



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09655/2016

THE IMMIGRATION ACTS

Heard at Field House
On 27th July 2018

Decision Promulgated
On 5th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

EMMANUEL [M]
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr O Noor of Visa and Migration Ltd.

For the respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant has been granted permission to appeal to the Upper Tribunal the decision of First-tier Tribunal Judge Rayner who dismissed his appeal. This was on the basis the judge arguably had not correctly applied TD (Paragraph297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049.

2. He is a national of Nigeria born on 21 December 1999. On 1 May 2015, at which stage he was 15 years of age, he applied for entry clearance to join his mother, Mrs [EM], hereinafter referred to as his sponsor. She holds British nationality. The application was for the purpose of settlement and was considered under paragraph 297 of the immigration rules. The issue arising was whether his sponsor has had sole responsibility for his upbringing (paragraph 297(i)(e)). The respondent refused his application on 4 March 2016 with the entry clearance officer concluding he had been cared for by his biological father, Mr [MEM] in Lagos Nigeria. No serious or compelling family or other considerations making his exclusion undesirable were identified. That decision was confirmed by the entry clearance manager on 20 July 2016.

The First tier Tribunal

3. His appeal was heard by Judge of the First-tier Tribunal Rayner at Taylor House on 30 June 2017. The appellant was represented by Mr Noor, as he is now. The judge heard from the appellant's sponsor. She said that she came to the United Kingdom in 2001. She said when she left she placed the appellant with her own mother until her death in 2006. He then had lived with her brother, Mr [MM] and his wife and their 2 children. It was explained he had been named as the appellant's father on his birth certificate because his biological father had abandoned him. The tradition was that the sponsor's father would have assumed paternity in the absence of the natural father but as he was deceased her brother stepped in. There was DNA evidence to confirm her brother was the appellant's uncle.
4. At hearing the sponsor said that before she left Nigeria she had the appellant baptised as a Catholic, her own religion. She referred to documents in the bundle of communication with the appellant and said that she paid a driver to take the appellant to school and arranged for his holidays with her sisters. Her son attended a boarding school in Nigeria and had just completed examinations for university entrance. She said that she had been back to Nigeria on 5 occasions to see the appellant, the last time being in 2016 when she brought his stepsister.
5. By the time of the appeal hearing the appellant was 17 years of age. The judge accepted that the appellant's biological father had played no part in his life. The judge accepted that when the sponsor came to the United Kingdom the appellant was placed in the care of her mother until her death in 2006. Then the sponsor's brother took charge. The judge accepted the sponsor's account of travel to Nigeria.
6. The judge had recorded that the sponsor had married a Portuguese national and they had unsuccessfully attempted to adopt the appellant in 2003. Her husband died in October 2011 and she remarried a Mr [M] in 2013. She was granted leave to remain as his spouse albeit the relationship was short lived. They had a child together, [F], the appellant's stepsister.

7. At paragraph 18 onwards the judge sets out the relevant immigration rule and the decision of TD (Paragraph297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. At paragraph 20 the judge found that the entry clearance officer incorrectly found the appellant had been living with his biological father rather than his uncle. This arose as his uncle had been named as his father on his birth certificate as outlined above and there had been a visit Visa application where his uncle had described himself as the appellant's father. The judge found that the appellant had lived with his uncle after his grandmother died and concluded that his uncle has treated him as if he were one of his own children. The judge concluded that control was shared between the sponsor and her brother.

The Upper Tribunal

8. It was argued that the immigration judge failed to distinguish between the person with day-to-day responsibility for the appellant, namely his uncle, and the role of his sponsor who had control and direction over his upbringing. The grounds point out for instance that it was the appellant's mother who decided before she left that he should be baptised as a Catholic. Another example was his mother's control over where he spent his holidays. Reference was made to the section 55 duty and it was contended that it was in the appellant's best interests to be with his sponsor.
9. Ms Kiss said that the judge was clearly aware of the case of TD (Paragraph297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 and had set out the history of the application and made detailed findings at paragraph 17. The judge had found that the relationship with the appellant and his uncle went beyond the norm and his uncle had treated him as one of his own children. At paragraph 22 the judge had referred to the sponsor only having visited on 5 occasions and of extended periods when she did not visit. His uncle had applied for a visit Visa for him. Regarding his education only one letter had been provided from the Principle of the school. There was no indication how the school fees were paid. There was no evidence about the choice of school. The judge pointed out that the burden of proof is upon the appellant.

Conclusions

10. Whilst the judge has referred to TD (Paragraph297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 it was submitted on behalf of the appellant the judge did not correctly apply the principle.
11. The judge was looking initially at matters through the prism of the immigration rules. This required the judge to assess the evidence and then apply that to the rules. The specific issue was the question of sole responsibility. TD (Paragraph297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 and the earlier cases recognised that when a parent is absent the day-to-day responsibility of looking after the child can devolve to a carer: for instance, in the provision of food and clothes yet the absent parent can retain sole responsibility and it is they

who takes the significant decisions affecting the child's upbringing. The judge here was tasked with assessing the evidence and then applying this principle.

12. I see nothing to indicate that the judge did not appreciate this concept. Rather, the judge carefully analysed the evidence. The judge untangled the confusion over the uncle being named as the appellant's father and accepted the explanation given. The judge had regard to the sponsor's immigration history and evaluated the appellant's uncle's role. The judge concluded that the relationship went beyond that of simply uncle and nephew and found that the uncle accepted the appellant as if he were one of his own children. This was a very significant finding in relation to the issue in contention.
13. The judge then looked at the other evidence in relation to control. The judge recorded that the sponsor had only visited 5 times and at paragraph 22 found there were long periods when she did not visit. The judge was given a bundle which contained details of communication between the sponsor and the appellant. However the judge did not find anything in that material which showed the sponsor having control over important aspects of the appellant's life. There was limited evidence of his sponsor's involvement with the appellant school.
14. The judge concluded that most responsibility was shared between the sponsor and the appellant's uncle. As stated this was part of the evaluation exercise and I can find no flaw with the judicial process. The judge then went on to refer to section 55 and gave reasons which are entirely justifiable. In conclusion therefore I find no material error of law established

Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge Rayner. Consequently, that decision dismissing the appeal shall stand

Francis J Farrelly

Deputy Upper Tribunal Judge

Date: 4 September 2018