Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21408/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 28th June 2021	**On the 5th July 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

AK
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Mr R Sharma, Counsel, instructed by Visa Legal
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in this appeal following the decision of a panel of the Upper Tribunal (Upper Tribunal Judges Kopieczek and Norton-Taylor), promulgated on 28 February 2020, by which the decision of the First-tier Tribunal was found to have contained errors of law and was accordingly set aside. The error of law decision is appended to this re-making decision.

2. This appeal concerns a citizen of Cote d'Ivoire, born in 2007, who applied for entry clearance in July 2018 to join her mother, Ms K (the sponsor) in the United Kingdom. That application was predicated on paragraph 297 of the Immigration Rules (the Rules) and was treated by the respondent as a human rights claim. The claim was refused by a decision dated 20 September 2018. It was not accepted that the sponsor had sole responsibility for the appellant's upbringing, nor was it accepted that there were serious and compelling family or other considerations making the exclusion of the appellant undesirable. No other aspects of paragraph 297 of the Rules were disputed.

3. In brief summary, the decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's refusal of the human rights claim was set aside because the judge failed to take proper account of medical evidence relating to the appellant's grandmother's state of health. This error had a material bearing on both the sole responsibility and serious and compelling reasons issues. A finding of fact that the sponsor had been in regular contact with the appellant was preserved.

The evidence

4. At this re-making stage of proceedings, I have been provided by a bundle from the appellant, indexed and paginated 1-106 (this includes the insertion of an additional items of evidence extracted from an old the bundle), together with evidence provided with the original human rights claim, and the respondent's refusal of that claim.

5. Although it had been contemplated that oral evidence might be taken from a number of individuals, in the event only the sponsor attended the hearing. A full note of her oral evidence is contained in the record of proceedings. In essence, she answered questions relating to her involvement in the appellant's upbringing over the course of time, and explanation why her brother had been named on the appellant's birth certificate, and the appellant's current living arrangements in light of the grandmother's deteriorating health.

Findings and conclusions

6. I can set out my findings and conclusions in this appeal briefly. This is because, having considered the documentary evidence and heard the sponsor's oral evidence, Mr Lindsay accepted the following:

    (a) that the DNA report proved that Mr KFK (the sponsor's brother) was not the appellant's father;

    (b) that the sponsor had given clear and credible evidence on all relevant issues;

    (c) that there were no outstanding concerns on the respondent's part;

    (d) that all constituent elements of paragraph 297 of the Rules were satisfied; and

    (e) that the appeal should be allowed.

7. I have no hesitation in concluding that Mr Lindsay's considered concessions were properly made, having regard to the evidence as a whole. Whilst there had indeed been a number of controversial matters in the lead up to the resumed hearing, the DNA report, other evidence contained in the appellant's bundle, and the sponsor's compelling oral evidence, were in my judgment clearly sufficient under paragraph 297(i)(e) of the Rules, as regards sole responsibility. By way of example, the sponsor had clearly articulated her directing role in all matters going to the core of the appellant's upbringing, such as education and health, and her explanation for why her brother had been named on the birth certificate was consistent and plausible.

8. Therefore, I find that the appellant's biological father has played no role in her life whatsoever, that the sponsor has indeed had sole responsibility for the appellant's upbringing throughout, and that all other criteria under paragraph 297 of the Rules are satisfied.

9. It follows from this, and in light of TZ (Pakistan) [2018] EWCA Civ 1109, that the respondent's refusal of the appellant's human rights claim constitutes a disproportionate interference with the family life enjoyed with the sponsor, and that the refusal is therefore unlawful under section 6 of the Human Rights Act 1998.

10. The appellant's appeal is accordingly allowed.

11. I wish to add a further comment on Mr Lindsay's approach in this appeal. It is in my view highly commendable on his part to have adopted the position that he did. His cross-examination of the sponsor was entirely appropriate and was directed at the matters of outstanding controversy between the parties. He quite clearly absorbed and considered the sponsor's responses and placed these in the context of the

documentary evidence as a whole. Fair and realistic positions taken by representatives are always appreciated by the Upper Tribunal.

Anonymity

12. Given that the appellant is still a child, it is appropriate to maintain the anonymity direction made when this appeal was at the error of law stage.

Notice of Decision

13. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

14. I re-make the decision by allowing the appeal on Article 8 ECHR grounds.

Signed: *H Norton-Taylor* Date: 29 June 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. Whilst the appellant has succeeded in her appeal, certain aspects of the case have required the consideration of evidence is not provided to the respondent when the application for entry clearance was made.

Signed: *H Norton-Taylor* Date: 29 June 2021

Upper Tribunal Judge Norton-Taylor

APPENDIX: THE ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21408/2018

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2020

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A K
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel instructed by Visa Legal
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Cote d'Ivoire born in 2007. On 2 July 2018 she made an application for entry clearance as a dependent child. On 20 September 2018 that application was refused with reference to paragraph 297(i)(e) and (f) of the Immigration Rules (sole responsibility and serious and compelling family or other considerations). In addition, the Entry Clearance Officer was not satisfied as to the relationship between the appellant and the sponsor, PK, her mother. The application was also refused with reference to paragraph A39 of the Immigration Rules because an approved TB certificate was not provided.

2. On review by the Entry Clearance Manager, the refusal in relation to the TB certificate was withdrawn.

3. The appellant appealed against the decision to refuse entry clearance and her appeal came before First-tier Tribunal Judge Kimnell ("the FtJ") at a hearing on 26 July 2019. In the light of DNA evidence, at the hearing before the FtJ the relationship between the appellant and the sponsor was no longer contested and that matter was resolved in favour of the appellant.

The FtJ's decision

4. The FtJ summarised the evidence given by the sponsor. She said that it was her brother's name on the appellant's birth certificate (rather than the appellant's father's). That was because the sponsor did not know the whereabouts of the appellant's real father (Jacque) and it was a requirement in Cote d'Ivoire for the father's name to be given on the birth certificate. Hence the sponsor's brother, KFK, was named as the father. The FtJ noted that although KFK was present in the UK he did not attend the hearing to give evidence.

5. The sponsor's evidence was that the appellant's grandmother had been acting as guardian under a formal arrangement and money had been sent to support the appellant. It was her mother who had day-to-day care of the appellant but she had now fallen ill and was unable to care for her.

6. The FtJ referred to two documents dated 23 April 2018 in which the sponsor and KFK are named as parents, delegating the rights, obligations and interests in the appellant to her grandmother, in terms of custody, care, instruction, education, supervision and legal administration. A second document of the same date refers to the sponsor's responsibility for the appellant. The FtJ also referred to the evidence that KFK's name as the appellant's father is given in school documents, the explanation being that this was taken from the birth certificate. The FtJ noted that there was no DNA evidence in relation to KFK.

7. There was evidence of money having been sent by the sponsor for rent and support, both for the appellant and her grandmother. The sponsor also said that she helped her brother who assisted with the appellant's care when not studying. However, he had returned to school as from September 2018. The sponsor's evidence was that she was last in Cote d'Ivoire in 2017 and had returned twice since coming to the UK. She came to the UK as a spouse but that relationship was now finished.

8. In his conclusions, the FtJ said that the issue of paternity was "very murky", noting that there was no DNA test to provide independent evidence as to the true relationship between KFK and the appellant, but again noting that he did not attend the hearing to give any direct evidence on the point.

9. The FtJ found that the explanation for KFK being on the appellant's birth certificate as the father was "unpersuasive". He said that there was no evidence to establish that it was a legal requirement in Cote d'Ivoire to nominate a father on the birth

certificate, much less a person who is not in truth the father of the child in question. He found that it would have been possible to nominate Jacque as the father, since that is who is said to be the real father.

10. He went on to find that it was not possible on the evidence to find that KFK was the appellant's father and he could not, therefore, make a finding that both parents are present and settled in the UK. He found it more likely that the appellant's father remains living in Cote d'Ivoire.

11. He decided that given the production of false information in an official document, that is the birth certificate, it was difficult to accept other parts of the sponsor's evidence unless supported by some reliable independent document or other material.

12. Nevertheless, he concluded that it was more probable than not that the father, whoever he may be, has not played much of a role in the appellant's upbringing because one of the documents dated 23 April 2018 from the Office of the Guardianship Judge clearly states that it is the grandmother who has custody and care of the appellant and who has provided for her education and so forth.

13. The FtJ accepted that the sponsor had been in regular communication with the appellant and that she had provided monetary support. Noting the sponsor's contention that she has had sole responsibility and had always taken the major decisions in her daughter's life, he said that she plainly knew that one of the requirements of the Rules was 'sole responsibility', she having said as much in her closing submissions. However, he found that the evidence did not support that contention.

14. He concluded that the evidence is clearly that she has not had sole responsibility and that the appellant's grandmother over the last 10 years has had more responsibility for the appellant's care and direction of her life than the sponsor in the United Kingdom, who left her daughter when she was only 8 months old.

15. He found that the evidence of the second document dated 23 April 2018 from the Office of the Guardianship Judge was "highly unsatisfactory". Both documents, he observed, were made long after the appellant's grandmother took responsibility for her upbringing and were thus somewhat in conflict. Referring to the decision in *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049, the FtJ concluded that the appellant had failed to show that the sponsor had had sole responsibility as explained in *TD*.

16. Referring to paragraph 297(i)(f) (serious and compelling family or other considerations making the child's exclusion undesirable) he referred to evidence that the appellant's grandmother was unwell. The evidence he referred to is a medical certificate dated 25 October 2017 which states that the appellant's grandmother had been suffering from bile infection with spontaneous fits, since 19 October 2017. The certificate confirmed that she had viral hepatitis with decompensating anaemia and

yellowing of the extremities. At that time, she was said to be unable to work for an indeterminate period until completely cured.

17. The FtJ noted the sponsor's evidence that the medical situation remained unchanged. However, the FtJ concluded that given the sponsor's unreliability as a witness he was unable to accept the truth of that assertion without further medical evidence from a medical practitioner in Cote d'Ivoire. In any event, he said that the sponsor had not been present in Cote d'Ivoire over recent months and thus could give no direct evidence on the point because of a lack of personal knowledge. He also pointed out that there was a full-time paid servant living in the house and the appellant's grandmother was sufficiently recovered to enable the appellant's brother, who was offering assistance, to return to his studies. He thus concluded that the appellant had not established that she met the requirements of paragraph 297(i)(f).

18. In relation to Article 8 of the ECHR, he found that there was family life between the appellant and the sponsor because they are biologically mother and daughter. He also accepted that because the sponsor had sent money from the UK and communication had taken place, there was a bond of dependency and affection.

19. Nevertheless, he pointed out that since leaving in 2008 the sponsor had returned to Cote d'Ivoire only twice to see the appellant who was left in the care of her grandmother at the age of only 8 months. He found that the appellant has a very strong family relationship with her grandmother as well as with the sponsor.

20. In summary, he concluded that there were not "sufficiently serious consequences" arising from the decision to refuse entry clearance such as to engage Article 8. The appellant would remain in Cote d'Ivoire being brought up by the person who has had sole responsibility for her care and upbringing since she was 8 months old. Even if proportionality did need to be assessed, he found that the appellant coming to the UK would disrupt her life significantly, removing her from the home in which she has had a stable upbringing since the age of 8 months, and removing her from the care of her grandmother who has been her *de facto* parent. Her maintenance, accommodation and education would continue. Bearing in mind the legitimate aim of the maintenance and enforcement of immigration control in the public interest, that being a weighty factor, the decision did not amount to a disproportionate interference with the appellant's Article 8 rights.

The Grounds of Appeal

21. The grounds in relation to the FtJ's decision, in summary, contend that his conclusions in relation to sole responsibility fail to understand the cultural issues surrounding the need for the name of a father on the birth certificate in Cote d'Ivoire. He thus failed properly to assess the evidence in relation to why the sponsor's brother's name appeared on certain documents as the appellant's father, in particular the birth certificate.

22. It is also argued that the FtJ failed to place "due weight" on the sponsor's financial contributions towards the appellant's care when determining the issue of sole responsibility.

23. It is further contended that the FtJ misunderstood the documents dated 23 April 2018 in concluding that those documents from the Office of the Guardianship Judge were in conflict with one another.

24. As regards the issue of serious and compelling family or other considerations, the grounds argue that the FtJ failed to have regard to the full extent of the medical evidence. He had only mentioned the medical certificate dated 25 October 2017 but did not consider later medical evidence dated 4 October 2018 which referred to, amongst other things, the appellant's grandmother suffering from a neurological condition described as a Meningeal Syndrome caused by a subarachnoid haemorrhage. Thus, the FtJ had not assessed the issue of serious and compelling family or other considerations in the context of all the evidence as to the seriousness of her condition.

25. The grounds also take issue with the FtJ's conclusions in relation to Article 8 in terms of the best interests of the appellant.

Assessment and Conclusions

26. At the hearing before us, Mr Jarvis accepted that the FtJ had failed to take into account the full range of medical evidence in relation to the appellant's grandmother's health. It was further accepted that this amounted to a material error of law requiring the decision to be set aside. Although primarily relating to the issue of serious and compelling family or other considerations, it was accepted that the error of law had a potential impact on the issue of sole responsibility and thus the FtJ's findings on both issues could not stand. However, it was not conceded that in a re-making of the decision the appeal should be allowed.

27. Whilst the FtJ's decision otherwise constitutes a detailed and thorough assessment of the evidence, we agree that the decision is marred by error of law in its failure to consider all the medical evidence that was before the FtJ. In addition to the medical report to which the FtJ referred there is a report dated 4 October 2018 which states that the appellant's grandmother suffers from a neurological condition and that she has suffered from severe headaches for a number of years. Her neurological history is said to date to 4 October 2018 and is "marked by left hemicranias associated with a right-sided hemicorporal deficit with aphasia. The brain scan shows intracranial suppuration". The report continues in stating that she was hospitalised from 19 September 2018 with a left frontal abscess associated with a frontal subdural empyema. In April 2018 there was an abrupt recurrence of headaches associated with grand mal epileptic seizures and the examination revealed "discreet meningeal syndrome with no sign of localisation deficit suggesting a subarachnoid haemorrhage confirmed by lumbar puncture". The report states that her very impaired general condition meant that there was an indefinite total incapacity for work.

28. A further report of the same date refers to her suffering from discreet meningeal syndrome such that she is unstable and does not understand the meaning of questions and that this is associated with a neurological condition. The report continues that her condition requires immediate care accompanied by constant surveillance in an authorised hospital.

29. All the medical reports are both in the appellant's and the respondent's bundles.

30. In the light of the respondent's concession as to the error of law, and our own assessment of the FtJ's decision in that context, we conclude that the decision must be set aside and re-made. We do not consider that it is appropriate for the appeal to be remitted to the First-tier Tribunal, having regard to the Senior President's Practice Statement at paragraph 7.2.

31. For the avoidance of doubt, we should say that we do not consider that there is any merit in the complaint about the FtJ having failed to take into account cultural issues in relation the appellant's uncle's name being on her birth certificate. The FtJ was right to point out there was no evidence to support the contention that it was a legal requirement to nominate a father on the birth certificate. He was entitled to find that the evidence in this respect was not credible. Nevertheless, given that the decision is to be re-made, it is a matter for those representing the appellant as to whether any further evidence in this respect is to be forthcoming.

32. As to what findings of fact are to be preserved, the parties are to have regard to the directions set out below. As indicated at the hearing, however, we do not accept Mr Sharma's submission that it should be a preserved finding as set out at [27] of the FtJ's decision that it is more probable than not that the appellant's father has not played much of a role in the appellant's upbringing. That is a matter which will require further assessment at the resumed hearing. We do, however, agree that one of the preserved findings will be as contained in the first sentence of [28], namely that the sponsor has been in regular communication with the appellant and has provided monetary support.

33. Again, it is necessary to record in this decision the observations we made at the hearing in relation to KFK and our view that at the next hearing consideration will be given not only to the fact that his name appears on the appellant's birth certificate but also on the documents dated 23 April 2018 recording him as the appellant's father, and that at questions 46 and 80 of the Visa Application Form, he is confirmed as the appellant's father. If KFK does not attend the hearing to give evidence in support of his witness statement, that is a matter that is likely to affect the weight to be attached to his evidence.

34. The parties are to have careful regard to the directions set out below.

DIRECTIONS

(1) In respect of any person whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there is no need for any further examination-in-chief. Any such witness statement must be filed and served no later than seven days before the next hearing.

(3) All further evidence relied on by either party must be contained within a supplementary, paginated and indexed bundle and must be filed and served no later than seven days before the next hearing.

(4) No interpreter will be provided by the Tribunal for the next hearing unless specifically requested on behalf of the appellant with reasons being given for that request.

(5) At the next hearing, the parties must be in a position to make submissions as to what findings of fact made by the FtJ can be 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 her or any member of her 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 24/02/2020