



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/20619/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2019**

**Decision & Reasons Promulgated
On 8 January 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER

Appellant

and

W A

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr J Reynolds, Counsel

DECISION AND REASONS

1. Although the Entry Clearance officer is the appellant in these proceedings, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal (“FtT”).
2. The appellant is a citizen of Nigeria, born on 12 September 2005. An application was made on his behalf for entry clearance for settlement as the child of a person settled in the UK, pursuant to paragraph 297 of the Immigration Rules. In a decision dated 5 September 2018 the respondent refused the application.

3. The appellant appealed to the First-tier Tribunal against that decision and his appeal came before First-tier Tribunal Judge Brewer at a hearing on 14 August 2019 which resulted in the appeal being allowed. Permission to appeal the decision of Judge Brewer was granted and thus the appeal came before me.

Judge Brewer's decision

4. The sole issue in the appeal before Judge Brewer was that of sole responsibility under paragraph 297(i)(e) of the Rules.
5. To summarise, Judge Brewer set out material background facts, and gave a self-direction on the burden and standard of proof which is unimpeachable. He referred at [9] to the oral evidence from the sponsor, SL, the appellant's mother, and to the parties' submissions, including a skeleton argument on behalf of the appellant.
6. In the light of the way that the sponsor gave evidence and in particular the difficulty she had in understanding even the simplest questions, and difficulty in formulating coherent responses, his view was that she struggled to follow the proceedings. Although there was no medical evidence to support the assertion made on behalf of the appellant to the effect that she was suffering from Down's Syndrome, Judge Brewer considered it appropriate to treat her as a vulnerable witness and to assess her evidence accordingly.
7. In his summary of the evidence Judge Brewer referred to the sponsor having left Nigeria in 2008 and come to the UK to study. There is reference to the evidence that the appellant was left in the care of his great-grandparents and that, at the time of the hearing before him, only the appellant's great-grandmother survived and she was in her 80s. The evidence was that the appellant's father left before the appellant was born and had never had any involvement in the appellant's life. That evidence reflected an issue that arose in the proceedings in terms of the whereabouts of the appellant's father, echoed in the appeal advanced before me.
8. The sponsor's evidence was that from 2012 she visited Nigeria every year and regularly sent money to a relative of the appellant's father who passed it on to the appellant's great-grandmother to pay for rent, food, school fees and the appellant's needs. The sponsor's evidence was that she chose the school which the appellant attended, decided what food and clothes were brought, and "in essence all of the decisions in his life". The sponsor's evidence was that she has school records and details of regular and frequent contact between her and the appellant.
9. Judge Brewer concluded that much of the evidence was supported by documents in the bundle. He pointed out that there were no records of decisions that the sponsor says that she made but that was not surprising given the nature of those decisions. He referred to one wrinkle, as it were,

in the evidence advanced on behalf of the appellant, revealed at page 178 of the bundle. That shows on a school record the name “Mr and Mrs [A]”, [A] being the family name and the name of the appellant’s father. Judge Brewer asked for an explanation from the sponsor which the sponsor was unable to provide.

10. Nevertheless, Judge Brewer concluded that given the very clear evidence by the sponsor and her mother that the appellant’s father had never had any relationship with the appellant and although there was no explanation for what appeared on page 178, he accepted the evidence that the appellant’s father had not, and does not, have any involvement in the appellant’s life. He said that “In general I found the sponsor and her mother to be credible witnesses and I accept their evidence”.
11. Judge Brewer then went on to deal with certain issues that arose in the respondent’s decision and concluded that the reasons given for refusing the application were not sustainable.
12. At [15] he said that he had detailed a lot of the sponsor’s evidence because the case turned on what the sponsor said about the issue of sole responsibility. There then followed a detailed analysis of relevant authority on the issue of sole responsibility. No complaint is made on behalf of the respondent in terms of the legal analysis of the relevant case law.
13. Judge Brewer went on to find from [22] as follows. Given the age of the appellant’s great-grandmother and the age of the appellant it was highly likely, and he accepted as a fact, that the sponsor is the sole provider of funds for the accommodation and other needs for both the great-grandmother and that of the appellant. He reiterated that he accepted the sponsor’s evidence as to her involvement in her son’s upbringing and although there had not been many important decisions, those that there were had been made by the sponsor. Dealing with issues arising in the decision letter, he rejected the respondent’s reasons for refusing the application. He concluded that the sponsor has had, and continues to have, sole responsibility for the appellant’s upbringing.
14. He then turned to consider the appeal under Article 8 outside the Rules.

The grounds of appeal and submissions

15. The respondent’s ground 1 contends that Judge Brewer was wrong to find that the sponsor was to be treated as a vulnerable witness based on the unsubstantiated suggestion that she has Down’s Syndrome. It is argued that he had failed to give adequate reasons for determining that the sponsor was a vulnerable witness.
16. In relation to ground 2, it is said that whilst Judge Brewer considered the submissions of the appellant’s representative, he completely disregarded key submissions that were made on behalf of the respondent to the effect that the sponsor and the witnesses were being led during examination-in-

chief. The Presenting Officer's ("PO's") minute or note of the hearing before Judge Brewer was referred to. It is argued that there is no recognition of those submissions in Judge Brewer's decision. That is said to tie in with what is said to have been the wholly inadequate reasoning regarding the appellant being a vulnerable witness.

17. Ground 3 contends that the sponsor was unable to provide an explanation as to why the evidence showed that the appellant's father was involved in the appellant's life. That is a reference to the school document which refers to Mr and Mrs [A]. It is argued that Judge Brewer merely stated that he preferred the evidence of the sponsor but did not address the fact that the evidence from the school was not undermined in any way.
18. As regards the PO's note which is said to have been attached to the grounds, Mr Reynolds informed me that it was not in fact attached to the grounds. I accept that it was not provided to him at least, although it is not possible to say whether or not it was actually attached to the grounds that were sent to the solicitors. However, that is not determinative of the issue that needs to be resolved in terms of the submissions that were made to Judge Brewer.
19. In submissions on behalf of the respondent, Mr Tufan relied on the grounds. It was submitted that Judge Brewer did not deal at all with the issue of contact with someone related to the appellant's father and the extent to which that might indicate that there was in fact a real issue arising in terms of whether the appellant's father is indeed 'on the scene'. It was submitted that there were no documents of any value showing that the sponsor had sole responsibility for the appellant and that the absence of the appellant's father was not adequately dealt with by Judge Brewer.
20. The issue in relation to the sponsor's vulnerability and the question of whether or not Judge Brewer was right to find that she was suffering from Down's Syndrome was reiterated. It was submitted that this was a matter that arose right at the end of the hearing with no medical evidence having been provided and no explanation as to how it came about. It was submitted that this affected Judge Brewer's consideration of the case.
21. For his part, Mr Reynolds submitted, in summary, that looking at Judge Brewer's decision overall, it could not be faulted.
22. In relation to the PO's note, its accuracy is called into question because it refers to a school receipt for payment of fees with Mr [A]'s name on it. However, none of the payment receipts has his father's name on it. They only have the appellant's name. That affects the credence that one can attach to the PO's note, it was submitted. I was referred to the appellant's birth certificate where the name of the appellant's father is given, supporting the contention that that name does not appear on the school receipts.

23. It was submitted that the evidence of the sponsor and the appellant's grandmother (who both attended the hearing before me today) was assessed by Judge Brewer and he was entitled to come to the conclusion he did in terms of accepting their evidence.
24. It was further submitted on behalf of the appellant that although there was said to be contact with a relative of the appellant's father, there was no indication that the appellant's father himself had any contact with the appellant or with anyone else. The judge considered the school report and the reference to Mr and Mrs [A]. He noted that there was no explanation for that matter but was nevertheless entitled to find that the evidence of the witnesses had established sole responsibility. The witnesses corroborated each other, and although there was what was described by Mr Reynolds as a slight 'fly in the ointment' in the assertion on behalf of the respondent that they were being led, Judge Brewer assessed the evidence overall.
25. It was submitted in relation ground 1 in terms of the sponsor having been treated as a vulnerable witness, that although it was asserted that she suffered from Down's Syndrome, in fact Judge Brewer did not come to that conclusion in response to the submission that was made. He simply found that she was a vulnerable witness and he was entitled to come to that conclusion.
26. It was accepted that there is no note from the advocate who appeared for the appellant before the FtT dealing with the matter raised in the grounds in relation to the respondent's submissions before Judge Brewer, but again it was said that the PO's note was not provided with the grounds.
27. In reply, Mr Tufan raised a matter that does not feature directly in Judge Brewer's decision in relation to bank statements. It was submitted that certain bank statements appear to show a name which is similar to, if not the same as, the appellant's father's, showing remittances to that person. It was submitted that that was a matter that was unexplained on the part of the appellant.
28. Because that was a new point raised before me, Mr Reynolds was given the opportunity to deal with it. He reiterated that it was a new point. For my part I note that this does not appear to have been an issue that was canvassed before Judge Brewer.

Assessment

29. After hearing the parties' submissions, I indicated that I was satisfied that there was an error of law in Judge Brewer's decision. I come to that conclusion for these reasons. The crucial issue in the appeal was the issue of sole responsibility. For the most part, although not exclusively, the assessment of that issue depended on the credibility of witnesses called on behalf of the appellant, namely his mother and his grandmother. Judge Brewer concluded that they were credible witnesses.

30. I am satisfied that it was part of the case for the respondent that the evidence given by those witnesses was tainted because of the way in which their evidence was given. The note provided by the PO is to the effect that submissions were made that the sponsor and her mother were being led whilst giving evidence. That contention is reflected in part in Judge Brewer's manuscript record of proceedings which I read to the parties. The note from the PO records that it was submitted on behalf of the respondent that the witnesses were not credible, that they were led, and that little weight should be given to their evidence.
31. That argument on behalf of the respondent does not feature at all in Judge Brewer's decision. It was submitted on behalf of the appellant that the fact that Judge Brewer recorded the submission in his manuscript note means that he was cognisant of it. However, in my judgement that does not answer the complaint on behalf of the respondent. It is incumbent on a judge to deal with a material argument advanced on behalf of a party and to explain why, if the argument is rejected, why it is rejected. The losing party is entitled to know why they have lost. One cannot tell from Judge Brewer's decision in this case what he made of the argument that the witnesses were led and that the credibility of their evidence was thereby affected.
32. Even if I accept that the PO's note was not provided with the grounds of appeal, there does not appear to have been any reason why the advocate on behalf of the appellant before Judge Brewer could not have been asked to provide a response to what is asserted in the grounds, with a statement or note of her own explaining her view of what transpired at the hearing in term of the submissions or the evidence of the witnesses. Having said that, the absence of such response on behalf of the appellant is not determinative because the information provided, as I have indicated, does suggest that the submission was made that the witnesses were led and that that affected their credibility.
33. I am not satisfied that there is any merit in what is argued in the grounds in terms of the suggestion that Judge Brewer was wrong to find that the sponsor was a vulnerable witness. He did not accept the contention that she was suffering from Down's Syndrome. In addition, notwithstanding the absence of medical evidence as to any condition that she may or may not be suffering from, Judge Brewer was entitled to conclude as he did in relation to her evidence for the reasons that he gave, namely in terms of what he observed about her difficulty in understanding the simplest of questions and in formulating coherent responses.
34. Nevertheless, the issue of the sponsor having been assessed as being a vulnerable witness does relate to the contention that the witnesses were (improperly) led. It seems to me that where a witness appears to have difficulty answering questions it is important that answers not be suggested to the witness so as to avoid the complaint that the evidence is not the witness's own.

35. In the circumstances, I am satisfied that Judge's Brewer's decision is marred by error of law in his assessment of the credibility of those witnesses. That error of law is such as to require the decision to be set aside.
36. Having canvassed the matter with the parties, I agree that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a fresh hearing at which the credibility of those witnesses must be reassessed. In coming to that conclusion I have had regard to paragraph 7.2 of the Senior President's Practice Statement.
37. Accordingly, the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Brewer with no findings of fact preserved.

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

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

Upper Tribunal Judge Kopieczek

2/01/2020