Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10065/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2018 & 12 March 2019	**On 09 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

OLUWATOFUNMI [A]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Collins (for Zoi Bilderberg Law Practice)
For the Respondent: Ms K Everett & Ms J Isherwood (Specialist Appeals Unit)

DECISION AND REASONS

1. This is the appeal of Oluwatofunmi [A], a citizen of Nigeria born 29 June 1999, against the decision of the First-tier Tribunal of 4 June 2018, itself dismissing her appeal against the decision of the Entry Clearance Officer to refuse her entry to the UK on human rights grounds.

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Introduction

2. The application for entry clearance was made on the basis that the Appellant was a child for whom her mother, the Sponsor [FA], had sole responsibility, or alternatively that there were serious reasons for considering her exclusion undesirable.

3. The application of 30 April 2017 was refused on 14 August 2017 because, whilst DNA evidence established the mother/daughter relationship, it was not accepted that the Sponsor had established that she had daily responsible for the Appellant's upbringing or that she continued to take an active part in her daughter's life.

4. The First-tier Tribunal set out the relevant background. The Sponsor is a British citizen who naturalised on 31 July 2015. The Appellant in her statement had explained that her mother took care of her needs, and of those of her brothers, paying for her school fees, her accommodation at school, for medical treatment, and additionally providing pocket money. The Sponsor had made arrangements with the school for the Appellant's care and had attended her graduation ceremony.

5. The Appellant was at boarding school from 2009 to 2015. Having originally resided with her father until he departed the scene around Easter 2010, she lived with her grandmother until 2013; once that arrangement was no longer tenable she was able to live with a guardian ([LD], the Sponsor's step-sister) appointed by the Sponsor; until April 2017, when Ms [LD]'s home became overcrowded due to [LD]'s own mother having to be accommodated there, those problems having begun around December 2016. Since then the Appellant had lived in university-provided accommodation. Ms [LD]'s duties included providing accommodation, taking the Appellant to school and collecting her, and managing her food and hygiene. She was paid for this work by the Sponsor, who played no part in the daily care herself. Ms [LD] wrote that the Appellant missed her mother and that she was worried for her emotional state.

6. The Appellant's brother [OA] indicated he and his siblings had been unable to bond with the Sponsor as they were unable to spend time together; she had nevertheless been responsible for their wellbeing, paying for their schooling and general upkeep since their father's departure. [AA] wrote in similar terms. A letter from the Appellant's school confirmed she had boarded there and that the Sponsor had fully met her liabilities; but, in the estimation of the Judge, it did not suggest the Sponsor had sole responsibility, instead stressing the role of the grandmother and guardian.

7. The Appellant had now left school and was in the second year of a five-year law degree at university. The Sponsor suffered from rheumatoid arthritis and depression, the latter condition having developed from April 2017 when the care agreement with Ms [LD] lapsed. She had trouble sleeping and used prescription drugs.

Findings of the First-tier Tribunal

8. The First-tier Tribunal came to its conclusions based on this evidence, noting that sole responsibility was not to be construed literally and that that state of affairs could be established where there was continuing control and direction over the child's upbringing, with the important decisions being made by a particular parent.

9. It concluded that the Appellant's care needs were divided between Ms [LD] and her mother; in the past her brother [AA], the grandmother and the school, had all played a part. The father had played a real part in her life as a care provider until Easter 2010. It was unclear who had made the decision that the Appellant would attend boarding school. Whilst the Sponsor had referenced giving the guardian instructions as to "the Appellant's needs she would provide", that appeared to specify particular duties. It accepted that the school would have dealt with the Sponsor once the father left the scene.

10. The Sponsor's role was mainly financial with occasional visits, and the evidence overwhelmingly pointed to a shared responsibility for the Appellant's care during her childhood, most of that care being provided by others. The children had been despatched to boarding school and there was no evidence beyond the financial payments of any dominant role by the Sponsor. The entry clearance application had been precipitated by a deterioration in accommodation conditions at the guardian's home, rather in recognition of the mother always having exercised control from a distance. Overall sole responsibility was not established.

11. Nor were there any circumstances suggesting exclusion was undesirable. The Appellant was now a young adult who had lived all her life in Nigeria, had presumably made friendships there, and was in the early stages of a law course that would open up opportunities to her. Her accommodation problems were short-term and the family had the resources to remedy them; besides, there was apparently still a living grandparent with whom she could reside, and her mother could doubtless engineer some solution for her from some combination of these relatives. She had missed out on a close relationship with her mother for much of her childhood, and was unlikely to regain that potential relationship as a young adult. Her best interests would be to complete her education and remain in her country of nationality keeping in touch with her mother via social media and occasional visits.

12. The First-tier Tribunal concluded that there was no disproportionate interference with private and family life rights given that a failure to meet the Rules represented a strong factor in the public interest being to maintain the refusal of entry clearance, given that her best interests pointed in favour of her remaining in Nigeria.

Onwards appeal, including the "error of law" hearing

13. Grounds of appeal of 13 April 2018 argued that the First-tier Tribunal had erred in law in

    (a) Failing to set out the standard and burden of proof;

    (b) Failing to direct itself as to the relevant date at which to assess the facts;

    (c) Failing to determine the question of who had "continuing control and direction" by way of making the overall decisions as to the Appellant's care.

14. The First-tier Tribunal granted permission to appeal on 21 August 2018 on all grounds, though particularly noting that the Appellant had been a minor at the date of application and under the Rules should have been treated as such throughout the decision making process. Given the relevance of the Rules to decisions as to proportionality generally, the First-tier Tribunal had arguably materially erred in law by straying into assessing the Appellant's circumstances as if she was a young adult. Furthermore there was an arguable over-concentration on questions of day-to-day care arrangements rather than focussing on overall responsibility.

15. I previously adjourned this appeal as the Appellant had changed representatives but his former representatives had been unable to pass on the relevant papers to the new representative. Ms Everett noted, and apologised for, the Home Office breach of directions in failing to provide copies of the refusal letters; both parties agreed that these were adequately summarised in the First-tier Tribunal decision, though in any event I provided Mr Collins with a copy of his decision.

16. Mr Collins developed the grounds and submitted that there had been undue attention afforded the daily care regime rather than the overall question of control over decision making.

17. Ms Everett submitted that the failure to cite the standard and burden of proof was not material here; it was true there was a misdirection as to date of decision, though that might not be material as the case on "serious and compelling reasons" was not especially strong. However she acknowledged that it was very difficult to determine why it was that the First-tier Tribunal had found that the Sponsor's assistance was restricted to financing daily care provided in the country of origin, given the express references in the evidence to her having had overall responsibility. Accordingly she felt unable to vigorously defend the decision on sole responsibility grounds.

Findings and reasons – Error of law hearing

18. As is explained in judgments such as that of Buxton LJ in *Cenir* [2003] EWCA Civ 572: "The general guidance is to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent … the importance of the parent with responsibility, albeit at a distance, having

what can be identified as direction over or control of important decisions in the child's life."

19. *TD Yemen* [2006] UKAIT 00049 made a very thorough survey of the legal principles relevant to the assessment of sole responsibility:

> "13. A central part of the notion of "sole responsibility" for a child's upbringing is the UK-based parent's continuing interest and involvement in the child's life, including making or being consulted about and approving important decisions about the child's upbringing. …
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> 30. The Court of Appeal [in *Nmaju* [2001] INLR 26] saw "sole responsibility" as a practical (rather than exclusively legal) exercise of "control" by the UK-based parent over the child's upbringing and whether what is done by the carer is done "under the direction" of that parent.
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> …
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> 27. What is apparent from both the judgments is the need to establish "responsibility" for the child's upbringing in the sense of decision-making, control and obligation towards the child which must lie exclusively with the parent. Financial support, even exclusive financial support, will not necessarily mean that the person providing it has "sole responsibility" for the child. It is a factor but no more than that.
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> 34. These cases are largely concerned with the issue of "sole responsibility" arising between a UK-parent and relatives who are looking after the child in the country of origin. In many of the cases, the other parent has disappeared from the child's life totally or plays so little part as to have, in effect, abdicated any responsibility for its upbringing. What emerges is a concept of "authority" or "control" over a child's upbringing which derives from the natural social and legal role of an individual as a parent. Whilst others may, by force of circumstances, look after a child, it may be that they are doing so only on behalf of the child's parent. The struggle in the case law is to identify when the parent's responsibility has been relinquished in part or whole to another such that it should be said that there is shared rather than sole responsibility. By contrast, where both parents are active in the child's life, the involvement of the parent in the country of origin is significant – perhaps crucial - in assessing whether the parent in the UK has "sole responsibility" for the child.
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> …
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> 44. In most of the cases, the parent based in the child's own country – usually the father – has abdicated any responsibility for his child by disappearing or taking no part in the child's upbringing. There is only one parent involved in the child's life. If one started from principle, it might be thought that the issue of "responsibility" for a child and whether or not that amounts to "sole responsibility" is exclusively an issue between parents. The issue of sole responsibility should not, therefore, arise. However, that is not the position taken in the cases, including those in the Court of Appeal. We accept that the question of "sole responsibility" is not so restricted and it remains an issue even where there is only one parent but, for practical reasons, the child is looked after by others (see, *Ramos*, above, per Dillon LJ at

> p 151). The issue is then whether, as between the relative/carers and the UK-based parent, the latter has "sole responsibility" for the child.
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> 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).
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> 52. Questions of "sole responsibility" under the immigration rules should be approached as follows:
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> > iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility."

20. In the light of the pragmatic stance of Ms Everett, my reasons for finding an error of law in the decision below were relatively brief. The stronger limb of this appeal was plainly the sole responsibility issue. The argument on "serious and compelling reasons" for excluding the Appellant was rather less forceful, given that it would seem that the family unit has had, all material times, some degree of resources and connections in Nigeria, such that it would not be beyond them to make alternative arrangements for the Appellant's care.

21. However, on the sole responsibility ground, there were several pieces of evidence that required more careful attention than they received. The Appellant's witness statement set out that the mother was the only person taking care of their needs by paying school fees, buying clothes, paying for food, accommodation and a guardian, making arrangements with the school authority regarding her care, and attending her secondary school graduation. The Sponsor's statement set out that "The guardian was taking instructions from me, regarding the Appellant's needs she would provide". The guardian [LD]'s statement set out that she was paid 20,000 Naira to provide accommodation, manage travel arrangements to school, and arrange for her nutrition and hygiene.

22. Each of those strands of evidence indicates that the Sponsor's care regime involved something by way of oversight of the arrangements in place in Nigeria, and did not simply involve the delegation of all decision making to family members or the guardian abroad.

23. I accordingly found that there was a material error of law in the determination of the appeal on sole responsibility grounds. However, as the findings on "serious and compelling reasons" were not shown as unsustainable, they were to be treated as preserved for the re-hearing, as I did not consider that the Judge's decision below would have been any different had the correct date of evidential assessment been identified.

Evidence at the Continuation hearing

24. It is now appropriate to set out the evidence that was before the First-tier Tribunal in slightly more detail, as it continued to found the Appellant's case, subject to the oral evidence now given before me. The Appellant's witness statement records that the Sponsor had been the only person taking care of her and her brother, paying their school fees, providing a guardian when their grandmother was too feeble to continue caring for them, travelling to Nigeria to see them, calling them daily, and making arrangements with the school authority regarding her care.

25. [LD], the Sponsor's stepsister, provided a witness statement setting out that she had accepted responsibility as her sister's children's guardian on the basis of 20,000 Naira monthly. The Appellant had last resided with her on 18 April 2017. [LD] had told the Sponsor that she could no longer care for the Appellant when the Sponsor visited her in May 2017; [LD] felt that the daughter was really struggling without her mother's support, which was adversely affecting her mental wellbeing.

26. The Sponsor's witness statement explains that she was solely responsible for her childrens' financial and emotional care and living arrangements from April 2010. She had also been financially responsible for her own mother. Her eldest child, [AA], was in the early days responsible for cooking for the family unit at one time; she would send him money to buy food and other provisions. He would collect and drop off the school registration form for the Appellant, which she would complete and return to him via email. However he found the caring role difficult, and she had to find alternative care, taking on [LD] as her daughter's guardian from 2013. [LD] was paid to cover living costs, deal with travel to and from school and for her daily provisions, to prepare her food, attend parents/teachers meetings, and to ensure that she maintained decent standards of hygiene. [LD], once guardian, would take instructions from regarding the Appellant's needs. Over this period the Sponsor would see her daughter twice a year during the school holidays, remaining until a day before the resumed school when she would go and see their lecturers and head of administration. Overall "The guardian was taking instructions from me, regarding the Appellant's needs she would provide".

27. When problems had begun with the quality of accommodation at her sister's house her daughter would call her up to twenty times a day, crying unconsolably. Once it was clear that further residence with [LD] was untenable, she sent her son [AA] to tell the Appellant that she would make arrangements for her to stay at a hostel pending her own arrival in Nigeria. Once she arrived, she became certain

that [LD] could no longer meet her role as guardian, given her need to care for her own mother, who was now residing in the limited accommodation space available.

28. Ms [A], the Sponsor, gave evidence, having adopted her witness statement. The tenancy agreement of 1 June 2016 related to her present accommodation where she had lived since that date, which had all relevant amenities. She paid rent there. She was a self-employed support worker making African dresses. If her daughter joined her in the UK, she could continue with this employment. In March 2018 she had moved to a new employer, Independence Homes, having previously worked for Amber Home Carers.

29. Cross examined, she said she worked four nights a week, from 9:15pm to 7:15am, and earning £1,400 a month. She earned around £1,000 monthly from making dresses. She would alter her present shift arrangements to day shifts if necessary, so she would not be leaving her daughter at night. It was put to her that she had made no decisions in her daughter's life; the material she provided, such as the school letter, did not show as much. She replied that she would give instructions to her mother to take her daughter to wherever was necessary. It was put to her that the grandmother or someone else would presumably send her daughter to see a doctor; she replied that she would make the decision about when the daughter would see the family doctor. She would direct arrangements generally, for example by the medium of WhatsApp. If urgent attention was needed for her daughter, she would see to that as well.

30. For the Secretary of State, Ms Isherwood submitted that sole responsibility was not established: there was no corroborative evidence of the Sponsor taking responsibility for the daughter's care. The evidence of her present employment had not been updated. Whilst she recognised that the degree of financial support the Sponsor had provided to her daughter could not seriously be disputed, that alone was not sufficient. If one went through the witness statements, there was limited reference to exercising overall direction over her child's upbringing; for example, the school letter did not record any direct oversight. Overall this appeared to be a case of shared responsibility by which the family combined their efforts.

31. Mr Collins replied that the Sponsor's witness statement did exemplify sole responsibility, if one had regard to the nine points identified in *TD Yemen*. The very fact that the Sponsor had overseen the appointment of a guardian was in fact indicative of the level of control that she exercised.

Findings and reasons – Continuation hearing

32. It seems to me that, making inferences from the accepted evidence, on balance of probabilities the Sponsor did indeed have sole responsibility for her daughter's upbringing at the date of the application and decision in this case. In making this finding I have regard to the need to recognise that there will be some cases where overall responsibility is shared between family members, notwithstanding

significant input from a UK resident Sponsor, and other cases where it can properly be said that the Sponsor is exercising overall control of the arrangements. I am confident that the arrangements here fall on the latter side of the line.

33. Firstly, the evidence of the witnesses, both Sponsor, Appellant, the Sponsor's son [AA], and the sometime guardian [LD], coincides in its general tenor. The overall direction of responsibility was given by the Sponsor. This is particularly clear from the fact that she signed off the arrangements for the child's schooling and that she took the time to physically visit the school on more than one occasion in order to speak to the teachers regarding her daughter's ongoing education. It is also demonstrated by the range of issues over which the mother has consistently held control: from issues of spending, education, to her daughter's attendance at the doctor. This evidence was unshaken (indeed, largely unchallenged) in cross examination.

34. Secondly, it is clear that the daughter has been very dependent on her mother emotionally, as shown by the exceptional number of telephone calls over the period of instability of her accommodation at [LD]'s home, and as indeed is shown by [LD]'s concern for the Appellant's state of mind.

35. I accordingly accept that the Sponsor exercised sole responsibility for her daughter throughout her childhood. Given that there is very limited evidence before me on developments thereafter, I see no reason to consider the situation has changed thereafter, given the regular contact between mother and daughter and the latter's strong emotional dependency on the former. For the reasons which follow, I do not consider that post-decision events are of critical significance in any event. In any event, Ms Isherwood did not question the Appellant on post decision developments, leaving her legal submission rather short of any evidential basis.

36. Ms Isherwood made the submission, albeit rather faintly at the outset of the hearing without reference to any clear governing authority and without pressing the point in her closing submissions, that the question of sole responsibility should be assessed at the date of the hearing rather than at the date of the entry clearance application. However, the authorities make it clear that the Rules should be taken as the starting point for assessing immigration appeals on Human Rights Convention grounds. As stated in *MM (Lebanon)* [2017] UKSC 10, "although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy." Lord Carnwath in the Supreme Court makes the same point in *Patel* [2013] UKSC 72, stating at [55] that "the balance drawn by the rules may be relevant to the consideration of proportionality".

37. So it seems to me that it is important that I should have regard to Immigration Rule 27 which expressly preserves the child's age at the date of application. I consider that any other approach would lead to arbitrary consequences, given the long delays in the listing of entry clearance appeals and the subsequent delays in their final disposition which the onwards appeals process may sometimes

occasion. This is also consistent with the Strasbourg and domestic jurisprudence which stresses the potential continuation of family life during a child's minority absent some exceptional circumstances that break the parental link.

38. Sir Ernest Ryder in *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35 stated:

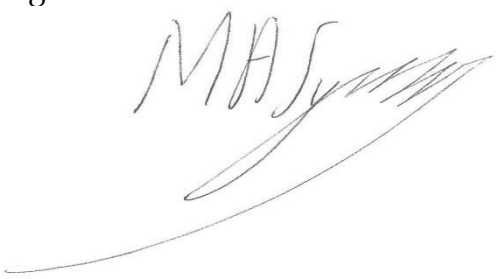
> "The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. … where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

39. Given that I have found the Immigration Rules satisfied on the sole question on which the application was refused, that of sole responsibility, and that family life plainly endures between the Appellant and her daughter, I accordingly find that the refusal of entry clearance was disproportionate to the family life with which it interfered.

Decision:

The appeal is allowed.

Signed: Date: 12 March 2019



Deputy Upper Tribunal Judge Symes