahmed submits that the subsequent death of the appellant's grandfather in April 2018 was a precipitating factor that changed the status quo and the arrangements for the care of the appellants.

11. Mr Ahmed submits there had been a change in circumstances following the death of the appellant's grandfather and Judge Spicer accepted that the sponsor began to have more involvement with the appellants lives after her father's death. He submits that in TD (Paragraph 297(i)(e): "sole responsibility"), the Upper Tribunal noted, at paragraph [10] of its decision, that a parent who has settled in the UK may retain "sole responsibility" for a child where the day-to-day care or responsibility for that child is necessarily undertaken by a relative abroad. That day-to-day responsibility may include seeing that the child attends school, is fed and clothed and receives medical attention when needed. Mr Ahmed submits that in reaching her decision, Judge Spicer did not consider the fact that it is quite possible that the sponsor has sole responsibility for the appellants but the day-to-day implementation of decisions made have been carried out by the appellants grandfather, and following his death, by Ms Dorcas Berfi. He submits that at

paragraph [6] of her witness statement, the sponsor had set out the role played by the sponsor and Mr Dorcas Berfi in the appellants lives.

12. I reject the claim that Judge Spicer erred by failing to consider the financial support that has been consistently provided by the sponsor since 2010 and failed to recognise the extent of the change in circumstances following the death of the appellant's grandfather and overlooked the evidence regarding the role played by the sponsor since her father's death.

13. In TD (Paragraph 297(i)(e): "sole responsibility"), the Upper Tribunal highlighted that financial support is clearly relevant since it may be an indicator of the obligations stemming from an exercise of responsibility by a parent. At paragraph [16] of its decision, the Upper Tribunal said:

> "Financial support, particularly sole financial support, of a child is relevant since it may be an indicator of obligation stemming from an exercise of "responsibility" by a parent but it cannot be conclusive. **[my emphasis]** There may be other reasons why an individual financially supports a child and so it can only be a factor to be taken into account along with all the other facts. Rudolph v ECO, Colombo [1984] Imm AR 84 illustrates this."

14. Drawing together the threads, the Upper Tribunal, at paragraph [52], summarised the issue in this way:

> 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".

15. The provision of financial support is therefore clearly a factor that is relevant and must be taken into account, but is not conclusive. Financial support, even exclusive financial support, will not necessarily mean that the person providing it has "sole responsibility" for the child. It is a factor but no more than that.

16. It is accepted by the appellants that the sponsor did not have sole responsibility for them between 2003 and 2010. At paragraph [32], Judge Spicer found that the appellant's grandfather took care of them after the sponsor left Ghana in 2003. She acknowledged at paragraph [33] that the sponsor herself was a child when she came to the United Kingdom and was not in a position to provide any financial assistance to her father. At paragraph [34] of her decision, Judge Spicer acknowledged the money sent by the sponsor to her father since 2010 but found that it is more likely than not that the status quo continued. That is, the appellants grandfather made all of the decisions in relation to the appellant's welfare.

17. For reasons set out at paragraph [31] of her decision, Judge Spicer accepted that the appellants father has not played a role in the appellants lives. At paragraph [32] she said:

> "I find that the sponsor's father took care of the appellants after the sponsor left Ghana in November 2003. At the time, the first appellant was only two months old, and the second appellant was just two years old. I find it more likely than not, given the very young age of the first appellant that he also had the support from other family members or friends."

18. Judge Spicer accepted the sponsor herself was a child when she came to the United Kingdom and could not be expected to take any responsibility for the appellants from afar. She noted the sponsor was not in a position to provide any financial assistance to her father for the first seven years after her arrival in the UK. During that time it was the appellant's grandfather that made all of the decisions in relation to the appellants welfare. She accepted the sponsor began to send money to her father in 2010 but even so, it is more likely than not that the status quo continued and the appellant's grandfather continued to make all of the decisions in relation to their welfare.

19. As to the deteriorating health of the appellants grandfather and the role played by Ms Dorcas Berfi, Judge Spicer said:

> "36. … I find that Ms Dorcas Berfi has also played a significant role in the appellants' lives since at least 2016. It was acknowledged by the sponsor at the oral hearing that Ms Dorcas Berfi was in the picture for two years before her father's death, as his health began to decline. It was during that time that the sponsor started to send money transfers to Ms Dorcas Berfi. I find that, as the sponsor's father's health began to decline, Ms Dorcas Berfi began to take over the day-to-day care of the appellants."

20. At paragraph [37], Judge Spicer acknowledged that a parent who has settled in the United Kingdom may retain sole responsibility where the day-to-day care or responsibility for that child is necessarily undertaken by a relative abroad. At paragraph [38], she found the sponsor, through no fault of her own, did not have sole responsibility for the appellants between 2003 and 2010. Judge Spicer went on to say:

> "38. … I am not persuaded that she subsequently acquired sole responsibility for them, given that she has not provided any persuasive evidence that she has ever been consulted about or approved important decisions in their lives."

21. Judge Spicer rejected the claim made by the sponsor that she and the appellants chose their schools together. She also noted that the evidence of contact between the sponsor and the appellants all post-dates the death of the appellants grandfather in April 2018. At paragraph [41] of her decision, Judge Spicer considered the letters from the schools that indicate that the sponsor is responsible for bills, but noted it was the appellants grandfather who was registered with the schools as their guardian and dealt with day-to-day matters. She noted, at paragraph [42], the absence of evidence of any direct correspondence between the schools and the sponsor. At paragraph [44], Judge Spicer concluded:

> "I accept that the sponsor began to have more involvement with the appellants lives after her father's death. However the period between the death of her father and the appellant's application amounts to only nine months. During that period, I do not find that the sponsor acquired sole responsibility for the upbringing of the appellants. Money transfers were made to Ms Dorcas Berfi from 2017, and I find on all the evidence that Ms Dorcas Berfi gradually acquired responsibility for the welfare of the appellants from 2016 onwards. When asked at the oral hearing about whether she had involvement in the appellants' medical treatment, the sponsor said that the appellants would tell Ms Dorcas Berfi if they had a problem and that the sponsor would pay the bill. This indicates that it was Ms Dorcas Berfi who made the decisions about any medical treatment. I have already noted that Ms Dorcas Berfi was also responsible for paying school fees. At its highest the evidence indicates that the sponsor shared responsibility with Ms Dorcas Berfi, for the care of the appellants following the death of her father, and the test in paragraph 297(1)(e) is not met."

22. The issue of "sole responsibility" must depend upon the facts of each case. A central part of the notion of "sole responsibility" was the sponsor's continuing interest and involvement in the appellants lives, including making or being consulted about and approving important decisions about their upbringing. In my judgement, it was open to Judge Spicer to conclude that the sponsor had not acquired sole responsibility for the appellants for the reasons set out at paragraphs [31] to [44] of her decision. The findings and conclusions reached by Judge Spicer were neither irrational nor unreasonable in the *Wednesbury* sense, or findings and conclusions

that were wholly unsupported by the evidence. It follows that in my judgment there is no merit to the first and second grounds of appeal.

23. In the third ground of appeal, the appellants refer to the decision of the Upper Tribunal in Mundeba (s55 and para 297(i)(f)) UKUT 00088 (IAC) in which the Upper Tribunal said:

> "37. Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come into play where there are other aspects of a child's life that are serious and compelling - for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve inquiry as to whether:-
>
> (i) there is evidence of neglect or abuse;
>
> (ii) there are unmet needs that should be catered for;
>
> (iii) there are stable arrangements for the child's physical care.
>
> The assessment involves consideration as to whether the combination of circumstances sufficiently serious and compelling to require admission.
>
> 38. As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC); [2012] Imm AR 939."

24. The appellants claim that in considering the requirement under paragraph 297(i)(f) of the immigration rules and whether there are serious and compelling family or other considerations, the judge erroneously considered the appeal on the basis that the appellants are now aged 16 and 18, whereas they both remained children at the time of their application and must continue to be treated as children, particularly as even now, the first appellant is under the age of 18. Furthermore it is said the Judge failed to address the ill-health of Ms Dorcas Berfi and its impact upon the appellants, with the likelihood of further deterioration in her health, and there being no adult to care for the appellants in Ghana. Finally, the appellants claim Judge Spicer failed to consider matters beyond the accommodation needs of the appellants. They submit what was required was a deeper evaluation of the appellant's welfare including their emotional needs.

25. Mr Ahmed submits the facts of the case speak for themselves. He submits that Ms Berfi cannot maintain an adequate level of care for the children and the Judge erroneously treated the children as adults, rather than treating them as children. He submits there is a lack of any proper consideration of the ill-health of Dorcas Berfi.

26. I reject the claim that Judge Spicer erred in her assessment of whether there are serious and compelling family or other's considerations which make exclusion of the appellants undesirable, and whether suitable arrangements have been made for the appellants care.

27. Judge Spicer accepted at paragraph [25] of her decision that there was evidence in the appeal bundle of money transfers made to Ms Dorcas Berfi from May 2017. At paragraph [36] Judge Spicer found that Ms Dorcas Berfi has played a significant role in the appellant's lives since at least 2016. She found that as the appellant's grandfather's health began to decline, Ms Dorcas Berfi began to take over the day-to-day care of the appellants. Judge Spicer considered the claim made on behalf of the appellants that Ms Dorcas Berfi has temporary guardianship of the appellants and that she has health problems which prevent her from visiting them, and which affects her ability to care for them. Judge Spicer found, at paragraph [46], that Ms Dorcas Berfi has a long-standing connection with the appellants and rejected the claim that this was a temporary arrangement precipitated by the death of the sponsor's father. At paragraph [47], Judge Spicer said:

> "I also take into account the fact that the appellants are both at boarding school for at least three months at a time, and do not require day-to-day care. They do not return home at weekends, and only return home during holidays. Although Ms Dorcas Berfi may be elderly and have health problems, the appellants are now aged 16 and 18 years old, and accordingly are capable of caring for themselves, and assisting Ms Dorcas Berfi where required. There is no indication that she is unable or unwilling to provide the appellants with accommodation during the school holidays."

28. Judge Spicer does not in that paragraph treat the appellants at adults, but she has regard to their ages, background and the arrangements in place for their care and

how they are met. That paragraph in my judgement must be read in context. At paragraph [48], Judge Spicer noted the appellant's lives have not been significantly disrupted and they continue to be educated. Furthermore, as Judge Spicer noted, there was no indication from the sponsor that her financial contributions would cease if the appellants were to remain in Ghana.

29. I referred Mr Ahmed to paragraph [19] of the grounds of appeal in which the appellants claim there is no real finding regarding the seriousness and impact of Ms Dorcas Berfi's ill health, with the likelihood of further health deterioration, leaving the appellants with no adult to care for them in Ghana. He accepted there was no independent evidence to support the claim that there will be a further deterioration in her health.

30. In Mundeba (s55 and para 297(i)(f)), the Upper Tribunal said, at paragraph [34] that:

> In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.

31. The focus of the decision of Judge Spicer was upon the social and economic environment in which the appellants are living and their circumstances in the light of their age, social background and developmental history. There was no evidence before the FtT of neglect or abuse, or of any unmet needs. Judge Spicer was satisfied that there are stable arrangements for appellants physical care. In my judgement, it was open to Judge Spicer to conclude that the appellants have not established that there are serious and compelling family or other considerations which make their exclusion undesirable and that suitable arrangements have been made for the appellants care. The findings and conclusions reached by Judge Spicer were neither irrational nor unreasonable in the *Wednesbury* sense, or findings

and conclusions that were wholly unsupported by the evidence. It follows that in my judgment there is no merit to the third ground of appeal.

32. The decision reached by Judge Spicer was one that was open to her on the evidence before the FtT. The appeal is therefore dismissed and the decision of First-tier Tribunal Judge Spicer promulgated on 24th April 2020 shall stand.

Signed *V. Mandalia* Date; 8th October 2020

Upper Tribunal Judge Mandalia