Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09228/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 June 2019	**On 12 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MASTER D D M
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Mr D Balroop, counsel instructed by Duncan Lewis & Co solicitors
For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica born on 26 May 2002. He appealed to the First-tier Tribunal against the decision of the Respondent dated 26 March 2018 refusing his application for entry clearance pursuant to paragraph 297 of the Immigration Rules.

2. His appeal came before Judge of the First-tier Tribunal Sweet for hearing on 6 March 2019. In a decision and reasons promulgated on 13 March 2019, the judge dismissed the appeal on the basis he was not persuaded that the Appellant's mother had had

sole responsibility for his upbringing, because that has clearly been shared with his grandmother [24].

3. Permission to appeal was sought, in time, on the basis of three grounds. Firstly, that the judge failed to consider or properly consider material evidence and failed to properly apply the test as set out in TD (Paragraph 297(i)(c) sole responsibility) Yemen [2006] UKAIT 00049 at [49] and Nmaju v Entry Clearance Officer [2001] INLR 26 per Lord Justice Schiemann at [9]. It was submitted that the test is not whether there is shared responsibility but whether the UK based parent has continuing control and direction of the child's upbringing, including making all the important decisions in the child's life *cf.* [52] of *TD (Yemen).* It was asserted that the judge had failed to give any or proper consideration to the witness statements and letters in support and had failed to provide reasons as to why this evidence should be disregarded.

4. The second ground of appeal asserted that there had been a previous refusal of a visit visa on 22 June 2016, which held that: "*in isolation does not demonstrate that you have a parent or guardian in the home country who is responsible for your care and consents to the arrangements for your travel*". It was submitted that the issue was the same and the Entry Clearance Officer had previously concluded that the Appellant's grandmother did not have responsibility for his care.

5. The third ground of appeal drew a parallel between paragraph 297(i)(e) which provides "*You have one parent who is present and settled in the UK who has had sole responsibility for your upbringing*" and E-ECC1.6 of Appendix FM which provides that "*(b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing*". The point made here is that the case of *TD (Yemen)* focuses on what sole responsibility is but does not address when that assessment should occur.

6. Permission to appeal was granted by First-tier Tribunal Judge Gumsley, on the basis that he was satisfied it was arguable the judge did err in law. Although the judge sets out the evidence before him and makes some findings, it is arguable that the judge failed to distinguish between practical day-to-day care of the Appellant and that of continuing care and control when assessing the issue of sole responsibility. In addition, the reasons for the findings he made are short and do not contain much detail in the way of analysis of the evidence that was provided. It is arguable that the reasons given by the judge for his findings are inadequate and do not allow the person reading the decision to understand in particular why the evidence in favour of the Appellant has been rejected.

Hearing

7. At the hearing before the Upper Tribunal, Ms Jones acknowledged that there was no Rule 24 response, however, she agreed that the decision of the First-tier Tribunal contained material errors in law. Whilst at [27] the judge referred to the fact that the Appellant's grandfather had died in November 2014 and up to that time sole responsibility had not been shown, he failed to go on to consider the position after

that date in circumstances where it is clear from *TD (Yemen)* that sole responsibility can be for a finite period.

8. She further accepted at [21] that when considering the issue of the grandmother's medical condition, the judge should have gone on to make findings about this but failed to give reasons or to engage with this evidence.

9. Mr Balroop did not seek to rely on anything other than his grounds of appeal.

10. I informed the parties I was content, both in light of Ms Jones's helpful concession and because I was persuaded that the grounds of appeal disclosed material errors of law, to find that the First-tier Tribunal had materially erred in law and that I proposed to remake the decision in its entirety, based on the evidence that was currently before the Upper Tribunal, i.e. an 89 page bundle and a short supplementary bundle of six pages.

Sponsor's evidence

11. The Sponsor, D P, was called to give evidence, when she adopted her statement dated 26 February 2019 and stated there had been no changes since that time and that her mother's health was still the same. She was still in receipt of a lot of medication and that she lived alone with her grandson, the Appellant.

12. In cross-examination, the Sponsor was taken to the letter at pages 5 to 6 of the supplementary bundle from Dr B MD dated 25 February 2019. She stated she was not aware of the exact medication her mother was taking but she knew it was for hypertension, for her heart problem and the fact that she had had a fall in September 2018, which had made everything in terms of housework and shopping more difficult, although she had not broken any bones.

13. She accepted that she had had sight of the doctor's letter, which had been sent to her by her lawyers, but she had not gone through it in detail. The witness confirmed that she spoke to her mother two to three times a week and that she would send her mother money two to three times a month in order to go to the doctor. She confirmed that her mother also had eye problems. In respect of other family members in Jamaica, she said that she has siblings, two sisters and a brother, but her grandmother and her son live in a different parish from her siblings.

14. When asked if the siblings assisted after her mother's fall, she said they might go once or at a weekend, but they have their own families to look after. When asked if the witness's mother would be on her own if the Appellant's appeal was allowed, she said she would have to pay somebody to look after her mother. It was suggested that her siblings would step in to help and she repeated her evidence that they come to see her not very often and have their own families so she did not think they would drop everything to come and look after their mother.

15. She stated that her son, the Appellant, has cousins, one the same age, one aged 14, one aged 6 and a baby which was born lately to her brother's girlfriend. She said that

her son was not a boarder at school but would return home every evening by bus, that he was doing very well at school and he had just taken the equivalent of his GCSEs.

16. When asked the last time was she had contact with the school the witness stated this was two weeks previously in order to pay for his graduation. The witness was asked how she obtained the letter from the Appellant's school at page 4 of the supplementary bundle *viz* a letter from Ms F, the Appellant's form teacher dated 28 February 2019, from Edwin Allen High School in Clarendon, Jamaica. She said that she spoke to the school and said she was trying to get her son to come and live with her and asked them to provide a recommendation.

17. In respect of her mother's letter, she said her mother would not have typed it. She would not know who typed it for her and did not ask her. In respect of her son's letter, she said that he did type it himself and that he was able to do that. The witness confirmed she had left Jamaica in December 2002, at which time her son had been 7 months old and that she had returned for visits for two weeks in 2012 and four weeks in 2016.

18. When asked how she could say she had a strong relationship with her son given the age at which she left him and the shortness of the time that she had spent with him since that time, the witness stated she always sent pictures, that she provided her son with everything he needs, but once he could speak she spoke to him almost every day. She confirmed although it was her mother that taught him to talk and to walk, she was responsible for checking his homework and that apart from keeping him washed and cooked for and clean, she was responsible for his wellbeing, that she would give permission for him to go on, for example, a school trip, and that she had full responsibility for everything that he does. She was asked about the accommodation in Jamaica and she said that it was her mother's house but that she did not receive a pension and that she, the witness, paid for everything.

19. When asked about what her son would like to do in the future, she said that he would like to be in the army and she accepted that he could do that from either Jamaica or the UK.

20. There was no re-examination.

21. In her submissions, Ms Jones referred to [44] of *TD Yemen*, which considers the test in relation to UK based carers. She submitted that the issue was whether one could believe what the Sponsor was saying. The evidence at page 5 onwards suggests that the Sponsor's mother appears to have a heart condition, however, this is neither exceptional nor is the fact that she is getting older. The Sponsor in her evidence referred to her mother having had a fall, but this is not referred to in the medical letter.

22. Ms Jones submitted that the doctor exceeded his expertise in referring to the child's need for strong emotional support and his opinion that his grandmother was unable to provide that. She sought to rely on the refusal letter and submitted that the key

issue was whether I believed and accepted that the Sponsor exercises strong parental control over her son.

23. In his submissions, Mr Balroop invited me to find the Sponsor to be a credible witness. He submitted she has always been entirely consistent in terms of how the relationship works. He accepted she had left her son in order to come to the UK for a better life, which is a hard decision, but the only issue is whether the Sponsor has sole responsibility for her son and this does not mean necessarily that she has a strong relationship with him.

24. Mr Balroop submitted that the letter from the Appellant and his grandmother and the oral evidence today were all consistent, that nothing happens without the Sponsor's permission or authority. This is also clear from the Sponsor's statement. Mr Balroop submitted that this is the entire crux of the matter in light of [52] of *TD (Yemen)*. The question is who it is that has continuing control and direction over the child's life. In this case, it resides squarely with the Sponsor. He submitted her evidence was consistent with the tests set out in *TD (Yemen)*.

25. In respect of the doctor's opinion as to why the grandmother cannot care for the child, it is not known what information the doctor had when making this assessment, which was in any event outweighed by the evidence. In respect of whether there were compelling features Mr Balroop acknowledged he was not pressing this matter. The Appellant is now 17. He lived alone with his grandmother. Any grandchild in these circumstances would lend a hand. Mr Balroop also sought to rely on the point made at ground 3 of the grounds of appeal.

Findings and Reasons

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

27. The Sponsor' evidence, as set out in her witness statement, is that she left Jamaica when the Appellant was 7 months old. She was a single parent and left him in the care of her mother on the basis that she would continue to be responsible for him, emotionally and financially, including the schools he attended and supporting him in his studied by paying for extra classes and materials. She assisted him in choosing his GCSE subjects and maintained regular contact with his schools as well as paying for his education. She also gave permission for him to join the cadets and the football team. She also made provision for his religious direction and for his bedtime when he was younger. The Appellant has met her UK born son, O, when he visited Jamaica with his father in April 2011 and July 2015 and her daughter, J, when the Sponsor visited the Appellant with both her UK born children. The Sponsor visited her son in December 2012 and August 2016 [WS at [18]-[38].

28. The focus in cross-examination and submissions by Ms Jones was upon the Appellant's current circumstances. The Sponsor's account of the history of contact and financial and emotional support was not challenged and I find that it is credible.

29. I find that the Sponsor was only granted leave to remain in the form of 3 years discretionary leave on 29 September 2011, which I surmise, in the absence of any evidence on the issue, was due to the fact that her UK born British son, O, was by that time 7 years old. The Sponsor also has a daughter, J, born in 2009, who has limited leave to remain in the UK. I find that the Sponsor was unable to visit her son in Jamaica prior to 29 September 2011 because she would have lost the right to re-enter the United Kingdom, but she has visited him twice since that time and her children have also visited him. I also find that the Sponsor made a visit visa application on behalf of the Appellant in 2014 but this application was refused on 3 June 2014, in part because it was intended he travel with his grandmother and her application was refused and it was not accepted in the absence of evidence that his grandmother is his legal guardian.

30. The Sponsor's father died in Jamaica in November 2014. It would appear that a further application was made for the Appellant to visit the United Kingdom but this was refused on 19 November 2015 and there was a further refusal of a visit visa on 22 June 2016, again on the basis that there was no evidence that his grandmother is his legal guardian and because of apparent discrepancies between the Sponsor's payslips and bank statements. The current application for settlement was made on 20 December 2017, very shortly after the Sponsor was granted ILR in the UK on 4 November 2017.

31. The Sponsor had been employed as a health care support worker at North Middlesex University Hospital since 12 September 2016. In the refusal decision of 26 March 2018 the Respondent accepted there was some evidence of money transfers, a letter from the Appellant's school, photographs taken during the visit made to Jamaica in August 2016, when the Sponsor was accompanied by O and J and some WhatsApp message from 2017 but was not satisfied that the Sponsor has sole responsibility for the Appellant, in light of the 15 year separation and the lack of evidence that the Sponsor has had the majority of control and decision making in the Appellant's education and has had the ultimate responsibility for the major decisions relating to his upbringing and has continuing care and control over the Appellant.

32. In respect of the current circumstances, I find that in light of the deteriorating health of the Sponsor's mother that her ability to care for the Appellant is impacted as she now needs care herself. Whilst the Appellant is able to provide her with some care and support, given that he is now 17, I bear in mind the Sponsor's evidence as set out in her witness statement, that she does not wish him to become his grandmother's carer and, in her oral evidence, that there are other relatives in terms of three siblings and their children present in Jamaica albeit living in a different parish. However, I did not find this evidence of particular assistance in deciding the issue in this case, which is whether or not the Sponsor has sole responsibility for the Appellant.

33. I have taken careful note of the guidance set out in *TD (Paragraph 297(i)(c) sole responsibility) Yemen* [2006] UKAIT 00049:

> "**48. The purpose of paragraph 297 is clear: it is designed to maintain or effect family unity…**

> **49. 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. The fact that the remaining active parent is in the UK makes no difference to this. Of course, the geographical separation of the parent from the child means that the day-to-day care of the child will necessarily be undertaken by others - relatives or friends abroad - who look after the child. Here, the issue under the immigration rules is whether the UK-based parent has, in practice, allowed the parental responsibility for the child to be shared with the carer abroad. This is, of course, the question we see most frequently in the case law.**
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> **50. The cases, particularly Nmaju and Cenir in the Court of Appeal, make clear that the touchstone of "sole responsibility" is the continuing control and direction by the parent in the UK in respect of the "important decisions" about the child's upbringing. The fact that day-to-day decision-making for a child - such as "getting the child to school safely and on time, or putting the child to bed, or seeing what it has for breakfast, or that it cleans its teeth, or has enough clothing, and so forth" (Ramos, per Dillon LJ at p 151) - rests with the carers abroad is not conclusive of the issue of "sole responsibility". However, 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".**
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> **51. In reaching a decision on what is a fact-rich issue, it is important to take account of evidence of any contact between the parent and the carer in respect of important decisions to be taken about the child and its upbringing. The availability of modern communications technology may reduce the impact of distance alone on a UK parent's ability to be consulted (and therefore decide) about the child's upbringing in another country. The length, and cause, of the separation of parent and child and the reasons for its continuation may shed some light on the role played by the carer abroad. Likewise, it may be helpful to look at the financial support provided by the parent and, in particular, its absence may be very telling."**

34. I find, despite the length of the separation between the Sponsor and the Appellant, that she has retained control and direction over his life in Jamaica; she has been responsible for the important decisions in his upbringing; she has been in regular contact with his school, as the letter from Ms F, his form teacher at Edwin Allen High School dated 28 February 2019 attests and she provided financial support and maintained regular contact with the Appellant by telephone. I find that, since the Sponsor was granted a period of discretionary leave in the United Kingdom in September 2011, she has visited the Appellant and ensured that her UK born children have also developed their relationships with him. Whilst there is limited evidence of her role in his life since she came to the United Kingdom in December 2002, I am able

to find the Sponsor has exercised sole responsibility since at least her father's death in November 2014.

35. I find, in light of all the evidence before the First tier and Upper Tribunal, that the Sponsor has demonstrated that she has sole responsibility for her son, the Appellant and thus meets the requirements of paragraph 297(i)(f) of the Immigration Rules. It follows that the appeal falls to be allowed *cf. TZ (Pakistan)* [2018] EWCA Civ 1109 at [34], that being the only issue that was in contention before the Upper Tribunal.

Notice of Decision

I find a material error of law in the decision of First tier Tribunal Judge Sweet for the reasons set out in the grounds of appeal. I set that decision aside and re-make the decision, allowing the appeal on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Rebecca Chapman* Date 9 July 2019

Deputy Upper Tribunal Judge Chapman