IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002973
First-tier Tribunal No: HU/01149/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

KILLIAN LOIC MEHDY KEITA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr A Steadman, Counsel instructed by Calices solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Friday 14 April 2023

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cartin promulgated on 30 November 2021 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 13 January 2021, refusing his human rights claim made in the context of an application for leave to enter to join his mother ("the Sponsor") who is now a British citizen.

2. The Appellant is a national of and resident in the Ivory Coast. He is now aged twenty years but, at the date of the application made for entry clearance, he was (just) under eighteen years old. The Sponsor came to the UK from the Ivory Coast in 2014, leaving the Appellant in the care of

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his grandmother. The application for entry clearance, made on 24 September 2020, was based on paragraph 297 of the Immigration Rules ("Paragraph 297") as it is claimed that the Sponsor has sole responsibility for the Appellant. It is claimed that the Appellant's father had left the family a few months after the Appellant's birth and his whereabouts were unknown. It was also claimed that the Appellant's grandmother could no longer look after the Appellant due to her age and ill-health.

3. The application under Paragraph 297 was refused by the Respondent on the basis that it was not accepted that the Sponsor had sole responsibility for the Appellant. It was accepted that she had sent some money to the Appellant and had visited the Ivory Coast but it was not accepted that the money was used for the Appellant's maintenance and upkeep. It was not accepted that the Sponsor's travel was for the purpose of visiting the Appellant. It was not accepted that the Appellant was unaware of his father's whereabouts nor was it accepted that the Appellant's father was no longer involved in the Appellant's life. The Respondent was therefore not satisfied that the Sponsor had sole responsibility for the Appellant. Nor was it accepted that the Appellant's grandmother could no longer care for him. An issue was also raised about the Sponsor's ability adequately to maintain and accommodate the Appellant. The Respondent did not accept that there were "exceptional circumstances" justifying entry clearance outside the Immigration Rules based on Article 8 ECHR.

4. The Judge accepted that the Sponsor had provided some financial support to the Appellant. He also accepted that the Sponsor had visited the Appellant on occasion between 2015 and 2018 and had maintained "a relationship of some form …remotely and briefly in person over the years since 2014". He accepted that family life existed between them.

5. In relation to Paragraph 297, the Judge did not accept that the Appellant had been living with his grandmother as he claimed due to an inconsistency in addresses between the one given in a report carried out by "a legal officer" and the witness statements when compared with the appeal notice, school document and the Appellant's passport (see [40] to [42] of the Decision). The Judge considered it likely that the Appellant might retain some contact with his father and "in fact lives with him".

6. The Judge also considered why the Sponsor had not applied for the Appellant to join her for many years after she came to the UK and concluded that "[t]he inference from this, is that there was another party who objected to the Appellant being taken abroad, namely his father".

7. The Judge concluded that the Appellant's father had "not abdicated responsibility for the Appellant" and therefore refused to accept that Paragraph 297 was met. Since that was the only basis upon which the Appellant relied in his Article 8 claim, the Judge dismissed the appeal against the refusal of the human rights claim.

8. The Appellant appeals on four grounds as follows:

Ground one: the Judge adopted the incorrect standard of proof

Ground two: the Judge reached findings on an unfair basis

Ground three: the Judge drew inferences which were not justified on the evidence

Ground three: the Judge failed to consider all the evidence.

9. Permission to appeal was refused by First-tier Tribunal Judge Komorowski on 21 January 2022. However, following renewal to this Tribunal permission to appeal was granted by Upper Tribunal Judge Sheridan on 27 September 2022 in the following terms so far as relevant:

> "... 2. The judge (JFTT Cartin) appears to have attached significant weight to what is described in the decision as 'conflicting addresses' for the appellant's family in Ivory Coast. It is arguable that it was procedurally unfair to treat this as damaging to the appellant's credibility without 'putting it' to the appellant, given that the issue appears to not have been raised either in the Refusal Letter or by the Presenting Officer at the hearing.
>
> 3. I do not restrict the grounds that can be pursued."

10. The matter comes before me to decide whether the Decision does contain an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

11. I had before me a core bundle of documents relating to the appeal, and the Appellant's bundle ([AB/xx]) and Respondent's bundle before the First-tier Tribunal. I also had an additional bundle for the hearing before me prepared by the Appellant's solicitors which includes documents which were not before the First-tier Tribunal and which are not therefore relevant to my consideration whether there is an error of law in the Decision. Those were not accompanied by any rule 15(2A) application. On the morning of the hearing, the Appellant's Counsel also produced a further document which appears to relate to the Appellant's inability to trace his father. Again, that was not before the First-tier Tribunal and is not accompanied by any rule 15(2A) application explaining why it could not have been produced earlier. I also had a transcript of the record of proceedings.

12. Having heard submissions from Mr Steadman and Ms Isherwood, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

13. The focus of Mr Steadman's oral submissions was on grounds two to four. Before I turn to those grounds, I deal with the first ground as pleaded.

14. The thrust of the first ground as pleaded relates to the finding at [39] of the Decision that "there [was] nothing from the school which confirms the absence of a father being involved in school life" and "there [was] also nothing which confirms the sponsor as being the main point of contact or the sole payer of school fees over the years". It is said that this discloses the adoption of the wrong standard of proof. The way in which Mr Steadman made the submission (insofar as he dealt with this ground) was to say that, whilst the burden of proof is on the Appellant, the Appellant cannot be required to prove a negative.

15. I do not consider that there is any error disclosed by the first ground. The Judge set out the relevant test which applies to Paragraph 297 and the issue of sole responsibility at [33] to [35] of the Decision by reference to the relevant case-law. He then proceeded to do as that case-law suggested by referring to the evidence as to the facts and making findings whether the evidence did or did not show that the Sponsor had sole responsibility for the Appellant. That was all that the Judge was doing at [39] of the Decision. I fail to understand how the use of the word "confirm" can be understood as an application of the criminal standard as is pleaded.

16. In this connection, I do not accept either that there is any inconsistency between what is said at [39] of the Decision when compared with [28] of the Decision (as Mr Steadman submitted). At [28] of the Decision, the Judge accepted that "[t]here [was] some evidence of financial support being provided in the form of payments of school fees from the sponsor for the Appellant". However, there is a difference between accepting that some financial support has been provided and accepting that the Sponsor was solely responsible for that financial support. Nor do I consider that the Judge's finding in this regard was perverse as is suggested at [11] of the grounds. The Judge took into account the documentary evidence from the school as is clear from [28] of the Decision. It was not unreasonable for him to find that, whilst that did show some payment of school fees, it was not sufficient to show that the Sponsor has sole responsibility for the Appellant's schooling. The remainder of ground one as pleaded is merely a disagreement with the Judge's finding in this regard.

17. Turning to the remaining grounds, I take those together as Mr Steadman made his submissions in that way.

18. The procedural unfairness which is raised by the second ground concerns a point which it is said was not put to the Sponsor when she gave evidence and was not raised by the Respondent. This was also the point which gave rise to the permission grant and therefore I start with it.

19. The Judge made a finding that the Appellant probably lived with his father and not his grandmother as he claimed. The passage relied upon by the Appellant as disclosing an error of law is as follows:

> "40. There are in my view a number of conflicting addresses provided for the Appellant's family in Ivory Coast. Firstly, his appeal notice and

> the school insurance document gives the address of: 26 BP 1091 Abidjan, Cote D'Ivoire and 26 BP 1091 Abi 26, respectively.
>
> 41.The Appellant's mother's Ivory Coast passport (at B3), issued on 9 May 2011, has her (Ivory Coast) address as being: 10 BP 2697 Abidjan 10 (Site: 165). This accords with the address given by the Appellant's grandmother in her witness statement: 10 BP Abidjan 10. The address is described somewhat differently by the legal officer in their report but I read nothing into that as this could simply be that a different format has been adopted; i.e., street names instead of the post box number.
>
> 42.However, the Appellant's own passport (at B1), issued on 27 February 2019, gives his address as being: 01 BP 424 Abidjan 01 (Site: 172). This is plainly a different address to his mother and grandmother's address. The inference I draw from these divergent home addresses, is that the Appellant does not in fact live at his grandmother's home, but elsewhere. The most obvious candidate being with his father, who it has been claimed he has no contact with. The evidence, coupled with the above-mentioned lack of evidence that his father is not involved in his life and the somewhat patchy evidence of financial support, points towards a conclusion that it is more likely than not that the Appellant does have contact with his biological father and in fact lives with him."

20. Whilst I fully accept that the Sponsor was not asked to explain this discrepancy in addresses, it is clear from the record of proceedings that questions were asked about the Appellant's father and whether he was in fact absent from the Appellant's life. The Respondent did not accept that to be the position in closing submissions. Nor did the Respondent accept it in the decision under appeal. The Entry Clearance Officer stated expressly as follows:

> "You state that your father's whereabouts are unknown, however, you have not provided any evidence to show that any attempt has been made to locate him, or any evidence to demonstrate that he is not involved in your life."

21. What is said at [40] to [42] of the Decision also has to be read in context. The Judge began his findings on "sole responsibility & credibility" in the following way:

> "36. It is clearly the Appellant's case; and that of his mother, that he has no relationship with his father and has been raised since the sponsor left Ivory Coast in 2014, by his maternal grandmother. It is clear from the refusal decision that the Respondent has not accepted this fact to have been established on the evidence."

As is made clear by that paragraph, and the Respondent's decision, the father's involvement in the Appellant's life was clearly an issue which the Judge was entitled (indeed bound) to consider.

22. The Judge considered at [37] a report relied upon by the Appellant said to be "a 'legal officer's report'" which purported to describe the Appellant's living conditions in the Ivory Coast. The Judge gave this

report little weight for the reasons set out in that paragraph. He concluded that "[t]he 'verification' such as it could be considered this, of the Appellant living alone with his grandmother at the property is not a verification at all. The report merely reflects a visit to the property, when the Appellant and his grandmother were there". He gave the report "no real weight".

23. As is evident from what is said at [38] of the Decision, the Judge did raise the issue of the whereabouts of the Appellant's father. He referred to a document emanating from the Appellant's school. He noted that this document was "odd" because it named the Appellant's father. However, having considered that document further, he decided that the document did so because it made reference to the Appellant's birth certificate where the Appellant's father was named. He therefore "read nothing particularly into the school having his father's name in their records as this appears to have come from that birth certificate".

24. Finally, as I have already noted, the Judge relied on the absence of evidence about the Appellant's father's involvement with the school and of the Sponsor being the main point of contact or "sole payer" of fees.

25. Having then referred to the conflict of addresses which I have set out above, the Judge said the following:

> "43. Whilst it is entirely plausible that the Appellant's father may have abandoned the family at age 4 months and elected not to assist in raising the Appellant, I struggle to understand why he would not even be contactable. People have ties through family and employment if not also their home. There is a complete lack of detail of how the relationship came to an end, where his father may have gone or why it was that none of his family were able to assist the sponsor by informing her where he was. There is no evidence of attempts to have him provide for his son or explanation of how they went from living together to not ever having contact. Even if accepting the breakdown of the relationship, it would not be unreasonable for the sponsor to have expected some contact with the Appellant or financial support or a relationship between the Appellant and his paternal relatives. The lack of detail about this important issue, casts some doubt on the credibility of the claim."

26. I reject the submission that the Judge was not entitled to say as he did at [43] of the Decision. As I have already pointed out, the issue regarding the whereabouts of the Appellant's father was a live one, it having been put at issue expressly by the Respondent. The Judge was equally entitled to consider whether the absence of evidence gave rise to an inference that the Appellant's father remained involved in his life and to question whether and to what extent the evidence about the Appellant's living arrangements was credible or whether the Appellant was in fact living with his father or at the very least still had contact with him.

27. I do however accept that the sole documentary evidence relied upon by the Judge is that regarding the conflict of addresses and that this

point was not raised with the Sponsor when she gave evidence. It may well be that there is a conflict. Equally, however, there may be an explanation for the apparent different addresses being given. Put another way, the Judge could not know whether the apparent conflict gave rise to an inference that the Appellant was not in fact living with his grandmother unless that evidence were tested.

28. Moreover, I accept that the way in which this was relied upon was procedurally unfair to the Appellant because the Respondent had not gone so far as to suggest that the Appellant was not living with his grandmother as he and the Sponsor claimed. This point would have taken the Appellant by surprise. He was not given the opportunity to explain the point and there is therefore procedural unfairness in the Judge's reliance on this point.

29. I have considered whether that error can be said to be material. I am persuaded that it is. If the Judge had given other reasons for what Mr Steadman described as the Judge's "theory" that the Appellant remained living with his father and those other reasons did not give rise to any error of law, the reliance on the conflict of addresses might not matter. However, as I have indicated above, this was really the only reason on the face of the documentary evidence which the Judge gave. The Sponsor did not give oral evidence about the Appellant's father's whereabouts, largely because she does not appear to have been asked about this.

30. Whilst the Judge was entitled for the reasons he gave at [43] of the Decision not to be satisfied that the Appellant's father was no longer in the picture, those inferences depend also on the finding made about the conflict of addresses. That finding is therefore material.

31. For those reasons, I am persuaded that the Appellant's grounds disclose an error in particular based on the Appellant's ground two. I am also satisfied that the error is material.

32. Given that the focus of the Appellant's ground two is procedural unfairness which I have found to be made out, I do not consider that it would be appropriate to maintain any of the other findings. For that reason, I do not need to deal in detail with the remainder of the Appellant's grounds. I make the following brief observations in this regard.

33. In relation to ground three, the Decision has to be read as a whole. The Judge was clearly aware of the Appellant's case that his stepfather gave him cash when he visited. It is referred to at [18] of the Decision where the Judge records the Respondent's submissions. However, as the Respondent pointed out, this did not constitute "physical evidence which showed financial dependency".

34. The point made at [44] of the Decision is in any event not simply that the evidence surrounding how the Sponsor made money to support the Appellant was weak but that there was an absence of evidence about

what money was left to support the Appellant. That emerges from the Sponsor's own statement ([AB/A4]) which says simply that the profits were used to pay towards the Appellant's education and upkeep. The Judge was entitled to say that "[t]he limited documentation paints a less than clear picture of financial support being provided in this way".

35. Contrary to what is suggested in the grounds, the written evidence does not deal with the provision of cash to the Appellant by the Sponsor and his stepfather other than by way of assertion that cash is given and that school fees are paid (which the Judge accepted). It is not said how much money is given nor how that is used.

36. For those reasons, the Judge was entitled not to accept the evidence about financial support. The Judge accepted some aspects of that evidence but was entitled not to accept other of the evidence for the reasons he gave.

37. As to the fourth ground, again, contrary to what is suggested in the grounds, there is nothing in the record of proceedings which shows that the Sponsor gave evidence that the reason for the delay in seeking entry clearance for the Appellant was because the Appellant's grandmother was moving to America or was unwell. The reasons given in oral evidence are consistent with the Sponsor's written evidence that she found it difficult to find work when she first came to the UK, then had another child and then was badly advised by solicitors. Those are the reasons which the Judge considered at [45] to [47] of the Decision.

38. I have dealt above with what was said at [43] of the Decision.

39. In short summary, I would not have found an error to be disclosed by the Appellant's third and fourth grounds taken singly or cumulatively.

40. However, for the reasons I have already given, I do not consider it appropriate to preserve any findings.

41. I therefore set aside the Decision in its entirety. Having done so, and given that my reason for finding an error of law in the Decision is based on procedural unfairness, I consider it appropriate to remit the appeal for redetermination by the First-tier Tribunal.

CONCLUSION

42. The Appellant's second ground discloses an error of law based on procedural unfairness. That error is material. For the reasons given, I consider it appropriate to set aside the Decision as a whole. I also consider it appropriate to remit the appeal to the First-tier Tribunal for re-determination.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Cartin contains an error of law. I set aside the Decision and remit the appeal for re-hearing before a Judge other than Judge Cartin.

L K Smith

Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 April 2023