IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/23471/2018 ('V')
& HU/23472/2018 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th November 2020	**On 7th December 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

LAWRENCE WIREKO (1)
and
REAGAN WIREKO (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms H Gore, Counsel, instructed by Regina Spio-Aidoo
For the respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 19th November 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellants against the decision of First-tier Tribunal Judge A M Black (the 'FtT'), promulgated on 2nd January 2020, by which she dismissed their appeals against the respondent's refusal of their applications for entry clearance to settle with their mother. The appeal was on the basis of the right to respect for their family life under article 8 of the European Convention on Human Rights ('ECHR').

4. The respondent had originally refused their applications in decisions dated 23rd October 2018. She did not accept that the appellants' mother (the 'sponsor'), who lived in the UK, had sole responsibility for the appellants. While she accepted that there had been financial support, this was only one aspect of parental responsibility and the sponsor had moved to the UK in 2008. Despite the separation of 12 years, the appellants had only provided telephone call logs for a single month in October 2016, and there was an absence of evidence about prolonged contact. The respondent also did not accept that the appellants had demonstrated any serious or compelling circumstances which would make their exclusion from the UK undesirable. The respondent further concluded, for the purposes of paragraph GEN.3.1 and .3.2 of Appendix FM, that the refusal of entry clearance would not result in unjustifiably harsh consequences.

5. An entry clearance manager review decision of 1st May 2019 confirmed the original refusals, noting a single month's worth call logs; limited photographs and an absence of further evidence of claimed sole parental responsibility.

6. In essence, the appellants' claims involved the following issues:

   6.1. whether the appellants met the requirements of the Immigration Rules and in particular, whether the sponsor had sole responsibility for the appellants, noting her assertion that the appellants' father's whereabouts in Ghana were unknown;

   6.2. whether there were serious and compelling circumstances or other circumstances making the exclusion of the appellants undesirable, in particular, what were said to be the terrible circumstances of the appellants' current arrangements;

   6.3. whether the refusal of leave to enter was, in any event, disproportionate, noting the appellants' family life with their mother and the delay in the respondent reaching her decision when the applications for entry clearance had been made in 2016.

The FtT's decision

7. At §19 of her decision, the FtT noted the limited documentary evidence of contact maintained between the sponsor and the appellants, after the sponsor left Ghana in 2008, including any visits. At the time of her departure, the appellants were under the age of 10. The FtT found that emotional and practical support would have been provided by the children's grandparents and the children's legal guardian (§23). At

§24, the FtT noted that the sponsor had remitted funds; there were limited visits, and she found that there was shared, as opposed to sole, responsibility. The FtT drew adverse inferences from the legal guardian's failure to refer to his status as the appellant's guardian in his witness statement, which she saw as an attempt by him to minimise his involvement. At §26, she noted there was no suggestion that the appellants were not living in suitable appropriate accommodation; rather that they had moved from one place of accommodation to another (§28).

8. The FtT at §31 considered the appellant's appeals under article 8 outside the Immigration Rules and at §35, concluded there was no reason why they could not be housed in permanent accommodation (they were currently living in temporary accommodation) with the support of the sponsor. At §37, the FtT noted that the appellants had never lived with their British half-sibling and there was not a particularly close relationship between the appellants and the sponsor. At §38, the FtT considered the appellants' best interests but noted the stability of the arrangements for them until the recent death of their grandparents and that any temporary difficulties in accommodation could be resolved. At §39, the FtT went on to consider section 117 of the Nationality, Immigration and Asylum Act 2002 and assessed the quality of any family life between the sponsor and appellants as being very limited. At §42, the FtT concluded that the refusal of entry clearance would not result in unjustifiably harsh consequences.

9. The FtT accordingly rejected the appellants' appeals.

The grounds of appeal and grant of permission

10. The appellants lodged grounds of appeal which are essentially as follows:

    10.1. the FTT had failed to consider and apply the well-known authority of TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 and in particular, whether the sponsor had continuing control and direction over the appellants' upbringing, including making all of the important decisions in the appellants' lives. The whole of the FtT's decision was perverse and the FtT had erred at §25 of the decision when she had stated that the sponsor had shared parental responsibility with others in Ghana.

    10.2. The FtT had wrongly considered, in the proportionality assessment, the fact that the appellants were now 18 years or over rather than, at the date of the application, that the appellants were still minors. Their best interests still needed to be considered and any delay in the respondent reaching her decision could not defeat the obligation under section 55 of the Borders, Citizenship and Immigration act 2009. The FtT had wrongly considered the appellants as adults in considering the circumstances.

11. First-tier Tribunal Judge Davies initially refused permission on 7th April 2020, but renewed permission was granted by Upper Tribunal Judge Finch on 3rd September 2020, who granted permission on all grounds.

The hearing before me

The appellants' submissions

12. Ms Gore began by referring to §19 of the FtT's decision and asserting that the FtT had failed to make findings of fact as to who decided on the appellants' living arrangements. The absence of findings on material facts continued at §20 and in particular there should have been a finding on who had decided the appellants' schooling arrangements. I was referred in that regard to paragraph 52(vii) of TD:

> *"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."*

13. At §22, the FtT had failed to make findings about who had decided where the appellants would live. Ms Gore also asserted that when read together, §22 to 25 of the FtT's decision were contradictory as to whether the appellants' legal guardian in Ghana shared responsibility with the sponsor.

14. I canvassed with Ms Gore at the beginning of her submissions regarding the FtT's omission to make findings, referred to above, about whether any these criticisms had been included in the grounds on which permission had been granted. For completeness, I set out ground (1) in its entirety below:

> *"That the judge erred in law to the extent that the whole decision is perverse. That despite the substantial evidence proving that their sponsor has sole responsibility for the appellants the judge erred in law in stating in paragraph 25 of the determination that sole responsibility for the appellants has been shared with others in Ghana. That the judge completely failed to apply the test for sole responsibility as set out in TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 which clearly states that 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. The judge totally failed to direct himself on this case."*

15. I explored with Ms Gore whether in fact she was substantially seeking to amend the grounds, noting the well-known authority of Latayan v SSHD [2020] EWCA Civ 191. I was concerned Ms Gore was making specific references to omissions in fact-finding, which had not been referred to in the grounds. In response, Ms Gore indicated that she was able to rely upon these specific omissions because first, there had been a reference to the "whole" of the decision being perverse and second, the ground had referred to a failure to apply TD and therefore there had been a failure to apply material findings.

16. Ms Gore further submitted that the FtT erred in her assessment of article 8, because of the lack of findings referred to already and because of her failure to analyse the role of the legal guardian in the appellants' lives.

The respondent's submissions

17. In response, Mr Walker submitted that the FtT had been clear at §23 that a legal guardian had been identified, who had parental responsibility for the appellant. The FtT had been entitled to make the findings that she had done on the basis of the evidence before her. The evidence clearly indicated that when the appellants' grandparents had died that there had been the transfer of their parental responsibility to the guardian.

18. In the context of criticisms about the FtT's analysis of the role of the guardian, the FtT had been entitled to rely upon the lack of transparency and the guardian's attempt to downplay his role and to fail to refer to it in his witness statement (guardianship had been referred to in another document). Whilst it was accepted that it would have been preferable had the FtT not to have referred to the appellants now being adults, this was not material to the FtT's decision.

Discussion and conclusions

19. First, I do not accept that it is permissible for the scope of grounds to be expanded upon in the way that Ms Gore seeks to do. While a Counsel may, as noted by the Court of Appeal at §32 of Latayan, seek to refresh the arguments so as to present them in the most persuasive way; and grounds may be concise; the specific arguments raised by Ms Gore had simply not been pleaded. The generality of the challenge of perversity had been pinned back to the FtT's conclusion at §25 that the sponsor shared parental responsibility with others. This was quite distinct from the challenge now being put by Ms Gore that fact-finding on specific issues (choice of schooling and accommodation) had been omitted, or that there was internal inconsistency in paragraphs §22 to 26. It was also distinct from the challenge of a failure to consider and apply the authority of TD.

20. As the Court of Appeal did in Latayan, I nevertheless went on to consider the additional arguments, as well as those raised in the grounds, and I do not accept that they disclose any error of law by the FtT, for the reasons I will come on to.

21. In relation to the additional grounds, in particular, the FtT cannot be criticised for failing to make specific findings that she was never invited to make. For example, when I queried with Ms Gore, whether there was specific evidence before the FtT as to who had made decisions on the appellants' schooling, Ms Gore said that she did not have notes of the oral evidence given to the FtT (I was not directed to any written evidence on the issue). I would expect an assertion that there had been oral evidence which the FtT had failed to consider, to have been referred to expressly in the grounds, with details of that evidence. Ms Gore in fact moved away from the suggestion that there had been evidence which had been ignored, suggesting that where there were gaps in evidence, the FtT ought to have adopted an inquisitorial approach, seeking to establish evidence that would otherwise meet the requirements of TD. That is not a role or a submission that I accept can be sustained, particularly when the appellants were legally represented at the FtT hearing, by Ms Gore.

22. Instead, what the FtT was entitled to consider, was that there was "*very little documentary evidence*", particularly in relation to contact maintained, (at §19). Any challenge to the FtT's analysis of the role of the appellant's guardian, Mr Paul, can be explained, in reality, at §24, by the failure of the sponsor and Mr Paul to refer to his status as the appellants' legal guardian, suggesting a lack of transparency and an attempt to minimise his involvement in their upbringing. Put in another way, the FtT cannot be criticised for failing to analyse, in a more detailed way, the precise legal consequences of guardianship when Mr Paul, as the guardian, was unwilling to volunteer any such details. The FtT was unarguably entitled to conclude that this role included an element of parental responsibility, based on the appellant's own oral evidence on re-examination at §23:

> "*Under re-examination the sponsor told me she had 'transferred custody…to him, so he has full responsibility*".

23. I do not accept Ms Gore's additional submission that there was an inconsistency, or as her argument later developed, a lack of clarity in the FtT's findings on whether Mr Paul had sole or shared responsibility. When I asked Ms Gore to identify which parts of the findings were inconsistent, she then submitted that there was a lack of clarity, in particular, in the references in §23 to evidence being consistent "*with others, such as the appellant's grandparents, having had sole responsibility prior to that year [2016*];" and at §24, where there was reference to responsibility being "*shared throughout the appellants' lives since 2008*".

24. However, both references are clearly to evidence "*suggesting*" or being "*consistent*" with scenarios, which the FtT was analysing. The FtT's findings (as opposed to recitations of evidence) were clear, in the preceding part of §24:

> *"I accept the [sponsor] has remitted funds to the appellants in recent years, particularly for their education, but I am unable to <u>find</u> [my emphasis] that the evidence is sufficient for a finding that the sponsor "has had and continues to have sole responsibility for the children's upbringing". The length of her absence from Ghana, the ages of the children throughout, the limited visits to that country to see her children in the circumstances described by the various witnesses, including the sponsor's oral evidence of the role of Mr Forjour Paul, is not sufficient for a <u>finding</u> of sole responsibility. Rather, the evidence suggests that responsibility has been shared throughout the appellants' lives since 2008 when the sponsor left Ghana. In particular, the existence of a legal guardian to the children indicates significant responsibility for the care of the children had been ceded to Mr Forjour Paul in 2016."*

25. In summary, I do not accept that there is merit in the additional ground that there is a lack of clarity in the FtT's findings concerning shared parental responsibility.

26. In relation to the original pleaded ground (1), on the one hand, ideally, the FtT could have expressly referred to the authority of <u>TD</u> in her decision, and in particular the helpful summary at §52 of that case which considers the approach to be adopted when analysing parental responsibility. The approach is intensely fact-specific and distinguishes day-to-day caring roles, on the one hand, and ultimate parental responsibility on the other. I nevertheless conclude that when reviewed as a whole, the FtT's decision engaged fully, in a way consistent with TD, with the evidence

before her, particularly in distinguishing day-to-day caring roles from parental responsibility. The FtT specifically considered the latter in connection with the appellants' guardian. The FtT had specifically considered (and was entitled to consider) the emotional and practical support given by the appellants' grandparents and in contrast, and the limited contact between the appellants and the sponsor; and the sponsor's limited role and the limited evidence of that role presented to the FtT. I do not accept that in reaching her decision, the FtT failed to apply the principles of TD, even if she did not expressly cite it.

27. In relation to ground (2), Mr Walker fairly accepts that it would have been preferable had the FtT not referred to the appellants as being adults, as she did at §41. However, I do not regard that as amounting to an error of law such that the FtT's decision is unsafe and should be set aside. It is clear that these comments have to be read in context, and in particular where the FtT stated at §38:

> *"The appellants are no longer children but are barely adults so I consider their best interests. I also have regard to the best interests of the sponsor's British child."*

28. At §38, the FtT analysed the proportionality the refusal of entry clearance in the context of difficulties over the temporary nature of accommodation for the appellants in Ghana, and the FtT found that it was in the immediate best interests of the appellants to live with the sponsor. The FtT was clearly considering "best interests" in the context of the best interests of children. This was reiterated at §41, where the FtT had referred to the "*the appellants who are now adults albeit only just so.*" It was not the case that the FtT drew a bright line between on the one hand those who are children and those who had become adults. I am satisfied that the FtT expressly considered the appellants' best interests as she ought to have done, namely in the context of the best interests of children. To the extent that the FtT referred to the appellants as "*barely adults*", this did not, in my view, amount to an error of law in the ultimate reasoning, in what was a succinct, but satisfactory analysis of the proportionality of the respondent's refusal of entry clearance. Ground (2) is also without merit.

Decision on error of law

29. I conclude that there are no errors of law in the FtT's decision, such that it is unsafe and should be set aside. The appellants' appeals fail, and the decision of the First-tier Tribunal shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law, such that it is unsafe and should be set aside.

No anonymity direction is made.

Signed *J Keith* Date: 27th November 2020

Upper Tribunal Judge Keith