Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05090/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 8 December 2017	**On 21st March 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SIMBIAT FERANMI ADENIKE OKUNUGA
(anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER, UKVS

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Nicholls promulgated on 20 March 2017 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a female national of Nigeria who, aged 17 years, applied for entry clearance to settle in the United Kingdom as the child of a person present and settled in this country. The application was refused on 29 July 2015 against which the appellant appealed on human rights grounds.

3. The appellant's father, who appeared before the Judge, confirmed the application for entry clearance was submitted on 14 May 2015 two days before the appellant's eighteenth birthday.
4. Having considered the evidence the Judge sets out findings of fact and conclusions from [17] of the decision under challenge in which it was noted the only available ground of appeal was that the decision amounted to an unjustified, disproportionate and, therefore, unlawful interference with the article 8 rights of the appellant or other people direct directly involved in the appeal.
5. The basis of the application to the Entry Clearance Officer was that the appellants father in the United Kingdom had sole responsibility for her upbringing which therefore met the requirements of paragraph 297(i)(e) of the Immigration Rules. The Judge noted the evidence given with regard to the child's arrangements in Nigeria leading to a finding at [20] that the appellant's mother retained both an interest in the appellant's situation and a significant measure of control over her movements. Whilst accepting the appellant's father made all the arrangements for the appellant's accommodation and schooling and paid the bills the Judge found that the amount of control retained by the appellant's mother was sufficient to show that the father did not have sole responsibility for the appellant's upbringing but that the responsibility was shared with her mother.
6. The Judge accepted that the evidence showed the appellant's father had played a substantial and continued role in his daughter's life including making key decisions such as the place and manner of her education and accepted the submission that the appellant's mother lives a distinctly separate live with her own partner and family in Nigeria. At [24 - 25] the Judge found:

> "24. There is no aggravating factor in the immigration history of this Appellant or of her father which indicates that any additional weight should be given to the public interest. I have found that the evidence shows that the Appellants father has at all times supported his daughter by both his financial contributions, his decision-making and his physical presence to or three times a year. I accept the evidence that the Appellant remains dependent on him and that he will continue his financial and emotional support for the foreseeable future. Whether the relationship between them is a family life or a private life is, in this appeal, a matter of no significance. In reality, the decision of the VCO has not forced changes in that relationship, nor has it meant that it could not continue and develop in the same way that it has done in recent years. The sponsor's evidence was quite clear that he would continue the support her as previously given, although he was concerned about the Appellant's emotional state. As I have indicated, there is no up-to-date medical report to show that the problems indicated in the letter accompanying the Visa application have continued or deteriorated in any way.

> 25. Applying the five Razgar tests, I find that the decision of the VCO does not amount to a sufficiently serious interference with the family and private life that the Appellant has with her father, her stepmother and her two half-sisters in the UK. That life can continue as it has done in recent years. The continuing difficulties and concerns do not, I find, amount to a sufficiently substantial interference with that family and private life, recognising the low level of interference that is required. However, if that conclusion is wrong and there is a sufficient degree of interference, the decision of the Respondent is a lawful one exercising the powers granted by Parliament and is in pursuit of the public interest of the control of immigration. The remaining question is whether that interference is proportionate and justified. As I have indicated, I find that the degree of interference is limited and that the weight which can be given to that interference is not sufficient to outweigh the public interest which has been identified.
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> 26. I take note that the Appellant does not meet the terms of the Immigration Rules. I find that the factors on her side of the balance are not sufficient to outweigh the public interest and that the decision of the ECO to refuse entry clearance was lawful and not in breach of article 8 of the ECHR."

7. The appellant sought permission to appeal asserting the Judge erred in failing to adequately or at all to apply the guidance in TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. It is also argued the Judge ought to have considered whether paragraph 297(i)(f) of the Rules was met, i.e. whether compelling circumstances existed and that the Judge ought to have considered the best interests and welfare of the child when the application was made in light of the reasons given.
8. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis that "it is just arguable that the Judge misdirected himself as to the definition of sole responsibility".

Discussion

9. In TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 the Tribunal said that "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) had 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".
10. In NA (Bangladesh) v Secretary of State for the Home Department [2007] EWCA Civ 128 the Court of Appeal said that, where a natural

parent continued to live in the same country as the child, it was a necessary part of the reasoning on sole responsibility to consider the position of that parent to determine whether that parent had partial responsibility (which would of course preclude the parent in the UK from having sole responsibility). The Court of Appeal said that the Immigration Judge was wrong to conclude that the requirements of the Rules were met where the parent effectively shared responsibility with his sons here. However, the Court of Appeal also said that the parent could have sole responsibility notwithstanding that the financial consequences of this were shared with his sons. The parent may, as head of the household, be regarded as controlling the disposition of those contributions.

11. In Buydov v ECO Moscow [2012] EWCA Civ 1739, as part of their written divorce agreement, the parents had agreed that the mother would have sole responsibility for the claimant's upbringing. The judge found that in practice the claimant's father retained some responsibility. It was held that the judge had misdirected himself when he found that it was necessary to show that the father had abdicated responsibility for the child before the mother could have sole responsibility. The finding that the father had not abdicated responsibility was clearly relevant but that was not the same as treating the finding as conclusive. The residence order for the child was clearly evidence but it would be wrong to treat it is necessarily sufficient evidence to prove sole responsibility. The Upper Tribunal's conclusion that it could not derive assistance from the IDI could not be characterised as an error of law. The Upper Tribunal was entitled to find that the mother did not have sole responsibility.

12. In DN v SSHD [2017] CSOH 144 the Court of Session was asked to rule that point ix) of the analysis in TD was not good law bearing in mind Articles 9 and 10 of the UN Convention on the Rights of the Child as the starting point from those articles was that it was in the best interests of a child to be with a parent or parents and so where there was only one parent the starting point should be that the condition was prima facie satisfied. The Court rejected that submission and held that the UNCRC was not fully incorporated in domestic law and the Convention did not impose any obligation on the receiving state party to grant an application. The guidance in TD was that the decision should be made on the basis of all the evidence and the assessment of whether a parent had sole responsibility would include a consideration as to the nature of the relationship between parent and child in a given case and the decision maker would be able to assess whether particular decisions were or were not important ones in the context of the evidence as a whole.

13. What the case law shows is that the question of ‘sole responsibility’ is one of fact. The Judge analysed the facts including the degree of involvement in the appellant’s life by both her father and mother. Whilst finding the appellant’s father played a significant part in his daughter’s life in terms of making arrangements from the United Kingdom the Judge also found the appellant’s mother had an

involvement too. The Judge assess the nature of that involvement and concluded that it was of a degree that prevented the appellant's father establishing that he exercises sole responsibility for the appellant.

14. It has not been shown this conclusion is perverse, irrational or outside the range of findings available to the Judge on the evidence.

15. In relation to the assertion the Judge should have considered 297(i)(f), this provision permits entry where one parent or relative is present and settled in the United Kingdom or being admitted on the same occasion to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care, in addition to other mandated requirements.

16. Although the Judge made no specific finding on this point it is not made out the Judge was asked to do so. In any event, the Judge considered the appellants circumstances by reference to Article 8 ECHR and concluded that factors in the appellant's favour were not sufficient to warrant a grant of leave to remain. It can clearly therefore be inferred that notwithstanding the appellants situation the finding of the Judge is that she is unable to satisfy any requirement of paragraph 297 of the Rules or to establish an entitlement for leave to enter outside the Rules.

17. No arguable legal error material to the decision to dismiss the appeal is made out. Whilst it is accepted the appellant's father may want his daughter to live with him in the United Kingdom, on the facts of this application made very late in the window in which it could be made which expired on the appellant's 18th birthday, it has not been shown the decision of the Judge to dismiss the appeal was not one reasonably available to him on the evidence.

Decision

18. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 16th March 2018