



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04385/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Decision & Reasons Promulgated
On 3 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR O J O
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms. K. Pal, Senior Presenting Officer

For the Respondent: Ms. P. Yong, counsel instructed by Bestway solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Nigeria, born on 8.11.99. He sought entry clearance to join his father in the United Kingdom. In a decision dated 10 February 2017, the Entry Clearance Officer refused this application and an appeal was lodged against this decision on 3 March 2017, however, the decision was upheld by the Entry Clearance Manager in a review dated 11 August 2017.

2. The appeal came before First tier Tribunal Judge Shamash for hearing on 8 January 2018. In a decision and reasons promulgated on 15 March 2018, she allowed the appeal on human rights grounds.

3. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal, in time, on the basis that the Judge failed to reason why at [26] she found the case to be “rare” and “exceptional” and why she found the extent of neglect and emotional abuse inflicted on the Appellant by his biological mother to be severe and that the decision does not reason how the Respondent’s father continues to have continuing control and direction over his life.

4. Permission to appeal was granted by Judge of the First tier Tribunal Murray in a decision dated 3 May 2018, on the basis that the First-tier Tribunal arguably failed to give adequate reasons why the Claimant’s mother is found to have abdicated responsibility for him and fails to adequately reason why she is found to have inflicted severe emotional abuse on him in the light of apparently contradictory information provided by the sponsor recorded at [3] of the decision and evidence that the appellant continues to live with his mother during holidays at [19] of the decision.

Hearing

5. At the hearing before me, Ms Pal submitted that the appeal turned on the extent of the relationship between the Claimant and his mother and that the Entry Clearance Officer contends that the background is set out at [3] which refers to the telephone interview with the Sponsor. At [19] of the decision, the evidence recorded confirms that the Claimant returns to his family home when not at University and it was also recorded that the Sponsor maintained a relationship with the Claimant’s mother and it was the intention of the family to join him in the United Kingdom.

6. She submitted that the grounds essentially argue on the basis of the evidence that the UK sponsor did not have sole responsibility for the Claimant. The grounds of appeal also state that the decision and reasons does not provide adequate reasons for how the Claimant’s father continues to have continuing care and control over the Claimant’s life since the Sponsor has been in the UK. Whilst the Judge accepts that the relationship between mother and son is not particularly good, what she should have considered is whether the Sponsor has continuing control over his son’s life, including guiding him as to his education and the Judge had to consider whether the Sponsor indeed had sole responsibility, given that on the face of the evidence it did not appear that he did, given that the Claimant still came home at holiday time and spent time in the family home. The Claimant’s mother still allowed him to come into the home and stay there and there was familial contact between mother and child.

7. Ms Pal drew attention to [26] and the finding that, even though the Claimant's father had been physically absent, he took decisions and had sole responsibility, however, there was no basis for that finding at [22] onwards. Whilst there is reference to evidence of visits at [26] this is not evidence of sole responsibility. It was the Entry Clearance Officer's position that there was joint rather than sole responsibility.

8. In her submissions, Ms Yong submitted that the Judge has made very clear findings of fact in relation to this appeal. Whilst the child goes back during the holidays, the fact that there is contact during school holidays does not amount to the mother taking responsibility for him. The child dreads the holidays and the Judge made a finding of fact on this at [26]. Control and direction by the Sponsor is ongoing and continuing. This is not a situation of joint responsibility see [22] given that it is clear there is no relationship between mother and child, so even when he did return there was no relationship. It was accepted by the mother in her affidavit that she does reject the son. The Judge found this striking and this evidence was fully corroborated by the Claimant's two siblings.

9. Ms Yong submitted that the Judge also had in mind at [12] the way the interview was conducted and the fact that it was abridged and the answers were quoted out of context. In any event, the content is limited to holiday periods and it is quite clear that throughout their lives the mother and son have not had a relationship. The mother pulled the Claimant out of school because the Sponsor had not paid the school fees. Despite the fact that the mother was financially secure, it was accepted in evidence by the Judge that the mother refused to fund or pay for the child and thus there had been an abdication of responsibility for that particular child and thus no joint responsibility.

10. Ms Yong further submitted that the Judge found very clearly at [22] that the Sponsor was credible and that there is consistent evidence about the mother pulling the child out of school, despite the fact that she was financially secure. She sought to rely upon the decision in TD (Yemen) [2006] UKAIT 00049 at [51] that not paying financial support is a valid factor to be taken into account: "*it may be helpful to look at financial support provided by the parent and its absence may be very telling.*" See also [42]. She further sought to rely on the case of Alogun cited at [39] of the decision in TD (Yemen) and the factually unusual circumstances, which were the subject of very particular findings of the Judge.

11. She submitted that the Judge sets out the reasons for why she reached her findings of fact ie. that his mother would not know which gate he used; the evidence of neglect and emotional abuse. The Judge was clearly entitled to find, based on the evidence before her, that the neglect and emotional abuse is severe [27] and see [26]. This renders it exceptional. Ms Yong submitted that there were ample findings of fact and adequate reasons provided by the Judge for finding the case to be exceptional.

12. I reserved my decision, which I now give with my reasons.

Findings

13. I have concluded that there are no material errors of law in the decision of First tier Tribunal Judge Shamash. My reasons are as follows.

14. The basis of the application for permission to appeal on the part of the Entry Clearance Officer was essentially a reasons challenge, firstly to the Judge's finding at [26] that the case is "rare" and "exceptional"; in failing to give reasons for finding the extent of neglect and emotional abuse inflicted on the Appellant by his biological mother to be severe and in failing to give reasons as to how the Claimant's father continues to have continuing control and direction over his life.

15. I have, in reaching my decision, taken careful note of what was said by the Upper Tribunal in TD (Yemen) [2006] UKAIT 00049, which the Judge also relied upon at [25] of her decision and reasons and which provides *inter alia* as follows:

"39. A decision of the Outer House of the Court of Session does, however, contemplate a different outcome in exceptional circumstances. In Alagon v ECO, Manilla [1993] Imm AR 336 the appellant sought entry clearance to join his mother in the UK shortly before his eighteenth birthday. His mother had come to this country when he was aged 8 and had only made one visit to see him when he was 13 years old. The appellant lived in a house with his father who was divorced from her mother. The house was owned by her mother. The mother provided most of the financial support for the appellant. Relatives who lived relatively close saw and provided some financial and other support to the appellant. The father did not contribute financially to the appellant's support and himself benefited from living in the house and the financial contributions from the mother. The mother alone was consulted about all major decisions such as education and the appellant's future maintenance. The father was not consulted and he took no major decisions about the appellant. It was accepted that the father played "at most a passive role" in the appellant's life. The Lord Ordinary (Lord Prosser) acknowledged (at p 344) that it was significant that the appellant was living with her father "since any responsibility exercised by her father need not be derived from her mother, and might put in doubt the mother's 'sole responsibility'."

40. Nevertheless, the judge concluded that the appellant's mother had indeed established "sole responsibility" for her on the basis that (at p 345):

"the adjudicator effectively found that the father is doing nothing for the child beyond the bare fact of living with her on reasonably good terms.... Moreover ... that is in a house belonging to the mother, so that even his bare presence and any help that that might be to the child, is derivative from the mother and essentially part of her arrangements for the child rather than his own."

41. *The judge concluded that that the mother (rather than the father or other relatives) was "exercising all the forms of responsibility typical of sole responsibility properly understood". (at p 345)*

42. *In our view, this case is consistent with the principled approach applicable to cases of this sort. It is merely a factually unusual - indeed exceptional case - in its outcome. It turns upon the very particular findings of the judge concerning the non-involvement of the father in the child's upbringing despite the fact that the appellant was living with him...*

45. *To understand the proper approach to the issue of "sole responsibility", we begin with the situation where a child has both parents involved in its life. The starting point must be that both parents share responsibility for their child's upbringing. This would be the position if the parents and child lived in the same country and we can see no reason in principle why it should be different if one parent has moved to the United Kingdom.*

46. *In order to conclude that the UK-based parent had "sole responsibility" for the child, it would be necessary to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK-based parent and was otherwise totally uninvolved in the child's upbringing. The possibility clearly cannot be ruled out: Alagon provides an example of this exceptional situation and turns upon an acceptance by the judge of the wholly unusual situation that the father was "doing nothing for the child beyond the bare fact of living with her on reasonably good terms". (at p 345)*

16. I have concluded that the Judge clearly had these passages from the judgment in *TD (Yemen)* in mind when she analysed the evidence at [22] where she found the Sponsor credible and accepted his evidence that, despite the fact that the Claimant's mother was a good mother to the two older children, she pulled the Claimant out of school when the Sponsor did not send money; she would not speak to him or eat with him, would leave a room if he entered it and would not answer basic questions. The Judge further took into account at [25] the Claimant's statement where he states that his mother would not even know what the gate of his school looks like as she has never visited and he prefers to stay at school rather than travel home in the holidays and that the evidence of the Claimant and his father was corroborated by the statement of Mary Adewumunmi-Aini. As to why she found the extent of neglect and emotional abuse inflicted on the Appellant by his biological mother to be severe, the Judge took into account the affidavit from the Claimant's mother, recorded at [19] that she had failed to bond with her son or treat him appropriately, in respect of which the Judge found at [25] that: "*There are situations in which one parent for a reason that they themselves cannot understand rejects a child. In this country it is likely to be detected and classified possibly as post natal depression, but help including speaking therapies could easily be accessed. I accept the Sponsor's evidence that this is not the case in Nigeria... The appellant's mother's acceptance of her own failings in respect of the appellant is striking.*"

17. The Judge also recorded the Claimant's mother's statement at [19] that the Claimant has always been supported and cared for by his father. The Judge concluded at [26] in the following terms:

"having considered this case very carefully, I am satisfied that although the appellant's father has been physically absent from the appellant's life for a number of years that he has nevertheless been the only parent who has taken decisions in the appellant's life and that he has had sole responsibility. He has returned to Nigeria frequently. I find that this is one of the "rare" and "exceptional" cases where there are two parents who could be classed as "present" but where only one has a relationship with the appellant. ... On the evidence before me the sponsor takes care of all the key decisions, education, medical and leisure in relation to his son and has had "sole" responsibility when it comes to the key issues in his son's life."

18. I find when the Judge's findings are read as a whole and in light of the decision in *TD (Yemen)* that she provided adequate and sustainable reasons for finding that the Sponsor has sole responsibility for his son.

19. In respect of the second ground of appeal, that the Judge has failed to provide reasons as to how the Respondent's father continues to have continuing control and direction over his life, I find in light of the Judge's findings at [26] above that she provided sufficient reasons, which were open to her in light of the evidence. The Judge found the Sponsor to be credible and accepted his evidence that he and his wife had always had a difficult relationship but societal pressure was such that they did not want a divorce and the situation was now so bad that he is no longer able to return to the matrimonial home [22]. He also stated that at the time he took the decision to come to work in the United Kingdom he believed his family would join him and did not anticipate a situation where he would be leaving a child behind in Nigeria whose mother did not care for him and that he makes every effort to go back to Nigeria during all the school holidays [23]. The letters from the school where he works show that he has struggled for some time with the question of whether to remain in the UK because he is separated from his son [24]. The fact that the Claimant returns to live with his mother during the school holidays must, in my finding, be considered in light of the evidence as a whole which is that he prefers to stay at school and that the Sponsor returns to Nigeria as often as he can during the school holidays. Further, whilst the Sponsor was interviewed over the telephone and this formed the basis of the refusal decision, the Judge accepted his evidence at [12] that the record of the interview is an abridged version and his answers have been quoted out of context.

20. For the reasons set out above, I find that this ground of appeal lacks substance and amounts to no more than a disagreement with the Judge's findings of fact, which were open to her on the evidence before her.

Decision

21. I find no material errors of law in the decision of the First tier Tribunal Judge. Consequently, I dismiss the appeal on the part of the Entry Clearance Officer and uphold the decision of First tier Tribunal Judge Shamash.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

29 July 2018