



IAC-PE-SW-V1

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

Appeal Number: OA/01507/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 October 2015**

**Decision & Reasons Promulgated
On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**JAY
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant: Ms K Cronin of Counsel instructed by Wilson Solicitors LLP
For the Respondent: Miss S Sreeraman of the Specialist Appeals Team

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the

Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The Appellant

1. The Appellant is a citizen whose year of birth is given as 2006. By reason of a court order made in late 2012 by the Ghanaian Circuit Court, the Appellant then known by another name became the adopted child of his United Kingdom Sponsor. She is a British citizen by naturalisation, born in Ghana in 1962.
2. The Sponsor married a Nigerian national in the United Kingdom in 2001 and her evidence is that the marriage has collapsed as long ago as 2002 (see paragraph 2 of the Sponsor's second statement) and a decree nisi was pronounced on 6 October 2015 in the Romford Family Court. The Sponsor stated her husband has returned to Ghana. There was no documentary evidence of this.
3. The Sponsor stated she had previously made an application for entry clearance for her adopted son on 27 September 2013 which had been refused.

The Respondent's Decision

4. On 19 December 2013 the Respondent refused the application solely by way of reference to paragraph 310 of the Immigration Rules. The Respondent noted the Appellant had been a foundling and had been cared for by the woman who found him. She had reported finding him to the police but had been asked to look after him on an interim basis. Some three years later she had returned to the police and stated that due to financial reasons she was unable any longer to look after him. The Appellant was then sent to a children's home.
5. The Respondent considered there was a lack of evidence that the Appellant had been on the waiting list for would-be adoptive parents for a long time. References were made to the adoption order querying its validity and to the United Kingdom Regulations currently in force in respect of adoptions of children from designated countries. In January 2014 Ghana was removed from the List of Designated Countries whose adoptions are recognised by the United Kingdom as being legal Overseas Adoptions. In this case the adoption order was made when Ghana was still on the List.
6. The notice of decision concluded the Sponsor had not shown she had and had had sole responsibility for the Appellant. The Respondent referred to the lack of evidence of contact which the Sponsor attributed to the use of international calling cards as the principal means by which she maintained contact with the Appellant.
7. The Respondent went on to consider whether there were any exceptional compassionate circumstances making exclusion of the Appellant undesirable and concluded there were none and refused the application by way of reference to paragraphs 310(i)(e) and 310(x)-(xi) of the Immigration Rules.

8. On 28 January 2014 the Appellant through the Sponsor lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds make the point that the 2012 adoption order is recognised because at the time Ghana was on the List of Designated Countries. The grounds refer to a report of 30 November 2012 prepared by the Department of Social Welfare (the Report) for the court in Ghana which considered whether to make an adoption order. The grounds assert the Appellant was living with the Sponsor's sister and gave an explanation why the money which the Sponsor sent to Ghana for his maintenance was sent for collection by others. Evidence of income which the Sponsor and other members of her family received from rents paid by the Ghana police had been submitted and the use of international telephone cards was explained as a means of reducing communication costs.
9. On 26 August 2014 the Entry Clearance Manager reviewed the decision referring to the suspension of all adoption cases in Ghana from 18 June 2013 (some six months after the Appellant's adoption order had been made) and the removal of Ghana from the List of Designated Countries on 4 January 2014. She went on to consider the Respondent's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 and referred to a memorandum of 20 June 2014 said to highlight a significant number of discrepancies and inaccuracies in the adoption order paperwork. No copy of that memorandum has been supplied to the First-tier Tribunal or the Upper Tribunal.
10. She went on to agree with the finding that the Sponsor had not shown she had sole responsibility for the Appellant, noting the lack of evidence of the advanced age of the Sponsor's sister and current carer for the Appellant and the arrangements made for collection of monies sent by the Sponsor for the Appellant.

The First-tier Tribunal's Decision

11. By a decision promulgated on 26 February 2015 Judge of the First-tier Tribunal Roopnarine-Davies dismissed the appeal under the Immigration Rules and under Article 8 of the European Convention outside the Immigration Rules, applying *Mundeba (s.55 and para. 297(i)(f)) [2013] UKUT 00088 (IAC)*. At the hearing the Respondent accepted as valid the 2012 adoption order which had first been acknowledged by a memorandum of 20 June 2014. In the same memorandum the Respondent had found the Sponsor had not established she had sole responsibility for the Appellant and that the evidence in support of the Appellant's claim "lacked overall coherence".
12. The Appellant sought permission to appeal and on 29 April 2015 Judge of the First-tier Tribunal Brunnen granted permission on the basis the Judge's findings whether the Sponsor had sole responsibility did not sufficiently identify the test she was applying and her conclusion was inadequately reasoned which might have infected her findings on what were the best interests of the Appellant.

Error of Law Hearing

13. Following a hearing on 2 September 2015 I prepared and signed on 10 September 2015 a decision to the effect that the First-tier Tribunal's decision promulgated on 26 February contained errors of law such that it should be set aside and no findings preserved. The substantive appeal came before me at a hearing on 28 October 2015 when both parties said that they had not seen a copy of the decision signed on 10 September 2015. Copies were handed to them. It would appear from the Tribunal file that the decision was never promulgated. Consequently, it is annexed to this decision.

The Hearing Afresh in the Upper Tribunal

14. Both parties took time to consider my error of law decision and went outside the hearing room to discuss it. On resuming the hearing they confirmed it was agreed that the sole issue for the re-hearing was whether the Appellant's mother (the Sponsor) had sole responsibility for him. She was present and I explained to her the purpose of and the procedure to be adopted at the hearing.

The Standard and the Burden of Proof

15. The standard of proof is the civil standard; that is on the balance of probabilities. The burden is on the Appellant. Evidence only of matters at or before the date of the Respondent's decision may be taken into account. The relevant Immigration Rules insofar as they relate to private and family life are those Rules in force at the date of the hearing: see paragraph A280 of the Immigration Rules and the judgment in *Singh and Khalid v SSHD [2015] EWCA Civ.74*.

Documentary evidence

16. Bundles were filed for the Appellant on 21 August and 26 October 2015. The former is described as a consolidated appeal bundle. Both bundles are indexed and given the limited scope of this appeal I shall not list the relevant documents but refer to them as appropriate in the course of this decision.

The Sponsor's Evidence

17. The Sponsor gave evidence. She referred to her two witness statements, the former in the consolidated appeal bundle of August 2015 and the latter in the October 2015 bundle.
18. The Sponsor's first statement filed for the hearing on 13 February 2015 before the First-tier Tribunal refers to the Sponsor's daily telephone contact with the Appellant, to the difficulty of doing "all my parenting remotely", her regular sending of funds for his maintenance and why the funds are collected by different people whom she identifies, and the role of her sister Mary with whom the Appellant lives and how Mary also receives the Sponsor's rental income share from family properties in Ghana. Of note also is the Sponsor's reference to the arrangement with her sister

Mary for the care of the Appellant to have been intended only as a temporary and short term arrangement. The second statement adds details of her divorce and of the distress caused to her and the Appellant by their continuing forced separation as well as the strain on her elder sister in looking after the Appellant.

19. The first statement refers to the arrangements the Sponsor made for the Appellant after he had been placed in her care in July 2012 for his care following her return to the United Kingdom. Paragraph 7 of her statement discloses an extensive involvement from major issues like his schooling to less important issues like his food. She describes her daily contact with him and intimate involvement with the minutiae of his life as well as contact with his school teachers. She refers again to the reluctance of her sister to look after the Appellant which the Sponsor considers is aggravated by her sister's increasing years and deteriorating health which the Sponsor became aware of when she last visited in October 2014.
20. In her oral testimony she confirmed daily telephone contact with the Appellant and his school and her frequent contact with her sister Mary so as to retain responsibility for all aspects of the Appellant's life. She also explained why she had not visited the Appellant in 2013 which was consistent with what she had said in her first statement.
21. In cross-examination she was asked why she had said that she was in contact with the Appellant's school two or three times a week when his teacher in his statement had said that she was in touch several times a month. She insisted that she was in touch with him two or three times a week. When asked about the Appellant's school reports she said that her elder sister Mary had only sent her two but she had asked her to send all documents to her. Everything she had received she had sent to the solicitors. She knew the Appellant's best school subjects as reflected in the latest report were science and mathematics. She explained why the Appellant went to a different church from the one frequented by his aunt. It was closer to home and one to which local children went. It had been his choice to go to that church and not her choice. Reference was made to the power of attorney of 21 November 2012 given by the Sponsor to her sister at page C154 of the consolidated appeal bundle. I noted it was limited to issues in relation to the proceedings for the Sponsor's adoption of the Appellant. The Sponsor could not recall the scope of the power and confirmed she had not given her sister any other power of attorney.
22. She confirmed her elder sister Mary's disapproval of the adoption and reluctance to care for the Appellant. This was in line with what was contained in the second statement of the Appellant's solicitor at pages 5 to 8 in the second bundle.
23. The solicitor's statement records a lengthy telephone conversation with the Sponsor's sister Mary. During the conversation Mary said she did not know how long she would be able to continue looking after the Appellant and that she was ever only supposed to look after him for a short period of time. She was clear the Appellant is not her son or her responsibility and the Sponsor made all the material decisions affecting the Appellant. Mary confirmed what the Sponsor had said about the frequency and subject matter of her telephone conversations with the Appellant and

the Sponsor's regular financial support was well as the fact that Mary received the Sponsor's share of the rental income from the family's properties.

Submissions for the Respondent

24. Miss Sreeraman relied on the reasons given in the Respondent's decision so far as related to sole responsibility. These challenge the Sponsor's claim to have sole responsibility on the grounds that the money transfer slips show that some transmissions have been sent to persons other than the Sponsor's sister Mary and the lack of evidence that the funds were for the benefit of the Appellant, the age of the documentation relating to rental income from the family's properties in Ghana and that telephone contact had been evidenced only by the production of international calling cards.
25. The Respondent relied on what the Asylum and Immigration Tribunal had said about sole responsibility in *TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049*. She submitted there were real issues about the scope and extent of the Sponsor's contact with the Appellant. She pointed to the absence of any school records before 2015. Other than assertion, there was no evidence the Sponsor had kept track of the Appellant's attendance or progress at school. Her oral testimony had been vague about the level of school fees payable and the exact rate of exchange. The evidence was of sporadic transmissions of funds to Mary and that these were not sufficient to meet the school fees so the question who paid the fees remained open. The production of international calling cards was of limited probative value.
26. The evidence of the frequency of contact between the Sponsor and the Appellant's school teacher was inconsistent. There was no external evidence of the position at the school of the individual concerned. The Sponsor had made only two visits to Ghana to see the Appellant, in 2012 and 2014.
27. Looked at in the round the evidence did not show the Sponsor had sole responsibility for the Appellant who had been left in the care of her elder sister for the past three years. The Sponsor's claim that the Appellant at the age of six had chosen which church he wanted to attend lacked credibility. She concluded the fact was the Sponsor shared responsibility jointly with her elder sister Mary and the appeal should be dismissed.

Submissions for the Appellant

28. Ms Cronin first addressed the submissions made for the Respondent. The Appellant had not chosen which church he wanted to attend but the evidence was that he had requested that he be permitted to go there because his friends went there. This was revealing of the Appellant's perception that the Sponsor had sole responsibility for him. If she had not, then he would have simply asked his aunt Mary for permission.
29. I noted this reflected the Sponsor's reply when asked why the Appellant had decided to go to this particular church which was different from that frequented by the

Sponsor's sister. Her reply was that he had said the children in the area go to it and this had been repeated: see hearing replies 51 and 52.

30. The evidence from the Appellant's teacher comprised a letter at page C3 in the consolidated appeal bundle and his statement prepared after discussion with the solicitors. Both had spoken of frequent contact. At paragraph 5 of his statement the teacher had referred to telephone contact being "very often". The Sponsor had said it was two or three times a week: see hearing reply 38. She submitted there was no serious inconsistency of any note between these statements and paragraph 7 of the teacher's statement that the Sponsor called him "several times per month". Ms Cronin pointed out that at paragraph 10 the Appellant's teacher had referred to the lack of contact between him and the Sponsor's sister, Mary.
31. She referred to what the Sponsor had said in paragraph 8 of her second statement about the identity of people who collected the remittances she sent and this had been confirmed to the solicitor by Mary at paragraph 11 of the solicitor's second statement. That statement was the best evidence available to the Tribunal about the role of Mary in the Appellant's life. It was consistent with the evidence given by the Sponsor and had not been directly challenged at the hearing.
32. Ms Cronin referred to the skeleton argument she had submitted at the start of the hearing. The agreed outstanding issue was that of sole responsibility. She had addressed this at paragraphs 23-34. These summarise the Sponsor's evidence about her contact and involvement in the Appellant's life, the evidence of remittances, the amounts and recipient's name. She refers to historic determinations about the meaning of sole responsibility which are cited and quoted in the determination in *TD (Yemen)*. She sets out paragraph 52 of *TD (Yemen)* which is the Tribunal's summary of the law relating to "sole responsibility":-

"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'."

She then refers to the judgment in *Buydov v ECO Moscow* [2012] EWCA Civ 1739 noting that at paragraph 18 the Court of Appeal approved the approach outlined in *TD (Yemen)*.

- 33. Ms Cronin continued that the Sponsor met the "sole responsibility" test. She was the sole parent and so there was an immediate presumption that she was solely responsible and the balance of the evidence was in favour of finding that the Sponsor did indeed have sole responsibility. The "touchstone" for "sole responsibility" identified by the Court of Appeal was "to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent" and "the importance of the parent with responsibility, albeit at a distance, having what can be identified as direction over or control of important decisions in the child's life" quoted from Court of Appeal judgments mentioned in paragraphs 31 and 32 of *TD (Yemen)*.
- 34. The Sponsor had chosen the Appellant's home and school. The evidence of her continued financial support had been accepted. The photographic evidence was consistent with her claim to have bought the Appellant clothes and toys. The evidence of constant frequent contact claimed by the Sponsor had been confirmed by other parties playing an active role in the Appellant's life. Overall the evidence was sufficient to show the Sponsor had "sole responsibility" for the Appellant.
- 35. Ms Cronin then turned to the obligation to consider the best interests of the Appellant as a child imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009. She referred to the background to the adoption of the Appellant by the Sponsor contained in the adoption papers from Ghana. She pointed to the visible change in the Appellant shown by the succession of photographs submitted from the Sponsor's two visits to him, the evidence from the Appellant's teacher, the Appellant's disrupted early life and his last three years spent in the home

of his disinterested aunt, the general history of disrupted care experienced by the Appellant and the fact that the Sponsor is recognised at law as the Appellant's mother. She concluded the appeal should be allowed.

Findings and Consideration

36. The only issue for decision by the Tribunal is by agreement between the parties whether the Sponsor has "sole responsibility" for the Appellant and shall therefore limit my findings to that single issue.
37. Paragraph 52(ix) of *TD (Yemen)* notes the issue is not who has day-to-day responsibility. In this case it is clear by reason of the distance between the Sponsor and the Appellant that day-to-day responsibility insofar as it may be exercised is exercised by the Sponsor's sister. *TD (Yemen)* continues that the issue is "whether the Sponsor has continuing control and direction of the child's upbringing including making all the important decisions". The Sponsor's evidence is that in addition to financial responsibility she is in daily communication with the Appellant and such contact extends to a genuine and serious involvement in the daily minutiae of the Appellant's life.
38. Her two statements and her oral testimony are broadly internally consistent and are consistent with the evidence given by her elder sister, Mary, to the solicitor as recorded in the solicitor's second statement. If there are inconsistencies about the frequency of contact between the Sponsor and the Appellant's teacher, I do not find that they are of a material nature. I have taken into account the lack of school reports in the Appellant's bundle from before 2015. The report together with the examination papers from July 2015 and a receipt for school fees of 14 September 2015 represent the most recent evidence the Sponsor may have. I take this evidence into account as corroborating the Sponsor's oral testimony bearing in mind the limitations on the evidence imposed by Section 85A(2) of the 2002 Act and the determination in *DR (Morocco) [2005] UKIAT 00038*.
39. A letter of 24 January 2014 from the Sponsor's sister by way of a statement was lodged with the original grounds of appeal and is therefore evidence at a very early stage in the proceedings. It is all of a piece with subsequent evidence recorded by the solicitor and consistent with the Sponsor's oral and written testimony. The letter speaks of Mary as an aging woman struggling to look after the Appellant. It explains the reason why money for the Appellant was sent by the Sponsor to a cousin. She says she hardly ever leaves the house. She refers to rental income from family properties for which documentary evidence is annexed: see pages C7-10 of the consolidated appeal bundle. She speaks of daily telephone contact and of her advanced age and physical ailments.
40. The teacher's evidence about the lack of contact with the Sponsor's sister, Mary is consistent with the Sponsor's evidence and not inconsistent with the evidence which Mary herself gave as recorded by the solicitor that she is really uninterested in the Appellant and sees his presence as a burden which has increased as he has stayed longer than was originally envisaged and as her health has declined.

41. I found the evidence about how it came about and why the Appellant attends a different church from the Sponsor's sister to be a telling illustration of their relationship. I find plausible and accept the explanation the Appellant had asked the Sponsor for permission to attend a church where his friends went.
42. Looked at overall, I find on the balance of probabilities that the evidence of the Sponsor is credible. I accept the evidence given by her sister as mediated through the solicitor's second statement. She is a solicitor well-known to the Tribunal and a partner in a respected firm of solicitors with very considerable experience in immigration and asylum matters. I place substantial weight on her evidence.
43. Looking at the evidence in the round, I am satisfied the Sponsor meets the "sole responsibility" test and therefore this appeal is allowed.

Anonymity

44. The Appellant is a young child and there is no reason to lift the anonymity direction and anonymisation order previously made.

NOTICE OF DECISION

The appeal is allowed on immigration grounds.

An anonymisation order made.

Signed/Official Crest

Date 05. i. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed and I have therefore considered whether a fee award should be made. The bulk of the evidence on the basis of which the appeal has been allowed was submitted after the date of the Respondent's decision and in all the circumstances I do not find it appropriate to make a fee award.

Signed/Official Crest

Date 05. i. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal