IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002044

First-tier Tribunal No: HU/03968/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 August 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ANTHONY TOMIWA OREKOYA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: No attendance or representation
For the Respondent: Mr Wain, Senior Presenting Officer

Heard at Field House on 3 July 2023

DECISION AND REASONS

1. The appellant is a Nigerian national who was born on 14 June 2008. He is therefore fifteen years old at present. The First-tier Tribunal did not make an anonymity direction and I have not been invited to make any such order. Since the appellant is a teenager, and because there is no reason to think that the public disclosure of his identity will have any impact on his best interests, I do not make an order for anonymity.

2. The appellant appeals, with the permission of First-tier Tribunal Judge Chowdhury, against the decision of the First-tier Tribunal Judge Groom. By her decision of 17 January 2022, Judge Groom ("the judge") dismissed the appellant's appeal against the respondent's refusal of his human rights claim, which was in substance an application for entry clearance to join his mother.

Background

3. The sponsor is Fouke Ibukun Akiode, a British citizen who was born on 20 May 1982. She entered the United Kingdom in July 2006 and was granted Indefinite Leave to Remain in October 2006. She subsequently gave birth to the appellant in Nigeria. She naturalised as a British citizen in October 2020.

4. The application for entry clearance was made on 12 February 2021, with the assistance of a firm of legal representatives instructed by the sponsor. The respondent refused the application on 16 June 2021. She was not satisfied that the appellant and the sponsor were related as claimed; that the sponsor had sole responsibility for the appellant's upbringing; or that there were serious and compelling family or other considerations which made the appellant's exclusion undesirable. Nor was the respondent satisfied that the sponsor was able to maintain the appellant adequately. She did not consider that her decision was in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The grounds of appeal were professionally prepared. The FtT was requested to determine the appeal on the papers.

6. The papers were accordingly placed before the judge on 5 January 2022. By that stage, bundles of evidence had been filed by the appellant and the respondent. The judge was content that it was fair to determine the appeal on the papers before her and she proceeded to do so.

7. The judge resolved the first issue in the appellant's favour and accepted that he and the sponsor were related as claimed: [10]-[11]. She was not satisfied that the sponsor had had sole responsibility for the appellant's upbringing, however. At [12]-[26] of her decision, she gave reasons for that conclusion which might be summarised as follows:

   (i) Whilst the sponsor claimed to send money for the appellant's upkeep, the money was sent to one Toyin Oluwadare and there was no evidence of that person's link to the appellant or the sponsor: [14].

   (ii) The evidence did not establish that the sponsor paid the appellant's school fees or that she was responsible for his food and medical bills: [15]-[16].

   (iii) Although it was claimed that the appellant's maternal grandmother had been mistreating him to the extent that alternative arrangements were urgently made for his care in 2020, messages between the sponsor and her mother suggested otherwise: [17]-[20].

   (iv) There was also no evidence from the appellant's grandmother about her circumstances in Nigeria, despite the fact that the sponsor had been sending money to her in 2020: [21].

   (v) There was inadequate evidence to show that the appellant had been sent to live with the sponsor's friend from 2020 onwards: [22]-[23].

   (vi) It was difficult even to see how the sponsor and the appellant enjoyed a family life, given the sponsor's decision to leave the appellant in Nigeria when he was a baby: [25].

8. At [27], the judge concluded that the appellant's best interests were to remain in Nigeria, where she concluded he was adequately cared for. At [28], the judge upheld the ground of refusal in relation to maintenance, noting that there was inadequate evidence of the sponsor's income and expenditure and that income from student finance arrangements should be discounted. The judge ended her decision by concluding that the respondent's decision was lawful for the purposes of s6 of the Human Rights Act 1998. So it was that the appeal was dismissed.

The Appeal to the Upper Tribunal

9. The appellant appealed to the Upper Tribunal. The manuscript grounds were settled by the sponsor in person and span four pages of A4. The grounds attack each paragraph of the judge's decision, often with reference to additional evidence which was not before the judge. I will return to what is said in the grounds in due course. It suffices to note at this stage that Judge Chowdhury, who granted permission to appeal, considered several aspects of those grounds to be arguable.

10. In preparation for the hearing in the Upper Tribunal, the sponsor filed various items of further evidence, seemingly in answer to the concerns raised by the judge in the FtT.

11. The appellant was unrepresented before me. I was satisfied that proper notice of the hearing had been given and that there was no reason for the sponsor's non-attendance. Mr Wain invited me to proceed in the sponsor's absence and I decided that it was fair to do so in all the circumstances.

12. I informed Mr Wain that I would focus on the evidence which was before the First-tier Tribunal and that any additional evidence which had been filed since that date was immaterial to the question of whether the FtT had erred in law: *CA v SSHD* [2004] EWCA Civ 1165; [2004] Imm AR 640.

13. Mr Wain submitted that the judge had adopted an approach to the question of sole responsibility which complied with the guidance in *TD (Yemen)* [2006] UKAIT 49. The judge had been correct to note on the evidence before her that there was no explanation of how Toyin Oluwadare was related to the appellant. There was no evidence in relation to the payment of school fees or medical bills by the sponsor. The concerns which the judge had expressed about the sponsor's relationship with her mother were also open to the judge. There was insufficient evidence, as the judge had found, to show that the appellant's grandmother was unable to care for him. There was no clear evidence to show who was accommodating the appellant at the date of the hearing before the FtT. The sponsor's grounds of appeal established nothing more than disagreement with the judge's findings on 297(i)(e) and (f) of the Immigration Rules. Whilst the judge might have erred in overlooking the sponsor's payslips, any error in relation to maintenance was immaterial, given the remaining findings.

14. I reserved my decision at the end of Mr Wain's submissions.

Analysis

15. As I have already mentioned, the sponsor has made a concerted attempt in this appeal to the Upper Tribunal to address what were thought by Judge Groom to be shortcomings in the evidence before the First-tier Tribunal. By way of one example, she now adduces evidence to show that Toyin Oluwadare is her own mother - the appellant's grandmother – in answer to the point made by the judge at [14]. What the sponsor has attempted to do is understandable but impermissible in the context of this appeal. I must decide whether the judge in the First-tier Tribunal erred in law, and it has been clear for the best part of two decades that that question is to be decided (subject to certain specific exceptions) on the basis of the evidence which was before the FtT. With that principle in mind, I resolve the sponsor's grounds of appeal as follows.

16. The judge was entitled to conclude on the evidence before her that Toyin Oluwadare's relationship to the appellant and the sponsor had not been established. It was for the appellant to establish the claim that that the sponsor had been sending money for his upkeep. The judge was entitled to find that claim was not established on the balance of probabilities when the money transfers were made to a third party with no proven link to the appellant.

17. There was no evidence before the FtT concerning the payment of school fees, whether by the sponsor or anyone else, and the judge was also entitled to consider that this was a lacuna in the evidence before her. The same conclusion applies to the judge's other concerns about the sponsor's claimed financial provision for her son; the evidence before her was simply insufficient to establish that any money which was being sent to Nigeria by the sponsor was for the appellant's upkeep.

18. The sponsor states in terms in the grounds of appeal that she 'respectfully disagrees' with the judge's findings in relation to the appellant's living arrangements in Nigeria. She is entitled to disagree with those findings, but that disagreement does not establish a legal error on the part of the judge. It was legitimate for the judge to express a concern that the sponsor claimed that she was continuing to send money to her mother despite the assertion that the latter was mistreating the appellant and keeping the money for herself. There was no evidence before the judge which began to explain that apparent oddity and it was a point which the judge was entitled to alight upon in furtherance of her concern that the evidence did not establish the claims made by the sponsor.

19. The sponsor has adduced a letter from her childhood friend in support of her appeal to the Upper Tribunal. The letter explains the circumstances in which the appellant supposedly came to live with her after leaving his grandmother's home in 2020. That evidence was not before the FtT and the submission of it only serves to highlight the validity of the FtT's concern about the absence of evidence in this case. As I have explained, this appeal is not an opportunity to address those shortcomings; what the sponsor must do is to establish that the FtT erred in law. She cannot do so by reference to evidence which was not before the judge. The sponsor contended before the FtT that the appellant was in a very difficult position, since he could not live with his grandmother and was on borrowed time in the sponsor's friend's home, but the judge was entitled to conclude that these claims were not made out on the evidence before her.

20. The judge's finding that there was no family life between the appellant and the sponsor followed on from her conclusion that the sponsor did not have sole responsibility for the appellant. It might have been better if the judge had cited

the consistent thinking of the Strasbourg court on this point: that family life exists between parent and child unless subsequent events break that tie: *Berrehab v The Netherlands* (App No 10730/84) [1988] 11 EHRR 322. In substance, however, the judge's conclusion followed that approach. The sponsor left the appellant with her mother when he was a baby; she had not exercised sole responsibility for him since then; and the evidence of a continuing relationship was scant.

21. It was properly open to the judge, in light of the findings she had made about the role of the sponsor in the appellant's life and the absence of proper evidence that he was living in unsatisfactory conditions, to conclude that his best interests were to remain in Nigeria. Those findings were essentially determinative of the question of whether there were serious and compelling family or other considerations which made the exclusion of the appellant undesirable and the residual question of whether exclusion was contrary to Article 8 ECHR: *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 88(IAC) refers. Whilst the judge might have erred in failing to examine the sponsor's payslips in considering the question of maintenance, that error was not material to the outcome of the appeal in light of the otherwise sustainable findings made by the judge.

22. In all the circumstances, therefore, I accept Mr Wain's submission that the FtT did not fall into material error of law in dismissing this appeal.

23. I add one observation for the sponsor. Nothing that I have said above should be taken as any criticism of her. She is a layperson who has tried to prepare and present her son's case in the FtT and the Upper Tribunal to the best of her ability. What the decision of the FtT quite properly showed was that there were holes in the evidence presented, and it is not part of my statutory function in this Tribunal to consider the sponsor's attempts to plug those holes.

24. The appellant is not yet eighteen. He is entitled to make a further application for entry clearance. If he still wishes to join the sponsor in the UK, the proper course is to make another application in which this additional evidence can be considered. I appreciate that this will be frustrating news for the appellant and the sponsor, who have already waited some years for the resolution of this appeal, but that is the proper course in law. It is to be hoped and expected that a future entry clearance officer will understand clearly that this appeal was dismissed not because anyone was thought to be lying but because the evidence was insufficient to establish the claims made.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal will stand.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 July 2023