**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/08642/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 27th May 2016** | **On 15th July 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MISS ASHEMA LATOYA HOLNESS**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr B Hawkin, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Jamaica born on 9th February 1997. The Appellant applied for entry clearance to join her mother in the UK. Her application was considered under paragraph 297 of the Immigration Rules and was refused by the Entry Clearance Officer on 10th June 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Aujla sitting at Taylor House on 2nd September 2015. In a decision and reasons promulgated on 22nd September 2015 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. On 22nd October Grounds of Appeal were lodged to the Upper Tribunal. In quite lengthy Grounds of Appeal nine reasons were set out as to why the First-tier Tribunal Judge had erred in law. On 1st April 2016 Judge of the First-tier Tribunal P J M Hollingworth granted permission to appeal. Judge Hollingworth noted that at paragraph 29 of the decision the judge had referred to the Appellant's grandmother having been solely responsible for her upbringing since the age of 3. He notes that Judge Aujla continues by stating that taking that fact into account in order to establish that the Sponsor had become solely responsible for the Appellant's upbringing she had to do much more than show that she had maintained contact with the Appellant and provide financial support. Judge Hollingworth considered that it was arguable that the judge had found as a fact the conclusion determining the outcome of the appeal without providing an analysis of all the factors relevant to sole responsibility being exercised by the Appellant's grandmother or the Sponsor before reaching a conclusion as to the scope of the exercise of sole responsibility and by whom. He considered that in such circumstances an arguable error of law may have arisen and that the judge had proceeded to analyse factors relevant to the question of the exercise of sole responsibility and by whom subsequent to finding as a fact that the Appellant's grandmother had been solely responsible for the Appellant's upbringing since the age of 3.

4. On 5th May 2016 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response highlights the issue in the appeal, namely whether the Sponsor has sole responsibility for the Appellant. It points out the Appellant was aged 19 at the time of the Rule 24 reply but at the material time accepts she was 17. It further notes that the Sponsor voluntarily left the Appellant in Jamaica when she was 3 years old. It contends that the First-tier Tribunal Judge is detailed and comprehensive and that the judge considered the evidence and concluded by giving sufficient reasons that he does not find it credible that the Appellant's grandmother who has been taking care of her since the age of 3 no longer can for health reasons, as claimed. It contends that the judge directed himself properly to the ratio of the relevant case of *TD Yemen* and concluded by giving sufficient reasons that the requirements of paragraph 297(e) of the Rules are satisfied.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Hawkin. Mr Hawkin has had previous involvement in this matter in that he is the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Wilding.

## The Relevant Law and Authorities

6. The relevant Immigration Rule is Rule 297(e), namely:

> *"297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:*
>
> *(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:*
>
> *(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing".*

7. The guiding case law is to be found in the authority of *TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] 00049*. The relevant head note for that authority states:

> *"'Sole responsibility' is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) has abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have 'sole responsibility'".*

## Submissions/Discussion

8. Mr Hawkin adopts his Grounds of Appeal as his starting point. I have read the Grounds of Appeal. He takes me to paragraph 29 of the First-tier Tribunal Judge's decision emphasising that this is the basis of the grant of permission. He submits that that paragraph is unclear and confusing and that in referring to the Appellant's grandmother as having been "solely responsible for her upbringing since the age of 3" the judge was effectively presuming the very issue which, in accordance with TD Yemen, he had to carefully weigh up and evaluate. He submits that the judge did not give any proper reason for rejecting the Sponsor's evidence that she chose the Appellant's school and that the language of paragraph 29 demonstrates the judge has not applied the principles of *TD* itself.

9. He states that it was wrong of the judge to state at paragraph 27 that the Sponsor "abandoned the Appellant" and that her intention had been for the Appellant to join her in the UK much sooner and that several unsuccessful attempts were made prior to the current application. He

points out that the Sponsor started sending money from the time she arrived in the UK and has continued to make all the major decisions in her life. He emphasises that there have been visits by the Sponsor to see the Appellant in 2008, 2010, 2011 and 2014. Further he submits that the judge has significantly underestimated the medical evidence. Having asked me to give due and further full consideration to his Grounds of Appeal, Mr Hawkin asks me to find material errors of law in the decision of the First-tier Tribunal Judge and to set aside the decision and remit the matter back to the First-tier Tribunal for rehearing.

10. In response, Mr Wilding relies on the Rule 24 response and the decision in *TD Yemen*, in particular referring me to paragraphs 49 and 52(ix). Against that basis he indicates it is necessary to consider what the judge did. He submits that the determination is carefully prepared, and that from paragraph 21 onwards the judge has considered the facts and that at paragraphs 25 to 28 the judge has set out his findings including the evidence before him that the Sponsor in effect abandoned the Appellant at the age of 3 and left her in the care of her own mother. He submits that it is clear that the judge has made a finding that the responsibility of the Appellant was undoubtedly shared and takes me to the extract from paragraph 29 which states:

> "However the Appellant's grandmother had sole responsibility for her upbringing since the age of 3. Taking that fact into account, in order to establish that the Sponsor had become solely responsible for the Appellant's upbringing, she had to do much more than show that she had maintained contact with the Appellant and provide financial support".

11. Mr Wilding submits that the judge has consequently grasped the central issue and has addressed it. Whilst accepting that there is a typographical error with regard to the amount of financial support, he submits that the judge fully understands what was meant and that the issue has been properly considered and that in any event the typographical error is not material. He emphasises that the job of the Upper Tribunal is not to replace the first decision but to consider whether there are material errors of law in the First-tier Judge's analysis. He submits that there are none and that the judge has signposted how he got to his reasons and that the judge has been very careful to note that the Appellant is a child and all the evidence relates to when she was a child. He submits that the grounds based on sole responsibility must therefore fail.

12. In addition he points out that the judge has at paragraph 31 gone on to consider paragraph 297(i)(f) and made findings that he was entitled to, that the Appellant did not satisfy the requirements of that Rule and that he has made significant findings at the date of decision on the circumstances relating to the Sponsor's health, and that the submissions of the Appellant's legal representatives amount to nothing more than disagreement. Further he considers that the judge has given due and full consideration to Article 8 and has carefully reasoned his analysis, and that

having made a finding that there is no sole responsibility the judge has quite properly still looked at Article 8 but that it is a hopeless submission on behalf of the Appellant to contend that a claim under Article 8 "saves the day". He asked me to dismiss the appeal.

13. Mr Hawkin in brief response also takes me back to *TD* in particular to paragraph 10 and that it is inappropriate as a result of the analysis of that paragraph which accepts that a parent who is settled in the UK may retain sole responsibility for a child where the day-to-day care or responsibility for that child is necessarily undertaken by a relative abroad to have built the judge's finding at paragraph 29 of his decision on the basis of matters considered within paragraph 27.

**The Law**

14. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

15. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

**Findings**

16. The challenges in this case predominantly centre on the judge's approach to *TD Yemen*. However this is a judge who has set out his decision in considerable detail and in a very sensible and well constructed manner. Having recited the documentary and oral testimony that he had heard in considerable detail including the submissions of the legal representatives, he has gone on to make findings of credibility and fact. He has looked thoroughly at the guidance to be given within *TD Yemen* setting that out and has made a finding which he was perfectly entitled to having heard the evidence as to how the Appellant came to be in the care of her

grandmother. He has identified the exact issue that needs to be considered, accepted that there was a financial responsibility for the Appellant on the Sponsor, and noted that there has been contact between the Appellant and the Sponsor. He has accepted that the evidence shows the Sponsor has some responsibility for the Appellant's upbringing. He has considered thoroughly the position therefore within *TD*, in particular whether a UK based parent has, in practice, allowed the parental responsibility for a child to be shared with a carer abroad and considered the appropriate test, namely 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 and the fact that if not, responsibility is shared and so not sole.

17. This is the approach that the judge has undertaken. His decision is detailed and comprehensive. There are a couple of typographical errors. They are conceded by the Secretary of State. They are not material to the outcome of the decision. Valiant as the submissions of Mr Hawkin are, when looked at in detail they amount to little more than disagreement with the findings of the judge. The judge has properly addressed the approach in *TD* and has reached findings which he was entitled to. I emphasise that I am only considering whether or not there is a material error of law. I am not rehearing this matter.

18. Having found that there was shared responsibility the judge then thereafter quite properly went on to briefly consider whether there were serious and compelling family or other considerations to make the Appellant's exclusion from the UK undesirable and made findings that he was entitled to. Thereafter having given due consideration to Article 8, the guidance given by the Court of Appeal in *SS (Congo) [2015] EWCA Civ 386*, and due consideration to Section 55 of the 2009 Act, the judge concluded that the appeal under Article 8 was also dismissed. Again the judge has followed a thorough and logical approach and his findings disclose no material error of law. Whilst I acknowledge that the decision will therefore be disappointing to the Appellant and to her Sponsor, I am satisfied that the judge in this matter has made findings that he was entitled to, that he has properly analysed the law, and that in a carefully constructed decision it discloses no material errors of law. In such circumstances the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

**Notice of Decision**

The decision of the First-tier Tribunal Judge discloses no material error of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**
**FEE AWARD**

No application is made for a fee award and none is made.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris