



IAC-FH-NL-V1

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

Appeal Number: OA/08607/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 10 February 2016**

**Decision & Reasons Promulgated
On 18 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

HD

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant: Ms K. Sidhu, Bassi Solicitors

For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Ghani promulgated on 13 May 2015 in which he dismissed the Appellant's appeal against the Entry Clearance Officer's decision to refuse to grant entry clearance as a dependent child under paragraph 297 of the immigration rules.
2. Permission to appeal was granted as follows:

"In [20] it is arguable that in stating, "In all probabilities I find that the money remittances were sent to the appellant's mother and not exclusively

for the appellant's needs" and later, "As far as various visits by the appellant's father are concerned, in all probabilities he visited his mother as well as the appellant.... these visits could not have been exclusively for the appellant", the Judge has erred in treating non-exclusivity as indicative of not having "sole responsibility".

3. The Sponsor attended the hearing. I heard submissions from both representatives, following which I reserved my decision which I set out below with my reasons.

Submissions

4. Ms Sidhu relied on the grounds of appeal. In addition she directed me to the evidence of contact in the Sponsor's travel to Gambia. He had visited in 2003, 2004, 2005, 2009, 2012 and 2014. I was referred to his statement at paragraphs [35] to [37]. He had not been able to travel when his son was ill. I was referred to paragraph [23] of the decision. Ms Sidhu submitted that, in addition to the evidence of visits, there had been evidence of calling cards, but nevertheless the judge had found that "as regards regular contact apart from recent evidence there is no sustained evidence of contact over a period of time". It was not contested that when the Sponsor travelled to Gambia it was not exclusively to see the Appellant, but also to see his mother and in connection with the business.
5. In relation to financial support, the Appellant lived with her grandmother and the money had been sent to her grandmother. She was only one when she started living with her grandmother and now she was only 13 years old. The money had to be paid to an adult. The Appellant was the beneficiary of the money sent to her grandmother.
6. The judge had placed no weight on the medical evidence [23]. In paragraph [22] the judge did not state that he did not accept the evidence relating to her school, for example the school reports. It was submitted that there was no conclusion regarding the educational evidence.
7. There had been no consideration of "serious or compelling circumstances". I was referred to the case of SS Congo [2015] EWCA Civ 387. Even if the Appellant was not successful under the immigration rules, having satisfied all of the other requirements and given that there was family life between the Appellant and Sponsor, who had an ill child in the United Kingdom, the half-brother of the Appellant, there was evidence of serious and compelling circumstances but no findings had been made. There was no reference to the ill-health of the Sponsor's child in the United Kingdom in consideration of paragraph 297(i)(f).
8. Mr. Mills referred me to the case of TD Yemen [2006] UKAIT 00049. There was no dispute here about the mother's involvement. However it is possible for parental responsibility to be shared between the Sponsor in the United Kingdom and the carer abroad, which is what the judge had found here. I was referred to paragraph [24] where the judge found that the Sponsor had not been exercising a "continuing control and direction"

over the Appellant's upbringing including making all the important decisions in her life.

9. It was submitted that the Appellant had relied on the visits to show ongoing sole responsibility but the judge had found that the evidence was not strong and that he could not be sure whom the Sponsor had visited. Even at its highest, the judge had not found sole responsibility. I was referred to the evidence of health and education. The medical letter had been found wanting and the judge had given it limited weight [22]. It was reasonable to ask why there would be regular contact with the clinic if the Appellant was not ill. In conclusion he submitted that it was mere disagreement with the findings of the judge and the grounds did that not show that the judge used the wrong approach or ignored the case of TD Yemen.
10. In relation to paragraph 297(i)(f) and Article 8, the judge was aware of the health issues of the Sponsor's son in the United Kingdom. He submitted that it could be inferred that the judge had that in mind when coming to his decision. He submitted that adequate consideration had been given to serious and compelling considerations [25]. Mr. Mills accepted that paragraph 297(i)(f) was not confined to circumstances in the home country and could relate to circumstances in the United Kingdom. It was arguably relevant therefore to the Sponsor's son. However he submitted that even at its highest the Appellant would not meet the test. There was no error in the judge's consideration regarding circumstances in Gambia.
11. In relation to SS Congo, the Appellant needed to show an exceptional case. The scope of the immigration rule was relevant. "Serious and compelling family or other considerations" in paragraph 297(i)(f) covered the majority of circumstances and the Appellant would have to go a long way to engage Article 8 outside the immigration rules given this broad scope. There would be little value in a second stage consideration given that sufficient consideration had been given to paragraph 297(i)(f). Adequate consideration had been given to Article 8.
12. In response Ms Sidhu referred me to paragraph 51 of TD Yemen. It was a "fact-rich" issue. There was evidence of phone contact and visits. There was evidence of the ill child in the United Kingdom. Financial support had to be a consideration. The judge had been looking for exclusivity of financial support and visits. Looked at in the round, weight had been given to the non-exclusivity of these factors and the test had not been properly applied. The evidence demonstrated continuing control. No reference was made to the grandmother's statement.
13. In relation to SS Congo, where an Appellant was unable to meet the requirements of the immigration rules, many factors needed to be considered including the finances of the Sponsor and the best interests of the child. In relation to the interference with family life, family life could not continue in Gambia due to the illness of the Sponsor's son. He is a British citizen and had the right to be with his biological parent. The judge

had to take into consideration all of the factors, but he had only looked at the issues raised by the Entry Clearance Officer.

Error of law

Immigration rules

14. The judge considers whether or not the Appellant meets the requirements of paragraph 297(i)(e) from paragraphs [18] to [24]. He quotes the case of TD Yemen [19]. In paragraph [20] he find that the money remittances were not sent exclusively for the Appellant's needs.

"In all probabilities I find that the money remittances where sent to the appellants mother [sic] and not exclusively for the appellants needs."

15. Given that the Appellant is still a child, it is of course the case that she would not be able to receive any remittances herself but that the money would have to be sent to an adult. In order to demonstrate sole responsibility, it is not necessary for money remittances to be sent exclusively for the child. The judge had before him evidence of financial support. He does not find that the Appellant is not the beneficiary of the support, but only that such support was not exclusively for her. However instead of making a positive finding of financial support, the judge's approach to this has been to place less weight on it because it was not exclusively for the Appellant.

16. Later in paragraph [20] the judge finds that the Sponsor's visits were not exclusively to see the Appellant.

"As far as various visits by the appellant's father concerned, in all probabilities he visited his mother as well as the appellant and of course he has now established a business in Gambia as well. These visits could not have been exclusively for the appellant."

17. Similarly, the judge has not found that the Sponsor's visits were not for the purpose of visiting the Appellant. Given that the Sponsor's mother lives in the Gambia looking after the Appellant, and that he established a business in the Gambia, a proportion of the profits from which go to support the Appellant, it is not surprising, and it has not ever been suggested, that the visits were for the exclusive purpose of seeing the Appellant. However, in a similar way to financial support, instead of making a positive finding as to the evidence of visits, the judge has focused on the fact that these visits were not exclusively for the Appellant.

18. Further, in relation to this evidence of visits, in paragraph [23] the judge finds that there is no sustained evidence of contact over a period of time. However, there was evidence of visits made between 2003 and 2014 before him. Reasons had been given as to why the Sponsor could not visit when his son in the United Kingdom was ill, having been diagnosed with leukaemia. There was evidence of calling cards. Given the fact that the judge has placed less weight on the evidence of visits as he has not found that there were exclusively to visit the Appellant, the fact that he later

refers to the fact that there is no sustained evidence of contact shows that he has allowed his finding in paragraph [20] to affect his consideration of evidence of contact.

19. These are the first two issues considered by the judge when making his findings as to sole responsibility. The next matter he considers is the evidence from the Appellant's grandmother. He finds that she does not state anywhere why she can no longer continue to take care of the Appellant, and merely states that she wishes the Appellant to join her father in the United Kingdom. However this is not a relevant consideration for the purposes of establishing sole responsibility.
20. In paragraph [22] the judge turns to the evidence relating to education. He finds that there are discrepancies. However, he had before him evidence of school reports which had been sent to the Sponsor, but he finds that there was no evidence that the Sponsor had requested the school reports. Given that the Sponsor had received the school reports, the judge has failed to give reasons for why the fact that there was no evidence that the Sponsor has requested them from the school was relevant. He sets out the evidence, but he fails to make a finding on the evidence as a whole, either the weight that can be attached to it, or what it shows.
21. In paragraph [23] he looks at the medical evidence. Again, he finds that there are discrepancies, as a result of which he attaches no weight to the letter from the clinic given the evidence from the Sponsor that the Appellant did not have any health problems.
22. Even if the educational and medical evidence does contain discrepancies, either no findings are made, and where they are, they are set against the backdrop of having placed less weight on the evidence of financial support and visits due to the fact that they were not exclusively for the Appellant. I find that the judge's approach to financial support and visits has infected the way in which he has approached the consideration of the rest of the evidence provided by the Appellant to show sole responsibility under paragraph 297(i)(e). I find that this is an error of law.
23. Further, I find that there has been no adequate consideration of serious and compelling considerations. It is considered in paragraph [25], a total of six lines. The wording of paragraph 297(i)(f) is "serious and compelling family or other considerations which make exclusion of the child undesirable". As accepted by Mr. Mills, it is not restricted to the circumstances in the country where the child is living. The judge considered the situation in Gambia but makes no findings as to whether there are any serious and compelling family considerations beyond this, for example relating to circumstances in the United Kingdom. The judge had evidence of the Sponsor's son leukaemia. He refers to this in paragraph [14] when setting out the evidence of the Sponsor and the fact that his son's illness has prevented the Sponsor from visiting the Appellant. However there is no consideration of the Sponsor's son's illness

in the context of serious or compelling family or other considerations. Paragraph [25] contains no analysis of this family situation in the United Kingdom and is an inadequate consideration of paragraph 297(i)(f).

Article 8

24. Paragraph [26], which is only seven lines long, contains the entire analysis in relation to Article 8. Given that there has been an inadequate consideration of “serious and compelling family or other considerations”, I find that there has been no adequate consideration of the totality of the family’s circumstances in order to carry out a proper assessment of family life under Article 8. It was submitted that family life could not continue in the Gambia, but there is no consideration of this.
25. With reference to SS Congo, in ascertaining whether there are any exceptional circumstances, given that there has been no proper consideration of the circumstances in the Appellant’s case under the immigration rules, there cannot be said to have been a proper consideration of whether there are any exceptional circumstances above and beyond those covered by the immigration rules. Given the family’s circumstances, the failure to conduct a proper assessment under Article 8 and the failure to give adequate reasons for why the decision is “proportionate and justified”, amounts to a material error of law.

Notice of decision

The decision involves the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal for re-hearing.

Signed

Date 13 February 2016

Deputy Upper Tribunal Judge Chamberlain