UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER **Appeal No. OA/20568/2013**

THE IMMIGRATION ACTS

Heard at: Bennett House
On: 20th March 2015

Decision Promulgated
On: 13th April 2015

Before

Deputy Upper Tribunal Judge Hanbury

Between

Mr Fortune Amel Moumpossa

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Markus, of counsel
For the Respondent: Ms Johnstone, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO ERROR OF LAW

Introduction

1. In this appeal I will refer to the parties throughout by their designations in the First-tier Tribunal (FTT) notwithstanding the reversal of their roles in this Tribunal.

2. The present appeal is against the decision of Judge of First–tier Tribunal Smith (the Immigration Judge). In a determination promulgated on 11th July 2014 the Immigration Judge decided to dismiss the appellant's appeal against the respondent's decision to refuse entry clearance to the

appellant to join his father (the sponsor) in the UK. On 18th September 2014 Immigration Judge Warren Grant gave the appellant permission to appeal that decision because he thought it at least arguable that the Immigration Judge mistakenly drew adverse inferences from the fact that the witness Mr Juslain Bilunga had made late changes to his witness statement and had mistakenly, as a consequence, gone on to make adverse findings about the sponsor's credibility also. The respondent filed a rule 24 response on 30th September 2014 asking the Upper Tribunal to uphold the decision of the FTT stating that there was a lack of evidence to demonstrate the sponsor's alleged sole responsibility for his son. In particular the Immigration Judge had rightly concluded that there was a lack of evidence from Western Union to back up certain alleged payments. It should have been obvious to the appellant and the sponsor that such documentation would have been needed given the basis of the refusal.

Background

3. The appellant, who was born on 16th February 1999, is from the Congo. On 2nd October 2013 he applied under paragraph 297 of the Immigration Rules for settlement to join his father, Fortune Venant Moumpossa (FVM), the sponsor, who is a British citizen. The sponsor was said to have left the Congo on 10th January 2000 and migrated to the UK. The appellant stated on his application for entry clearance that he had not seen his mother since he was 2 years old. He claimed to have lived with his paternal grandmother since then.

4. The ECO was not satisfied that the documents supplied were adequate. A purported birth certificate was dismissed having regard to the ease with which such documents could be obtained from Congo. The ECO was therefore not satisfied that the appellant was related as claimed to the sponsor. Nor did the ECO accept that the appellant had ever lived as part of the sponsor's family unit. As far as the evidence of financial responsibility on the part of the sponsor was concerned, the ECO was not satisfied that the sponsor had financial responsibility for the appellant. 2 letters were submitted and a further letter from Justin Bikounga that stated that money was regularly transferred to the appellant. The ECO was not satisfied that evidence submitted was satisfactory. It did not constitute independent verifiable evidence. A subsequent review by the ECM did not bring about any different conclusion.

The hearing

5. At the hearing I heard submissions by both representatives which were noted in the file. A preliminary point arose as to two faxes sent to the Tribunal on 18th March 2015 and 20th March 2015. Mr Markus pointed out that the reason for this late evidence was to deal with the respondent's rule 24 response dated 30th September 2014. Those faxes contained second witness statement from Mr Bikunga under para. 15(2A) of the 2008 rules and the contents of Ms Mair's notebook from the hearing

before the FTT on 27th June 2014 together with a short witness statement from her. I will deal with the relevance of those additional documents later but they are principally aimed at addressing alleged shortcomings in the approach of the FTT.

6. Mr Markus pursued all four grounds of appeal but later accepted that some were more powerful than others. The appeal before the FTT was under paragraph 297 of the Immigration Rules which deals with the requirements that must be met by a person seeking settlement of a child of a parent, parents or relatives present and settled or being admitted for settlement in the UK where that parent, parents or relatives has or have sole responsibility for the child in question. Mr Markus relied on the cases of **Nmaju [2001] INLR 26** and **TD [2006] UKIAT 00049**. Those cases established, he said, that there was no minimum period of sole responsibility required in order to satisfy rule 297. It was a matter of fact in each case and it would be an error of law to find that the child did not require entry into the UK. Mr Markus also submitted that the correct date for determining whether the evidence satisfied the requirements of the rule was the date of the application. However, in fact, the correct date is the date of the decision pursuant to section 85A (2) of the Nationality, Immigration and Asylum Act 2002 as this was an application for entry clearance. He said by reference to paragraph 50 in **TD** that the "touchstone" of "sole responsibility" would be the important decisions in relation to the child such as taking him to school, putting him to bed and ensuring he eats on time. The fact that these tasks rest with someone abroad is not conclusive of the sole responsibility test not being met. However, if the UK parent has allowed some of the decisions about the child's upbringing to be shared this may indicate joint responsibility. Others in a non-parenting role may also be involved in the child's upbringing.

7. Paragraph 18 of the determination was criticised because it was said by Mr Markus to focus on a period well before the application. Paragraph 19 went onto deal with the situation ten years before and subsequent paragraphs, in his submission, displayed a similar error of approach. Paragraph 24 of the determination was criticised for not focusing on the past level of financial support rather than the position at the date of the application (the date Mr Markus claimed was the relevant one). Mr Markus then went on to deal with the specific grounds :

    1) He said there were flawed findings in relation to financial support. His colleague (Miss Mair) had met Mr Juslain Bikunga at court on 27th June 2014. He had indicated to her that his statement was materially inaccurate in relation to the manner in which payments had been made by the sponsor for the benefit of his child. Apparently, he had mistakenly referred to bank transfers when he intended to refer to payments being made by the sponsor in cash. Although this was not before the FTT it was relevant now to consider this evidence. The assertion that the Juslain Bikunga converts money into goods as a means of transferring money from the sponsor to the benefit of the

appellant appears not to be dealt with in the witness statements or in the oral evidence before the FTT but it was a concern of the Immigration Judge.

2) There was also a request to adduce a late witness statement from Mr Bikunga under paragraph 15 (2) of the Upper Tribunal Procedure Rules. According to his statement Mr Bikunga (also known as Mr Juslain) did not pick up on the discrepancy in this witness statement until he arrived at the hearing and met Ms Mair. The statement, supported by a statement of truth, confirms that the sponsor gave him cash to "use when needed". It seems that Mr Bikunga's mother forwards the money onto the appellant's mother in Congo. Mr Bikunga lives in the UK. He says that he did not need to send money to his own mother in Congo because she had sufficient income of her own.

3) Next Mr Markus criticised the Immigration Judge for attaching too much weight to the manner in which money was transferred and not enough to the fact that money was transferred. He maintained that the way that money had been transferred was to send goods which had value. Western Union transfers, he said, were expensive and the sponsor did not wish to expend money unnecessarily.

4) The Immigration Judge was criticised for, effectively, rejecting all the documents.

5) The Immigration Judge was said to have reached an inaccurate and unfair view of the lack of contact between the sponsor and the appellant. There was an adequate explanation in the sponsor's witness statement, it was submitted.

6) There was a failure to consider the child's best interests. In this context I was referred to **Moayed [2013] UKUT 00197 (IAC)**. In that case the Upper Tribunal explained the duty on the tribunal dealing with a case in which the welfare of a child is involved. The seven years from aged four are likely to be important to a child whereas short periods of residence are unlikely to give rise to considerations about private life. The Upper Tribunal would not interfere with decisions which were only marginally wrong. However, Mr Markus argued that the Immigration Judge had not considered the rights of the child appellant adequately and there had been an interference with the rights of the child both under section 55 of the 2009 Act and article 8 of them ECHR.

8. In her final submissions Ms Johnstone said the findings were neither perverse nor irrational and should not be lightly set aside. The Immigration Judge had made sufficiently robust findings on the key points for the determination to stand. The Upper Tribunal should be reluctant to interfere with the case which the FTT decided on the evidence presented to it, and the Upper Tribunal should not set-aside its decision.

9. Mr Markus submitted that the decision of the FTT was wrong in principle and on the facts and that the grounds on which the decision was based were, essentially, undisputed. The grounds on which the Immigration Judge's decision was reached were unsatisfactory in all the circumstances.

Conclusions

10. It is clear from paragraph 46 of **TD** (quoted by the appellant at paragraph 4 of his skeleton argument before the FTT) that for a claim that that the UK parent had "sole responsibility" for a child to succeed the foreign parent had to be shown to have abdicated any responsibility for the child so as to have become "totally uninvolved" in the child's upbringing. The situation, if established, was therefore an exceptional and, one might say, unusual one.

11. As Mr Markus submitted, there appears to be no minimum period during which the foreign parent has abdicated responsibility for his child but I do not find any prohibition in the authorities on looking at the whole history of the matter in determining whether or not the "sole responsibility" test is met. Indeed Schiemann LJ pointed out (at paragraph 24 in **Nmaju**) that "time may often be a relevant factor". As the UT pointed out in **TD** the function of paragraph 297 (i) (e) is to deal with the situation where there is a parent in the UK and a parent abroad. The term "sole responsibility" acts as a control mechanism in preventing applications which are designed to remove children from their parents. Such a step can only be justified in the exceptional case of sole responsibility vesting with the UK parent. This can only be justified where it is necessary and in their best interests.

12. Having regard to section 85A (2) of the 2002 Act the correct date for determining this issue is the date of the decision because this was an entry clearance application, but there appears to be no discussion of that issue in the authorities. Mr Markus only referred in passing to section 85A but did not cite any authority to support his submission that the date of the application was the correct date. The application here was on 2nd October 2013 and the refusal was 22nd October 2013 (see ECM's review). Therefore it appears to make no difference to the outcome in any event.

13. The Judge was concerned that much of the evidence of financial support between sponsor and appellant only began in 2012 (See paragraph 18 of his determination). That was essentially a credibility point, however. The judge drew attention to the lack of Western Union transfers prior to 2012. Given that the financial support was said to have continued for 12 years I do not see any reason why the judge should not consider the absence of such documentation to be a serious deficiency which adversely impacted on the credibility of the application.

14. The Immigration Judge also had regard to the lack of contact between the sponsor and the appellant over many years (see paragraph 21 et seq.). There appears to have been contact over Skype but the only regular contact was between February and July 2013, the decision being on 22nd

October 2013. The Immigration Judge took account of the fact that the sponsor had only seen the appellant once in the 13 years prior to the application and these points seem highly relevant. These, I am satisfied, were also matters the judge was entitled to take account of.

15. On balance the Immigration Judge was entitled to reject the evidence of Mr Juslain, who appeared to provide an account of having been the conduit of money from the sponsor to the appellant by converting cash into goods. It was perhaps unfair of the Immigration Judge to dismiss Mr Juslain's attempt to put right a defect in his is statement so lightly. However, I am satisfied that the Immigration judge adequately considered Mr Juslain's account as part of his overall assessment and was entitled to reject it as being implausible and largely uncorroborated. I am not persuaded that the criteria for adducing fresh evidence before this tribunal is met nor am I satisfied that it will make a material difference to the outcome.

16. There were some matters that the Immigration Judge attached greater weight to than other judges would have done and other matters he could gave attached more weight to. However, the Immigration Judge's overall conclusion that the appellant is not entitled to entry clearance for settlement seems sound. There was very limited evidence that the sponsor had sole responsibility for the appellant even for a short period of time and this justified the conclusion the Immigration Judge came to.

Decision

17. The decision of the First-tier Tribunal does not disclose an error on a point of law such that it has to be set aside and the decision of the FTT stands.

18. The Immigration Judge made no fee award or anonymity direction and there is no challenge to those decisions in this Tribunal.

Signed: Date: 2nd April 2015

W.E.Hanbury