Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05338/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 August 2015	**On 2 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER, NAIROBI

Appellant

and

MISS JULIET NAKATO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr N Aghayere, Counsel, instructed by Melrose Solicitors

DECISION AND REASONS

Introduction

1. For the purposes of my decision I shall refer to the Appellant as the Entry Clearance Officer and the Respondent as the claimant.

2. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge M P W Harris (Judge Harris), promulgated on 25 March 2015, in which he allowed the claimant's appeal. That appeal was against the original refusal of entry clearance, dated 24 March 2014, in which it was said that the claimant's application under Paragraph 297 of the Immigration Rules failed because the United

Kingdom-based sponsor, Mr Frederick Kalemba (the claimant's father) did not have sole responsibility for her, and that there were no compelling family or other considerations present.

3. The claimant had had a previous appeal against another negative entry clearance decision in 2012. First-tier Tribunal Judge Prior had found that the sponsor did not have sole responsibility for the claimant and that there were no compelling family reasons. The appeal was dismissed on all grounds. This was not successfully challenged.

Judge Harris' decision

4. Judge Harris first dealt with the sole responsibility issue under Paragraph 297(i)(e) of the Rules. In paragraphs 10-20 of his decision, clear findings and reasons are provided for his conclusion that the claimant could not satisfy sub-paragraph (e). These findings and reasons have not been the subject of any cross-appeal by the claimant and I need say no more about them.

5. Judge Harris then deals with the compelling family reasons issue at paragraphs 22-31. He found that, taking the evidence as a whole and notwithstanding the application of Devaseelan *[2002] UKIAT 00072 principles, the claimant's relationship with her mother's partner had broken down to the extent that she was unable to reside with her mother. She was in effect, Judge Harris found, being forced to live at her boarding school, and therefore being separated not only from her father in the United Kingdom, but also her mother in Uganda (paragraph 29). This was contrary to her best interests. Given the situation pertaining in Uganda, Judge Harris concluded that the best interests lay in re-joining her father in the United Kingdom: this factor represented a serious and compelling family consideration (paragraph 31).

6. Judge Harris also found that arrangements had been made for the Appellant's care in the United Kingdom, and that maintenance and accommodation were not in dispute (paragraph 32).

7. The appeal was therefore allowed under Paragraph 297 and there was no need to go on and consider Article 8 issues (paragraphs 33-34).

The Entry Clearance Officer' grounds

8. The succinct grounds assert that because no explanation as to the cause of the hostilities between the claimant and her mother's partner had been provided, Judge Harris erred in failing to adequately reason his conclusion that serious and compelling factors existed in this case.

9. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 16 June 2015.

The hearing before me

10. Mr Melvin relied on the grounds. In addition he submitted that Judge Harris had failed to take any account of the need for effective immigration control. There was nothing on the ability of the father to visit the claimant in Uganda.

11. Mr Aghayere submitted that Judge Harris had relied not only on evidence from the father, but also that from the mother. The serious and compelling factor was not

simply that the claimant was at her boarding school: it was the fact that she could not go and live with her mother at all.

Decision on error of law

12. As I informed the parties at the hearing, I find that there are no material errors of law in the decision of Judge Harris.

13. The grounds are in essence a reasons challenge. However, in my view Judge Harris has provided perfectly adequate reasons for his core finding of fact that the claimant was unable to reside with her mother in Uganda because of the antipathy between the former and the partner of the latter. The Judge clearly took account of the unreliable nature of aspects of the sponsor's evidence (paragraph 24). He stated, as he was probably bound to, that the sponsor's evidence alone could not prove the claim. Then Judge Harris goes on to place weight on the mother's written evidence in respect of the existence of antipathy vis-à-vis the claimant and the partner (paragraph 25). He was fully entitled to place weight upon this evidence, notwithstanding the fact that religious differences were not mentioned in the relevant declaration. What is clear from that declaration is that the mother was stating that the claimant could no longer live with the partner due to "family issues" (see paragraph 6 of the declaration). The fact that a specific cause was not mentioned did not preclude Judge Harris from placing whatever weight upon this evidence he saw fit.

14. In addition to the foregoing, Judge Harris took account, as he was entitled to, of the fact that the permanent address stated in the visa application form was that of the boarding school, not the mother's house (paragraph 26). This was a further reason provided in support of the core finding.

15. On a proper reading of paragraph 23 it is also apparent that Judge Harris had in mind the claimant's own evidence contained in her letter dated 23 April 2014 (referred to in paragraph 16). Whilst quite properly not taking post-decision circumstances into account, he was fully cognisant of the nature of the "heart of the appellant's claim." That "heart" was the hostility between her and the mother's partner.

16. Therefore, when paragraphs 23-26 are read as a whole, there is more than adequate reasoning to support the core finding of fact in paragraph 27 that the claimant was unable, as at the date of decision, to live with her mother.

17. Turning to the remainder of Judge Harris' reasoning process, there is nothing wrong in what is said in paragraphs 28-31. He was entitled, indeed bound, to consider the claimant's best interests. She was a minor who was clearly affected by the decision under appeal. Judge Harris was not, as suggested by Mr Melvin, seeking to apply section 55 of the Borders, Citizenship and Immigration Act 2009 to the case before him. He was simply applying the relevant provision of the Immigration Rules (Paragraph 297(i)(f)) in the context of compliance with the broader requirements of the jurisprudence on decisions concerning children. Mr Melvin's submission on this point was beyond the remit of the grounds of appeal, and in any event misconceived.

18. Judge Harris was in turn entitled to treat the best interest of the claimant in being able to reside with at least one parent (in this case the father being to only option) as a serious and compelling family consideration, making her exclusion from the United Kingdom undesirable. Again, the grounds have not taken an issue with this approach in terms of legal misdirection. In any event, I see no error of law here at all. Whether one describes the factual circumstances in terms of best interests or serious and compelling considerations, the result is, in this case, the same: Judge Harris was entitled to conclude as he did, namely that sub-paragraph (f) was satisfied.

19. As to the suggestion that the serious and compelling consideration was only that the claimant was living in a boarding school, it is patently obvious that Judge Harris based his conclusion on the fact that the claimant was precluded from living with her mother, not simply that she was physically staying at the school.

20. Mr Melvin has submitted that Judge Harris erred in failing to consider the need for effective immigration control. However, the decision was not based upon Article 8. Paragraph 297 (as with other provisions of the Rules) has this requirement already factored into it. The Rules are the primary tool for effective immigration control. There was no need for Judge Harris to 'double-count' immigration control: once the criteria of Paragraph 297 were met, the appeal fell to be allowed, without more.

21. Finally, Judge Harris took proper account of the previous decision of Judge Prior in 2012 (see paragraph 31). Time and circumstances had moved on, and there is no error of approach in respect of this issue whatsoever.

Anonymity

22. No direction was made by Judge Harris and none has been requested from me. I make no direction.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The Entry Clearance Officer's appeal is dismissed.

The decision of the First-tier Tribunal stands.

Signed Date: 28 August 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

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 £10.00 only. This is to reflect the fact that whilst the claimant has ultimately succeeded in her

appeal, this result is based almost entirely on evidence not submitted with the initial application itself. The appellate process was crucial to the outcome.

Signed Date: 28 August 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal