Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA095632015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 May 2016	**On 26 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

[D O]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Cole of Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on [ ] 2009. He made an application on 5 March 2015 for entry clearance to the United Kingdom as the dependant of his father

[OO] who has limited leave to remain in the United Kingdom until 7 August 2017 as the spouse of [KB].

2. The First-tier Tribunal Judge dismissed the appellant's appeal and the appellant appealed against that decision. First-tier Tribunal Frankish on 24 February 2016 refused permission to appeal but it was subsequently granted by Upper Tribunal Judge McGeachy on 25 March 2016 stating that it is arguable that the First-tier Tribunal Judge erred in law in finding that the sponsor did not have sole responsibility for the appellant pointing to the fact that the concerns of the Judge of the First-tier Tribunal were not put to the sponsor whose replies to all relevant questions showed that he did have full responsibility. Moreover, permission Judge stated that the judge might have erred in law in requiring corroborative evidence and that he was wrong to reject unchallenged evidence. Furthermore, the judge may have erred in not applying relevant case law and making findings on a matter which was not raised in the refusal.

3. Judge of the First-tier Tribunal made the following findings in her determination promulgated on 17 November 2015 which I summarise. She set out the case of **TD (paragraph 297(1)(e) sole responsibility) Yemen [2006] UKAIT 00049** which sets out what sole responsibility means under the Immigration Rules which is basically to identify the person who has responsibility for a child's upbringing and whether the responsibility is sole is a factual matter to be decided upon all the evidence.

4. Initially the application had been refused by the respondent under paragraph 320(7A) of the Immigration Rules on the basis that the respondent found that the appellant had provided a false birth certificate. This however was later rectified and the judge considered the appeal under the appropriate section of the Immigration Rules which is EC-C of Appendix FM. Nothing rests on this because it was accepted that the judge was entitled to consider the appellant's application under the new Rule. This hearing was concerned with several other issues, one being that no respondent's bundle was produced and the Immigration Rule being a different one from that under which the application had been refused.

5. The judge found that on a balance of probabilities that the appellant is the sponsor's son and who is the sole surviving parent. The judge stated however at paragraph 27 that this does not necessarily mean that he has sole responsibility for his son's upbringing within the meaning of the Immigration Rules. He noted that the responsibility for a child's upbringing may be undertaken by individuals other than their parents. He noted that the appellant currently resides with his paternal grandparents, his grandmother [BO] who is his legal guardian. The central issue the judge said in this appeal is whether the de facto care given by the sponsor to the grandmother and other relatives of the child left behind in the country of origin has been given under the direction of the sponsoring parent in the UK to justify the conclusion that the latter has had sole responsibility despite the geographical separation. This is a question of fact.

6. The judge found that there was very little documentary evidence to substantiate the sponsor's claims that he had sole responsibility. He set out the evidence at paragraph 29 which consisted of a letter from the doctor and the letter dated 25 February 2015 from the principal of the Living World Academy, where the appellant goes to school and evidence that the sponsor had paid the school fees and has taken responsibility for making decisions as to his son's schooling, religious upbringing. The judge stated that there was no documentary evidence to show that any financial support for the child's living expenses has emanated from the sponsor, [OO].

7. At paragraph 31 the judge stated that in his judgment the facts demonstrated fall short of establishing that [OO] has exercised sole responsibility for the appellant in the sense that he has had continuing control and direction of his son's upbringing including making all the important decisions in his life. He stated "in my view it is more probable than not that the responsibility is shared with the sponsor's mother. I am not satisfied the requirements of EC-ECC 1.6(b) have been met", then he sets out the requirements.

8. The judge considered the case of **Mundeba** and stated that according to the sponsor the appellant's grandmother who he says is 65 was extremely unwell and unable adequately to look after the appellant. He noted the two letters submitted to show that and the doctor who states that the grandmother's heart disease has rendered her helpless. She set out that when the sponsor was asked at the hearing what problems his mother had the sponsor says that she had arthritis and sometimes found it hard to breathe. When asked what was the cause of this breathing problem, the sponsor said he thought it was contamination in the air or a disease that his mother had caught when working in farming. The judge noted that the sponsor did not mention that his mother was suffering from heart disease which calls into question the credibility of the comments and diagnosis of Dr Collins. It is apparent the judge found that [BO] is not in fact helpless given that she drives the appellant to school daily albeit in an automatic car.

9. The judge then went on to consider the appellant's living conditions in Nigeria and found that there is no evidence or suggestion that he is living in any substandard accommodation in his home country. The judge stated that the appellant appears to be in good health, has no education needs, enjoys the emotional support of his grandparents, he has two aunts living in Port Harcourt which the sponsor's evidence is that this is about three hours' drive. The appellant's aunt [P] accompanied the appellant when he went for his DNA test. The sponsor's father has two wives, both of whom live in separate houses on the same compound and clearly the appellant has a large extended family in Nigeria.

10. The judge said that having given careful consideration to all the evidence written and oral he is not satisfied on a balance of probabilities that the appellant has discharged the burden of proof under the Rules and that there is no compelling evidence of any adverse circumstances such as to amount to serious and compelling family or other

considerations which make the appellant's exclusion from the United Kingdom undesirable.

11. The judge then went on to consider the financial requirements of the immigration rules and said that he also fails for refusal under the financial requirements. He then considered Article 8 and stated at paragraph 41 that the appellant's rights under Article 8 would be in accordance with the law and in pursuit of a legitimate objective namely the maintenance of immigration control. He found the exclusion of the appellant proportionate and that the appellant and his sponsor can continue contact with each other through telephone, Skype calls and visits. He then dismissed the appeal under all the Immigration Rules and under Article 8 of the European Convention on Human Rights.

12. The grounds of appeal state the following which I summarise. The First-tier Tribunal Judge finds that the sponsor does not have full responsibility for the appellant and stated "In my view it is more probable than not that the responsibility is shared with the sponsor's mother". In the decision to judge sets out the appellant's sponsor evidence at the hearing which was that he pays the appellant's school fees, makes the decision about his healthcare and makes decisions about his religious upbringing.

13. The judge stated in his decision that in cross-examination no questions were put to the sponsor by the respondent's representative to challenge any of his answers to these questions. The only questions that were put to the sponsor was as to how his son travels to school in which he answered that his grandmother drives him in an automatic car. In re-examination the sponsor confirmed that when the appellant's grandmother is ill the appellant does not attend school. In cross-examination when the sponsor was asked who would his son stay with if his grandmother could not look after him, he replied that there was no-one. The sponsor talked about the appellant's medical treatment by taking regular malaria tablets. No questions were put about the appellant's faith at all and the evidence shows that the appellant attends a catholic school. No challenge was made to the sponsor's assertion that it is he who makes the decisions about his religious upbringing, healthcare, school fees and that he provides everything for the appellant.

14. It was stated in **TD (Yemen)** at paragraph 21 that responsibility may be shared if the sponsor parent has allowed relatives abroad to make some important decisions in the child's life. There was no evidence before the First-tier Tribunal at all to suggest that the grandmother has made any important decisions for the appellant nor was this suggested to the sponsor in cross-examination. In the circumstances it is not open to the judge to conclude that responsibility was shared.

15. Ground 3 goes on to say that the judge was erroneous in requiring corroborative documentary evidence for the sponsor's oral evidence which was unchallenged evidence by the respondent at the hearing. The judge also fell in error by considering the maintenance requirement of the immigration rules when that was not an issue taken by the respondent. The judge also erred in disregarding supplementary

questions put to the sponsor at the hearing such as if the appellant is in trouble or does something naughty what happens and the evidence was that the sponsor's mother calls him and then the sponsor disciplines the appellant over the telephone and he seems to listen to his father. No mention was made of this evidence in the determination.

16. There was also an error in the judge's approach to the appellant's sponsor's medical knowledge about his mother's medical condition. The judge found that the sponsor did not mention that his mother was suffering from heart disease which calls into question the credibility of the comments and diagnosis from Dr Collins who did say that his mother suffers from chronic osteoarthritis and hypersensitive heart disease.

17. Further it was argued in the grounds of appeal that the judge failed to apply the case law of **Mundeba** appropriately in finding that there are no compelling circumstances which would make the exclusion of the child from the United Kingdom undesirable. It states that as a starting point the best interests of the child are best served by being with both or at least one of their parents. The judge's assessment does not address the elements set out in **Mundeba**. The judge did not take into account the evidence before her that the best interests of the child are to be with his father particularly given that at 5 years old he does not have the social awareness to make continued residence a real feature. The sponsor's evidence that when his mother was not well, that the appellant does not go to school meaning that his educational needs are sometimes not met. There was evidence of a serious and deteriorating health condition of the appellant's grandmother which makes caring for a 5-year-old active child increasingly difficult and this shows that the judge only looked at one side of the coin in making her findings at paragraph 36 of the determination. The judge's findings are not adequately reasoned and case law has not been properly applied.

18. The sixth ground of appeal is that the judge made findings on a matter not raised at any stage. This is the financial requirement.

19. Ground seven is in respect of the procedural error in applying the wrong immigration Rule and ground eight is the alternative modes of conducting parent and child life, the reasonableness of a British citizen relocating saying that the best interests of the child, is to live with his father. The sponsor's wife cannot live in Nigeria, the evidence was that she was in terror of the possible kidnappings and has had no tie or contact with that particular country and she is a British citizen and there should be no reason for her to go to Nigeria with the sponsor to be with the appellant.

20. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination. Mr Cole adopted his grounds of appeal which are very detailed and I will say no further about them. Mr Avery on behalf of the respondent said that the issue has to be looked at in context. He accepted that there is no respondent's bundle but nevertheless argued that the appellant nevertheless wanted to proceed with the appeal. Mr Avery said that there was

shared responsibility between the sponsor and the grandmother but there was no evidence of sole responsibility by the sponsor for the appellant.

21. Mr Avery further submitted that the judge took into account all the evidence, knew that the burden is on the appellant and stated that the appellant did give false information and therefore did not have an unblemished record in respect of credibility. He reiterated that the prime issue was sole responsibility and the burden was not discharged by the appellant and therefore the appellant did not meet the requirements of the Immigration Rules.

Decision as to Whether there is an Error of Law in the Determination of the First-tier Tribunal Judge

22. The issue in this appeal was whether the appellant has provided sufficient evidence to prove on a balance of probability that his sponsor, his father living in the United Kingdom has had sole responsibility for him since his sponsor left Nigeria and came to this country when the appellant was 3 years of age. The appellant is now nearly 6 years of age. The question was whether during those three years when the appellant remained in Nigeria, did his sponsor have sole responsibility for him as he lived with his grandmother.

23. The judge took into account and understood the issues in the appeal. The judge correctly stated that the question of sole responsibility is set out or elaborated in the case of **TD (sole responsibility) Yemen [2006] UKAIT 00049** which is set out at paragraph 9. The judge sets out in detail the issue of sole responsibility but nevertheless found on the evidence that the appellant's sponsor did not have sole responsibility for the appellant and stated at paragraph 27:

> "I am satisfied on the balance of probabilities that the sponsor is David's sole surviving parent. However, this does not necessarily mean that he has sole responsibility for his son's upbringing within the meaning of the Immigration Rules".

24. As found in **TD (Yemen)** responsibility for a child's upbringing may be undertaken by individuals other than their parents. The appellant currently resides with his parental grandparents, his grandmother [BO] is his legal guardian. The central issue in this appeal is whether the de facto care given by the grandmother and other relatives to the child left behind in the country of origin has been given under the direction of the sponsoring parent in the United Kingdom so as to justify the conclusion that the latter has had sole responsibility despite the geographical separation and which is a question of fact.

25. The judge made adverse credibility findings against the sponsors because he found that sponsor's evidence about his mother's health was not consistent with the evidence and diagnosis of Dr Collins about the appellant's grandmother's health conditions. The evidence from Dr Collins was that the appellant's grandmother has a

heart condition and hypertension. The judge failed to appreciate that the real issue in this appeal is not the appellant's grandmother's illness or the nature of that illness or any contradiction or inconsistencies about the nature of the illness but whether the appellant's father in this country has played a central part in his child's upbringing in Nigeria whereby sole responsibility has been demonstrated.

26. The sponsor's evidence at the hearing was very much in line with a notion of sole responsibility for the main decisions and welfare of his child living in Nigeria with his mother. There was evidence by the sponsor's witness at the hearing who said that if the appellant is naughty or does not do anything correctly it is the father in this country who gives him a telling off or advises him about whatever that needs to be done.

27. The judge failed to appreciate that the important issue in this appeal is that the appellant is the biological son of the sponsor who lives in the United Kingdom and who is now married to a British citizen.

28. I therefore find that the First-tier Tribunal Judge has made a material error of law in the determination in equating day to day care of the appellant by his grandmother as being inconsistent with his sponsor having had sole responsibility for the appellant. The judge erred in not taking into account that responsibility can be shared because it is inevitable that the person who is looking after a child as said in **TD (Yemen)** will have day to day care towards a child of 5 such as bathing him, caring for him, driving him to school but that is not the kind of responsibility that is being considered. The issue in this appeal was whether sponsor has been making the main decisions for the appellant notwithstanding that there is day-to-day care by some other member of the family in Nigeria. This care given by the person looking after the appellant in Nigeria is not conclusive on the issue of sole responsibility. The grandmother will inevitably make sure that the child cleans his teeth, goes to bed, does his homework and responsibility will to that extent be shared. That does not preclude the sponsor from having sole responsibility for the appellant.

29. The unchallenged sponsor's evidence before the Judge was that he makes all the decisions in the appellant's life and that the grandmother does whatever he wants her to do looking after the appellant. The sponsor stated that he has had a continuing interest and involvement in his child and that he is consulted and involved and makes the decisions about the child's upbringing.

30. I find that the judge heard in his finding that the appellant's father does not have sole responsibility despite ample evidence before the judge that he does. The judge fell into error by accepting that shared responsibility is inconsistent with sole responsibility.

31. I therefore set aside the decision of the first-tier Tribunal and remake the decision.

32. I find that the appellant's sponsor came to this country three years ago on a student visa. He remained in this country and married. He left his child in the care of his mother in Nigeria and the culture from which the sponsor comes from it is not unusual that mothers will care for their children's children but this by no means indicates that the appellant's father has relinquished care, responsibility or otherwise for his child. I therefore find that the appellant meets the requirements of the Immigration Rules for entry clearance as a dependant of his father in this country which leaves me with the only issue which is one of maintenance.

33. Mr Avery's position at the hearing was that maintenance was not considered because initially when the decision was taken, it has not been accepted by the respondent that the appellant was the biological son of the sponsor in the United Kingdom and therefore the issue of maintenance would not have arisen. I have been pointed to evidence that the appellant's sponsor and his wife earns well over the minimum amount required of £18,600. There was no issue taken by Mr Avery that the appellant does not meet the maintenance requirements of the Immigration Rules.

34. I therefore set aside the decision of the First-tier Tribunal and I substitute my decision and I allow the appellant's appeal.

No anonymity direction is made.

Signed Mrs S Chana Date 25th day of May 2016

Deputy Upper Tribunal Judge Chana

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and I make an order to the amount of fees paid.

Signed Mrs S Chana Date 25th day of May 2016

Deputy Upper Tribunal Judge Chana