Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03696/2019

THE IMMIGRATION ACTS

Heard on: 12th March 2021 **Decision & Reasons Promulgated**
At: Manchester Civil Justice Centre (remote hearing) **On 23 March 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

HAA
(anonymity direction made)

Appellant

and

Entry Clearance Officer, Pretoria

Respondent

For the Appellant: **Mr Brown, Counsel instructed by Knightbridge Solicitors**
For the Respondent: **Mr Bates, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Somalia born in 2004. This appeal is concerned with her application for entry clearance to come to the United Kingdom to settle with her mother, the Sponsor 'S'. The Respondent refused that application on the 14th January 2019. The only matter placed in issue is whether S has had "sole responsibility" for her daughter.

2. The Appellant appealed to the First-tier Tribunal on human rights grounds. The matter came before Judge Malik, who dismissed the appeal in a decision

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dated the 3rd December 2019. Permission to appeal to this Tribunal was sought, and was granted on the 3rd April 2020. The matter came before me on the 11th January 2021, and by my decision of the 1st February 2021 I set the decision of the First-tier Tribunal aside. The three principle errors of law I found are all reflected in the First-tier Tribunal's conclusion at its §30:

> "..this evidence does not satisfy me that the sponsor had/has continuing control and direction over the appellant's upbringing given the limited evidence of this, nor that she made the important decisions in the appellant's life ***as*** inevitably the sponsor's brother from when the appellant was around the age of 3 onwards will have had day-to-day care for the appellant and other than the sponsor's say so, there is no evidence to suggest she was involved in any decision making whilst the appellant was in Somalia, such as choosing the appellant's school".

3. The first error is in the Tribunal's approach to the evidence of the Sponsor. There was nothing inherently improbable in S's testimony. Nor was there any contradiction between her statements and oral evidence. The Tribunal nevertheless appeared to reject various assertions of fact - including the matter highlighted in this passage - because it was just the Sponsor's "say-so". Nowhere did the Tribunal give any reason why the Sponsor's oral evidence on these matters should be rejected, nor why it was not on its own sufficient to discharge the burden of proof. The second error is highlighted in the added emphasis above. The fact that the Appellant was in her infancy provided with day to day care by another relative was not a matter in itself capable of defeating the claim: that TD (paragraph 297(i)(e): 'sole responsibility') Yemen [2006] UKAIT 00049. The third error was in failing to consider the guidance in TD to the effect that paragraph 297 does not require an applicant to prove that every single decision in their life has been undertaken by the sponsor in the UK. 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. Crucially, that responsibility "*may have been for a short duration in that the present arrangements may have begun quite recently*". As such the question of who chose the Appellant's infant school in Somalia could not properly be treated as determinative of the decision in the appeal, given that more recent evidence demonstrated S's *current* involvement in decisions about her education etc.

4. In remaking the decision I heard oral evidence from S. This was entirely consistent with the written and oral evidence she has given previously save that she updated the Tribunal on matters arising since the matter came before the First-tier Tribunal.

The Evidence/Preserved Findings

5. The family history presented is as follows. The Appellant's parents, both Somali nationals at the time of her birth, were married in Mogadishu in 2003. They were divorced before the Appellant was born in October 2004. S and the Appellant lived with S's brother and his family. Her father has played no role in her life. He was contacted for the purpose of the entry clearance application to confirm this, which he did. The First-tier Tribunal was satisfied that this was true, and that finding has been preserved.

6. In 2007 S travelled to Yemen in order to work, leaving the Appellant in the care of her brother and sister-in-law. She did so because the family were struggling to survive. Her brother was poor and had six children of his own. S thought if she could find work in Yemen she would be better able to help support the household. During this period she regularly remitted money directly to her brother and maintained contact by use of calls made using cheap rate telephone cards or prepaid SIMs. It was whilst S was in Yemen that she met the man who was to become her second husband. He had been recognised as a refugee in the United Kingdom and after they married she travelled here to live with him. It is S's evidence that she continued to financially support her daughter, and to take all material decisions about her upbringing. Her brother and sister-in-law continued to look after the Appellant on her behalf. It is S's evidence that she has always wanted to bring her daughter to live with her here, but her second husband was reluctant to support her. This caused difficulties between them and she has now in fact left him as a result.

7. The Appellant's uncle died in 2017. Shortly thereafter his wife told S that she could no longer care for the Appellant. After her brother's death S made alternative arrangements for the Appellant. A family friend, a Mr Mohammad Mohammad Hussain, agreed to look after her. He and S agreed that he would take the Appellant from Somalia to Uganda where she would be able to attend boarding school. Having addressed itself to these facts the First-tier Tribunal described Mr Hussain [at its §31] as the Appellant's "legal guardian": in fact, the parties agree, there is no evidence at all to support a conclusion that Mr Hussain has somehow, in either Somalia or Uganda, assumed legal responsibility for the Appellant. He can more properly be described as her *de facto* guardian inasmuch as he is the adult who brought her to Uganda and delivered her to boarding school. At the time of the appeal before the First-tier Tribunal this was the arrangement then in place. However at the date that I remake the appeal, some 16 months later, the situation has changed again.

8. In her most recent evidence S explains that during 2020 Mr Hussain decided to return to Somalia – he told her that this was because he was "unable to stay in Uganda". I took this to mean because he was living there illegally, but it may have related to some other practical or emotional issue. Before he left Mr Hussain put S in touch with another family friend living in Uganda, a Mrs

Fardowza Mukhtar Muhumad. This lady is now caring for the Appellant, because the boarding section of the school has closed and she is now having to attend as a day pupil. S is now sending money directly to Fardowza for her daughter's upkeep.

9. At the time of the application for entry clearance S had returned to Somalia on two occasions, spending about one month with her daughter in 2015, and about two months in 2017. She explained that she had been unable to do this whilst she was in Yemen because she had been living there without immigration papers. After she came to the United Kingdom there was further delay, first in obtaining her British passport and then the documents required to get into Somalia. More recently S visited her daughter in Uganda. She travelled at the beginning of the pandemic, in January 2020 and stayed there for two months. It was a very worrying time because the school closed its boarding section and Mr Hussain decided to return to Somalia. S had to take a decision about whether the Appellant went with him. She did not want her daughter to go to Somalia. Its dangerous there, especially for young women, who are assaulted or raped by bad people like al-Shabaab. S would be very worried for her if she lived in Somalia – she worries for her in Uganda but Somalia is much worse. S decided that the Appellant should stay in Uganda, and carry on attending school as a day pupil. She would live with Fardowza and her child. The bundle contains photographs of mother and daughter taken during that trip.

10. In respect of the Appellant's school the oral evidence of S was that it cost her about US $50 per month for the actual schooling, plus it had been an additional US $200 for the boarding fees. The Appellant has been unhappy there. She sees the other children arriving/going home with their families and she feels alone, and lonely. She misses her mother and often cries during their daily telephone calls. The school is called the Katwe Noor Islamic School. It has provided two letters, both addressed to S. The first is dated the 23rd August 2019. It says that the Appellant is in good condition and is happy there except she "always misses her parents". In light of the preserved finding that the Appellant's father has played no role in her life I treat this plural as a typographical error. The second is dated the 1st February 2000. This letter corroborates S's evidence that the boarding section was then closing down. The author, headteacher Kigozi Arafat, adds: "On a sad note, she was not happy with her life here in Uganda without her mother, she was pleading that she was in need of her family". A separate document outlines the fee structure: having used online currency tool OANDA to converted the Ugandan shillings shown to US dollars Mr Bates was satisfied that this was broadly consistent with S's oral evidence about the costs. The bundle contains receipts for payment issued by the school, and money transfer receipts showing S to be sending money to Uganda in varying monthly amounts of between £320 and £400. At the beginning of 2020 these were to Mr Hussain; from May onwards they were to Fardowza Muhumad.

11. In respect of contact it was the oral evidence of S that this takes place using whatsapp and other free social media messaging services. She last spoke with the Appellant on the morning of the hearing. They speak at least once per day, sometimes more. The Appellant is frequently upset during these calls. She is getting older and needs her mum to be there for her and explain the changes that are happening to her as she gets older. These things are difficult by telephone.

12. The Entry Clearance Officer took no issue about the ability of S to adequately maintain and accommodate her daughter. Before me Mr Bates was satisfied that this remained the position. I had sought clarification, since there has been a material change in circumstance in that S has now left her husband, but Mr Bates was satisfied on the documentary evidence produced that S is, as she claims, working three jobs in order to support this application: she has produced P60s, employer's letters, payslips and bank statements. These show that in the last tax year she earned £8829 from Mitie Limited, £4856 from ISS United Kingdom Ltd and £6569 from Essential Hygiene Ltd. Her most recent bank statement shows a balance of over £10,000.

13. I now proceed to set this evidence against the applicable legal test. Before I do so it is appropriate to note that having had the opportunity to hear directly from S I found her to be a wholly credible witness. Her evidence has been consistent, both internally and with the documentary evidence produced.

Legal Analysis and Findings

14. On the 17th August 2018 the Appellant made an application for leave to enter as the child of a person present and settled in the United Kingdom. Although the Entry Clearance Officer's decision makes reference to the section of Appendix FM concerned with applications to join a parent with limited leave to remain, the parties are in agreement that the relevant part of the Immigration Rules is still to be found at paragraph 297: S has had, at all material times, settled status since she became a British citizen since 2013. The single ground for refusal was that the Appellant had not demonstrated that S -her biological mother - has had "sole responsibility" for her upbringing. The burden in proving this matter lies on the Appellant and it must be discharged on the civil standard of a 'balance of probabilities'.

15. The leading guidance on the meaning of "sole responsibility" remains TD (Yemen):

> *"Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad.* ***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***. *However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".*

16. At its §52 the Tribunal expands on this guidance:

> 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".

17. It was the finding of the First-tier Tribunal that the only parent who has been involved in the Appellant's upbringing is S. It also appears to be accepted that S does have at least some involvement in her daughter's life – that this is so might be evident from the fact that she sponsors this application, but beyond that there is the evidence of remittances, the photographs of the visit and the correspondence from the school, as well as the credible oral evidence of S herself.

18. The issue however arises as to whether S has exercised 'sole responsibility' in the context of the rule, or whether she has in effect abdicated some of that responsibility to other carers - to her brother and his wife, to Mr Hussain and now to Fardowza. I remind myself that even if S is the only parent involved in the child's upbringing, she may not have sole responsibility. The test is whether she as a parent has had control and direction over the Appellant's upbringing, including making the important decisions in the child's life. My findings on that matter are as follows.

19. I accept that when S travelled to Yemen in 2007 she did so in order to work. Her evidence that her family were living in dire financial circumstances is consistent with the circumstances known by this Tribunal to have existed in that country then: see for instance HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022. I found her evidence on this matter to be credible. It has been this Tribunal's long experience in hearing cases involving Somali nationals that many parents have become dislocated from their children by war and poverty. The arrangements entered into by these family members are in no way atypical. I am satisfied that when S went to Yemen as the sole parent of her daughter it would have been she who decided to leave her in the care of her brother and his wife. I accept that she continued to send money home, because that was the purpose of her migration. I accept that she would continue to do so because it would have been in her daughter's best interest. I am unable to make a finding on whether S was during this period of her daughter's early life having continuing "control and direction" over her - given her young age it seems the opportunities to do so would necessarily have been limited. A young child simply needs love and sustenance day to day – this would have been provided by her uncle and aunt.

20. That uncertainty does not however matter for the purpose of my decision. That is because it is quite clear on the evidence before me that at least since 2017 when her brother died it is S who has been in control of all of the major decisions in the Appellant's life. On the balance of probabilities I am satisfied that when the Appellant travelled to Uganda in order to go to boarding school she did so at the request of her mother – and financial provider – rather than because Mr Hussain, a family friend, decided that it would be a good idea. No alternative explanation is offered as to why this man would elect to take over the care and control of a 12 year old and decide to place her in boarding school in another country. The most likely explanation is the one that is offered on the evidence: he did so at the request of S, a family friend. Similarly I can see no reason to reject the evidence about the current position, that Fardowza has now taken over the role played by Mr Hussain. I entirely accept Mr Bates' point that it would have been immensely helpful to have had some evidence from Mr Hussain, or Fardowza, or the Appellant herself who is now 14 years old. Its absence is however not fatal to the appeal. The overall account is plausible, and on the evidence before me, demonstrated on balance to be true.

21. As I observed at hearing, had the initial arrangement persisted, it is in my view doubtful that the Appellant could today succeed in an application under paragraph 297. Had she remained with her aunt and uncle, the arrangement originally conceived as temporary and necessary would, over the years, perhaps inevitably have drawn closer to a *de facto* adoption. The death of S's brother changed all of that. Although no death certificate has been produced, there was clearly a dramatic change in circumstances post 2017 in that the Appellant was taken to Uganda: I am therefore prepared to accept the oral evidence is in itself capable of discharging the burden of proof on this point. Since the Appellant arrived in Uganda there is a clear chain of command that can be traced between mother and daughter. When the school communicates, it does so with mother, albeit acknowledging her in-country guardian. Numerous remittances, for what are substantial and regular sums, are produced. S has now visited her daughter three times, and given wholly credible oral evidence about the choices she was faced with at the outset of the pandemic. It was she who decided that her daughter was to stay in Uganda rather than risk going back to Somalia with Mr Hussain. It was she who placed the Appellant with Fardowza and decided she should remain at the Katwe Noor school despite her unhappiness. These are important decisions in the Appellant's life, and I am satisfied that no adult other than her mother is able to take them. It follows that on the balance of probabilities the Appellant has discharged the burden of proof and the appeal is allowed.

Anonymity Order

22. The Appellant is a child. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No

1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

23. The appeal is allowed on human rights grounds with reference to paragraph 297 of the Immigration Rules.

24. There is an order for anonymity.

Upper Tribunal Judge Bruce
15th March 2021