



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/20462/2013

THE IMMIGRATION ACTS

Heard at London Field House

**Decision and
Promulgated**

Reasons

On 20 January 2015

On 3 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

ENTRY CLEARANCE OFFICER, ACCRA

Appellant

and

BENJAMIN CANN

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer

For the Respondent: Mr Charles Prah (sponsor, father of Benjamin Cann)

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals to the Upper Tribunal against the determination of First-tier Tribunal Judge Majid that was promulgated on 1 October 2014. Judge Majid allowed the Mr Cann's appeal against the ECO's decision of 5 November 2013 refusing entry clearance on the basis that he was not satisfied that Mr Prah had sole responsibility for Mr Cann's upbringing. It would seem that Judge Majid allowed the appeal both under paragraph 297 of the immigration rules and under article 8 of the human rights convention.
2. Mr Prah represented his son. Because Mr Prah is not legally qualified I explained to him the nature of an appeal to the Upper Tribunal, the

procedures I had to follow and advised him of my role to ensure that neither he nor his son would be disadvantaged by a lack of legal knowledge.

3. Mr Kandola relied on the grounds of application. He reminded me that the ECO argued that Judge Majid had completely failed to assess whether sole responsibility had been demonstrated. There was no reference to the factors that should be considered, as set out by the Tribunal in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. Mr Kandola also reminded me that the ECO argued that Judge Majid made no findings in relation to the issues of maintenance and accommodation, which had been one of the reasons for refusing entry clearance.
4. Mr Kandola also argued that Judge Majid had misapplied article 8. Not only was there no need for him to have considered article 8 directly since he was allowing the appeal under the immigration rules, the Judge failed to appreciate that Mr Cann had turned 18 by the date of the immigration decision. Although paragraph 27 of the immigration rules meant that the application for entry clearance could not be refused under the immigration rules solely because Mr Cann had passed the age of majority, no such protection applied to article 8. Judge Majid failed to deal with this issue and failed to explain the nature of the family life between Mr Cann and Mr Prah. A final problem with regard to the approach to article 8 was that Judge Majid had failed to have regard to the changes introduced by s.19 of the Immigration Act 2014 regarding the weight to be given to the public interest when carrying out the balancing act under article 8(2).
5. The issues in this appeal are: (1) whether Judge Majid considered the relevant legal provisions relating to sole responsibility, maintenance and accommodation as set out in paragraph 297 of the immigration rules, and (2) whether Judge Majid applied the law relevant to the assessment of the appellant's protected private and family life rights.
6. The determination is of such poor quality that I have no hesitation in finding that I can only find that Judge Majid did neither. As a result I find that the determination contains numerous legal errors which require me to set it aside and to remit it to the First-tier Tribunal for a fresh hearing where the relevant law is properly considered. My reasons follow.
7. The Tribunal set out clear guidance as to the approach judges need to take to issues of sole responsibility. These are summarised at paragraph 52 of TD (Yemen), which I cite for the benefit of the appellant.

52. Questions of "sole responsibility" under the immigration rules should be approached as follows:

- i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
- ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.
- iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst

the only parent involved in its life travels to and lives in the UK.

iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

8. This reported decision remains the leading case on the assessment of sole responsibility. I am satisfied that Judge Majid failed to have any regard to this case or the principles it set out. It is unclear on what basis he concluded that the evidence showed that the appellant's father had sole responsibility. Judge Majid did nothing to resolve the factual problems that arose from the limited evidence provided. That failure is an error on a point of law.
9. In addition, at no point does Judge Majid make any findings in relation to maintenance and accommodation. There are strict financial requirements in the immigration rules which cannot be ignored. Some evidence was provided but no findings were made on that evidence. That was also wrong in law.
10. With regard to the arguments relating to article 8, I am satisfied that Judge Majid has failed to show that he had any regard to relevant case law or changes to the statutory scheme relating to article 8. The case law cited by Judge Majid has been overtaken.
11. In addition to all these points which clearly show that Judge Majid failed in his judicial functions, Judge Majid did nothing to assist the appellant's father who presented the case. Mr Prah is not legally qualified and could not be expected to have realised the legal context of assessing sole responsibility or the evidence needed to prove he could adequately maintain and accommodate his son. This failure to assist is contrary to Presidential guidance and although perhaps not raising a legal error of itself it raises serious concerns as to the fairness of the hearing which contributes to the errors I have found.
12. I mention that the issue of fairness perhaps requires more consideration in this appeal than in others because Mr Cann is over 18 and will be unable to make any future applications under paragraph 297 of the immigration rules. It is appropriate in such instance to remit the appeal to the First-tier Tribunal. It may be, given the complexities arising in this matter, that Mr Prah will consider whether he should obtain legal advice about how to

prepare for the next hearing.. But that is a matter for him.

Directions

13. In light of the errors I have decided that not only must I set the decision aside but I must remit the appeal to the First-tier Tribunal for a fair hearing. I make the following directions for the remitted hearing.
14. Nothing is preserved from Judge Majid's determination.
15. The appeal can be heard by any First-tier Tribunal Judge other than Judge Majid.
16. A date has been fixed for the rehearing (25 June 2015) but this may be subject to change by the First-tier Tribunal, who will issue notice of hearing and any further directions.

Decision

The Entry Clearance Officer's appeal is allowed because the determination of Judge Majid contains numerous legal error that require it to be set aside.

The original appeal is remitted to the First-tier Tribunal for afresh decision on all issues.

Signed

Date

Deputy Judge of the Upper Tribunal