Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03030/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunals	**Decision & Reasons Promulgated**
On 31st August 2018	**On 25th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SHAMAR MICHAEL MORGAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sarwar (Counsel)
For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge E Young-Harry, promulgated on 22nd September 2017, following a hearing at Birmingham Sheldon Court on 26th July 2017. In the determination, the

judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Jamaica, and was born on 12th September 1998. He appealed against the decision of the Respondent, Entry Clearance Officer, dated 20th October 2015, refusing his application to join his mother, Marie Hall-Wilson, as her dependent child under, what is known as the "sole responsibility" Rule, in paragraph 301 of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that his mother left him in the care of his grandmother when he was 2 years of age, to come to the UK. She was granted discretionary leave to remain in 2010. Subsequently she was granted full settlement. She has since then been in a position to Sponsor the Appellant to come to the UK. She has done so because the Appellant's grandmother is no longer able to care for him. The Appellant's sponsoring mother, Marie Hall-Wilson, has visited the Appellant once in 2011. She keeps in touch with him and there is phone card evidence. She sends him money. She takes an interest in his education. She supports him.

The Judge's Findings

4. The judge, at the outset, referred to the guidance in **TD (Yemen) [2006] UKAIT 49**, that the Sponsor has to show that she has "continuing control and direction of the Appellant's upbringing which includes making the important decisions" in his life (paragraph 10). However, in this case, the sponsoring mother, having left Jamaica in 2000, when the Appellant was only 2 years of age, only visited him once in 2011, even though she had discretionary leave by that stage from 2010, and has only seen the Appellant once in seventeen years (paragraph 12). There was phone card evidence (paragraph 13). The Sponsor sent money, but she only had before her produced one piece of documentary evidence dating back to 2010 to support this claim (paragraph 14). The Sponsor had identified the school that the Appellant should go to because she had been to the school herself, but that "I note this was the only important decision she was able to refer to" (paragraph 16). When the Sponsor was asked about the progress of the Appellant at school, she was able to say that he struggled with maths, and this was consistent with the school reports that the Appellant often was absent from maths classes (paragraph 17). The judge made positive findings in the Appellant's favour (at paragraph 20), but concluded that these do not go far enough (paragraph 21). There was insufficient evidence to show that the Sponsor had sole responsibility for the Appellant's upbringing (paragraph 21). As for the Appellant's claim that the grandmother was too unwell, the Appellant had now reached the age of majority and was an adult and the medical evidence provided was not relevant (paragraph 25).

5. The appeal was dismissed.

6. The grounds of application state that the judge, although referring to the decision in **TD (Yemen) [2006] UKAIT 49**, proceeded on the wrong footing. The proper basis of approach to a case such as this was that the Appellant was applying as a child of a single parent, where the father had abdicated responsibility. This was clear from the decision in **TD (Yemen)** where it was stated that,

> "Where one parent has disappeared from the child's life, and so relinquished or abdicated his (or her) responsibility for the child, the starting point must be that it is the remaining active parent who has 'sole responsibility' for the child" (paragraph 49).

7. In the circumstances where the Sponsor was the remaining active parent who had sole responsibility for the Appellant, the judge had to approach the matter from this basis as a starting point. The judge failed to do so (see paragraphs 10 to 21 of the determination).

8. Second, with reference to the decision in **TD (Yemen)**, in any event, there was no reference in substance or form in the determination to the test in **TD** (at paragraph 49), or to adopting it as a starting point.

9. Third, the decision in **TD (Yemen)** also made clear that in a "one parent case" that whilst the starting point or sole responsibility is with the single parent, this may be negated where there is evidence that the carer abroad has shared responsibility for decisions with respect to the child's life. Thus, **TD (Yemen)** makes clear that, "if the UK based parent has allowed the carer abroad to make some 'important decisions' in the child's upbringing, then it may readily be said that the responsibility for the child has become 'shared'" (see paragraph 50). In this case, Judge Young-Harry had failed to demonstrate in the conclusions how it was that the child's upbringing had been shared with the carer in Jamaica. At no stage in the determination (see paragraphs 11 to 21) are there findings reached in relation to the grandmother (carer's) decision-making in the Appellant's upbringing.

10. Finally, that being so, it could not be overlooked that the judge had reached certain fundamental findings in relation to the Appellant, which did demonstrate that there was sole responsibility on behalf of the sponsoring mother. These were, first, that the Sponsor used calling cards to contact the Appellant (paragraph 13); second, that the Sponsor provided financial support (see paragraphs 14 to 15); third, that the Sponsor chose the school of the Appellant (paragraph 16); and finally, that the Sponsor had knowledge of the Appellant struggling with maths at school (see paragraph 17).

11. Mr Sarwar submitted that in the light of these favourable findings of fact the judge ought to have directed herself to the starting point, namely, that

the one remaining parent should be taken to have had sole responsibility for the child's upbringing, in a case such as the present.

12. For her part, Ms Aboni, submitted that the judge had directed herself appropriately. She did accept that the financial support was given by the sponsoring mother from the UK to the Appellant in Jamaica. However, she was not satisfied that the only decision-maker in the Appellant's life was the mother in this country. The Sponsor had made no contact with the school itself. She had only visited once in 2011, despite having had leave to remain since 2010. Furthermore, the judge observes that the Appellant himself, as a child chose his religion, with no involvement of the Appellant in that regard.

13. In reply, Mr Sarwar simply stated that if the judge wished to say that the grandmother had been engaged in a "shared" decision-making process with her daughter, the sponsoring mother, the judge would have said so. This was not stated anywhere in the determination.

Error of Law

14. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

15. First, this is a case of a "single parent". The starting point, as made clear by the Tribunal by **TD (Yemen)** is that "it is the remaining active parent who has 'sole responsibility' for the child" (paragraph 49). The judge did not proceed from this basis. Secondly, and following on from that, if it was the case that responsibility in this case was "shared" because, plainly, the grandmother abroad was looking after the Appellant since the age of 2, then there had to be findings of fact made in relation to what these "important decisions" were in the child's upbringing (see paragraph 50 of **TD**).

16. Second, given that none of this was done, the areas where the judge did make findings of fact in the Appellant's favour, assumed a greater importance. Thus, the judge's finding that the Sponsor did use calling cards to maintain contact with the Appellant, did provide the Appellant with financial support, did choose the Appellant's school, and was aware of his struggles with maths at school, were such as to demonstrate that she did have sole responsibility for the Appellant. It has to be remembered that the phrase "sole responsibility" can never be literally construed. This is because in the very nature of things, where responsibility is being shared with the carer abroad, there is bound to be a distinction between day-to-day care provided by the carer abroad, and overall care, in terms of "continuing control and direction of the Appellant's upbringing", as Judge Young-Harry, correctly put it (at paragraph 10). In short, the word "sole responsibility" is not to be literally taken.

17. Finally, I should just add that the fact that "when asked about the Appellant's religious inclinations, the Sponsor honestly stated that the Appellant has made his own choices about religion contrary to her advice and guidance" (paragraph 19), does not necessarily imply that she did not have "sole responsibility" over the Appellant's life. It would have been otherwise had the choice of his religious orientation lay with the carer in Jamaica. The fact that he had made his decision "contrary to her advice and guidance" (paragraph 19) can just as equally suggest that she did set out to exercise the necessary control and direction over his upbringing. That, however, must remain the matter for decision by the Tribunal below, as I remit this matter to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal pursuant to Practice Statement 7.2(b) to be heard by a judge other than Judge E Young-Harry.

No anonymity direction is made.

This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd September 2018