IAC-FH-NL-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/18561/2013

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Determination Promulgated** |
| **Oral determination given following hearing** | **On 19 February 2015** |
| **On 9 February 2015** | |

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**BA**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr S Karim, instructed by Melvyn Everson & Co.
For the Respondent: Ms K Pal, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Ghana who was born on 30 October 2000. It is common ground now between the parties that he is the son of the sponsor. Apparently the sponsor came to the United Kingdom in 1990 and he met the appellant's mother in 1996 in the United Kingdom but she returned to Ghana. It is not clear exactly when she returned to Ghana. In paragraph 7 of the determination of First-tier Tribunal Judge E B Grant which is now under appeal it is said that she returned in 1999 and then telephoned the sponsor to inform him that she was pregnant by him. That is

unlikely to be true because if that is right the pregnancy must have lasted considerably more than nine months as the appellant was not born until 30 October 2000. It may be that she returned early in 2000 but this is not a material factor in this case. In any event again it is common ground (and this was the evidence given by the sponsor, the appellant's father), that the appellant's mother took care of her son until he was approximately 3. The sponsor says that his son was then taken to his mother, that is the appellant's paternal grandmother, and left him with her there. Then apparently a cousin, a Ms Akua Pokuaa agreed to take the appellant in to live with her and her other children (she apparently had five) and it is the sponsor's case that he then sent money to Ms Pokuaa to take care of his son and pay for his school fees.

2. It is the sponsor's case that subsequently a concerned neighbour, a Ms Appiah Cosmos, was not happy with the care that the appellant was receiving from Ms Pokuaa and took him in herself but subsequently Ms Appiah married and wants to move to a different area in Ghana with her new husband who is a teacher.

3. The appellant made an application for entry clearance which was apparently refused because the Entry Clearance Officer did not believe the sponsor was the father of the appellant but following receipt of DNA evidence it is now accepted that he is and a subsequent application was made. This was refused by the respondent on 28 August 2013 and the appellant appealed against that refusal.

4. The appeal was heard before First-tier Tribunal Judge E B Grant sitting at Hatton Cross on 26 August 2014 and 13 October 2014 but the appeal was dismissed. The basis of the appeal was that the appellant was entitled to entry clearance under the Rules because her father, the sponsor, had been exercising sole responsibility for him as set out within the Tribunal decision of *TD (Yemen)*. It was accepted of course that the father could not have had day to day care and responsibility for his child in the sense of being physically with him but nonetheless if he had taken the main decisions with regard to the appellant's welfare and upbringing then that was a finding which nonetheless could be made.

5. Having heard the evidence from the sponsor and having considered all the documents set out in the file, Judge Grant was not satisfied the appellant satisfied the requirements under the Rules.

6. At paragraph 7 of her determination she stated that "the sponsor's witness statement is very sparse on detail and information about the appellant some of which emerged during evidence before me". Then at paragraph 11, having set out the gaps in the evidence at paragraph 12 she found that "I am not satisfied that either the Entry Clearance Officer or the Tribunal have been given the full story with regard to the arrangements for care of the appellant or the whereabouts of his biological mother".

7. Amongst the matters set out at paragraph 10 it is noted that the sponsor had never resided with his son in Ghana and also that there was no evidence from the sponsor's mother with whom the child was apparently left initially. Judge Grant then goes on

to state at paragraph 11 (it was argued before me that this was speculation) that "I observe that Madam Akua Pokuaa has the same Christian name as the appellant's mother (Akua) and for all I know may well be his biological mother remarried with other children as well as the appellant". Because of the gaps in the evidence put before her Judge Grant was not satisfied that there was credible evidence before her that the sponsor had exercised sole responsibility for the appellant, even adopting the tests set out within *TD (Yemen)*. Also, at paragraphs 15 and 16 she gives her reasons for not being satisfied that the maintenance and accommodation requirements under the Rules were satisfied either.

8. At paragraph 14 the judge sets out the procedure which she considers ought to be adopted if there is to be another application for entry clearance which includes that the appellant should be interviewed and also the evidence that ought to be obtained and given on behalf of the appellant by his grandmother on his father's side. The evidence should also be given to demonstrate that Ms Pokuaa "is not actually the child's biological mother". It is also noted that although a letter was submitted from Ms Appiah Cosmos stating that she wished to move that had not apparently been put before the Entry Clearance Officer and this should be done as well.

9. Judge Grant did not deal with Article 8 at all even though there is some reference within the Record of Proceedings to indicate that Article 8 was at least raised within the appeal. Permission to appeal was granted by First-tier Tribunal Judge Foudy on 18 December 2014 in the following terms:

> "...2. The grounds appear to argue that the Judge did not adequately deal with the Appellant's appeal under the Immigration Rules. The grounds also argue that the Judge failed to consider the Article 8 grounds relied upon by the Appellant.
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> 3. The Judge dealt with the oral evidence under the Immigration Rules in detail. Her determination sets out the matters relied upon by the Appellant and makes findings in respect of them in a comprehensive and reasoned manner. There is nothing in the determination to support that allegation that the Judge did not adequately deal with that part of the Appellant's case.
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> 4. It is clear from the Record of Proceedings that Article 8 was pursued in front of the Judge. She has made no findings on that part of the appeal. This is an arguable error of law."

10. It is in my judgment clear from the reasons given by Judge Foudy which were of course sent to the appellant's solicitors together with the notice informing him that permission to appeal had been granted that permission to appeal had only been granted to make the Article 8 submissions because Judge Foudy made it plain that there was no error of law in her judgement regarding the decision which was made dismissing the appeal under the Immigration Rules.

11. In the course of his exceptionally well-argued submissions Mr Karim submitted first that the Tribunal ought to allow argument as to the entirety of the appeal. He referred the Tribunal in particular to a decision of this Tribunal made in 2012, that is *Ferrer (limited appeal grounds; Alvi)* [2012] UKUT 00304 in which a panel of the Upper Tribunal (Upper Tribunal Judges Storey and Peter Lane) had set out the procedure which should be adopted where permission was granted only in respect of certain of the grounds. Mr Karim referred the Tribunal in particular to head note (2) where it was stated as follows:

> "Where the First-tier Tribunal judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision under Rule 25(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal."

12. It was Mr Karim's argument that notwithstanding that the appellant's solicitors would have been sent the reasons nonetheless the appellant was still entitled to be sent a notice formally stating his right to appeal against that part of the decision effectively refusing him permission to appeal under the Rules. On behalf of the respondent with regard to this point Miss Pal submitted that the court ought to take it as read that Counsel and solicitors know what the Rules are and can understand the reasons which are given by a judge when granting or refusing permission to appeal. In my judgment, on the facts of this case, that submission is well-founded. It is very clear indeed from the reasons given by Judge Foudy that permission was not being granted to the appellant to argue that there was an error of law in the judge's dismissal of his claim under the Rules. The reasons given make it clear that in Judge Foudy's words:

> "The judge dealt with the oral evidence under the Immigration Rules in detail. Her determination sets out the matters relied upon by the appellant and makes findings in respect of them in a comprehensive and reasonable manner. There is nothing in the determination to support [the] allegation that the judge did not adequately deal with that part of the appellant's case."

13. In these circumstances it cannot realistically be argued that any legally qualified person reading this could have been in any doubt whatsoever but that permission was refused to argue this aspect of the appeal. The appellant was legally represented and the solicitors who were instructed must have known because they practise in this area of the law what steps the appellant would have to take if he wished to challenge this aspect of the decision.

14. Notwithstanding that I am quite clear that the appeal was limited to consideration of whether any case could be made under Article 8 I nonetheless allowed Mr Karim to advance those arguments as he considered appropriate to deal with the appeal under the Rules so that it cannot in any event be said that he has not had a full hearing.

15. With regard to Article 8, Judge Foudy did not when granting permission consider whether or not that failure to consider Article 8 in terms could have made a material difference to the outcome. I note in this regard that in the Rule 24 response submitted on behalf of the respondent it is said at paragraph 5 that "given the significant adverse factual findings on the requirements of the Rule it is clear that no properly directed Tribunal could have found an engagement with Article 8".

16. With regard to the substantive argument under the Rules although I entertained Mr Karim's submissions on this point which were made succinctly and clearly, I nonetheless also consider as did Judge Foudy that there is no merit in them. The argument that the appeal should succeed under the Rules was comprehensively dismissed by the judge on almost every ground. Not only were the maintenance and accommodation requirements not met but she also found for reasons which she gave that it had not been established on his behalf that the sponsor had sole responsibility for his upbringing. Although Mr Karim did submit that the evidence was not all referred to in the determination (and it was not) there is no obligation on a judge to set out every single aspect of the evidence and in this case I consider that she has given sufficient reasons for the decision which she made. There is little for me to add on this. The appellant was rightly refused permission to argue this aspect of the case and such arguments as have been advanced regarding the refusal under the rules could not have succeeded anyway.

17. With regard to Article 8, Mr Karim invited the Tribunal to consider the decision of this Tribunal in *T (s.55 BCIA 2009 – entry clearance – Jamaica)* [2011] UKUT 00483 in which the Tribunal (presided over by the President) stated that it may be necessary where the interests of a child are under consideration in an entry clearance case to make investigations and "where appropriate having regard to age, the child [himself] may need to be interviewed". However, in this case, there was a lack of evidence such as to come close to establishing that the welfare of the appellant would be in jeopardy (rather than would merely be affected) were entry clearance refused. Mr Karim accepted that this was not "the most compelling" case such as where a child might be killed if he is not granted entry clearance but he nonetheless argued that because Ms Appiah's decision to move to another region of Ghana would affect the appellant's education and he had no one else in Ghana to live with, he should have been interviewed. In my judgment that is taking the obligation of the respondent in these circumstances too far, even though it may be appropriate in certain circumstances for a child to be interviewed. Although, as Judge Grant noted, in this case if another application is made consideration must be given to interviewing the appellant, this is not a legal requirement and the failure to interview, or give consideration to interviewing the appellant in respect of the present application is simply no basis upon which an Article 8 claim which would have any realistic prospect of success could be founded. Accordingly, although there was a technical error of law in Judge Grant's failure to have specific regard to Article 8, on the facts of this case this was not a material error because such consideration could not have led her to allow this appeal. It follows of course that even had I decided that I would have myself to re-make the decision, I would have had no hesitation in dismissing the appeal under Article 8 as well. It further follows that there being no material

error of law in Judge Grant's determination, this appeal must be dismissed and Judge Grant's decision affirmed and I will so order.

**Decision**

**There being no material error of law in the determination of the First-tier Tribunal the appellant's appeal is dismissed both under the Rules and under Article 8**.

Signed:

Date: 17 February 2015

Upper Tribunal Judge Craig