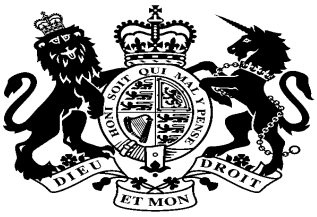

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12196/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 January 2019	**On 5 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SACARAH [H]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Tufan (Senior Presenting Officer)
For the Respondent: Ms C Bexson (counsel for AJA Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 1 October 2018 allowing the appeal of Sacarah [H] (who I shall refer to as Miss [H] for convenience), a citizen of Jamaica born 15 February 1998, itself brought against the refusal (of 26 October 2015) of her human rights claim.

The background to the present proceedings

2. Miss [H]'s application was based on her wish to join her mother, [SH]. It was her mother's case that she had held sole responsibility for her upbringing in recent years.

3. A similar assertion had been made in the past, and rejected, following two applications, on both occasions the Secretary of State's thinking being upheld on appeal.

4. Miss [H] was born when her mother, the Sponsor, was aged 16. She and the Sponsor were compelled to leave the home of the Sponsor's mother (i.e. Miss [H]'s grandmother) given the domestic fall-out from the pregnancy and birth. Miss [H]'s father had not been heard of since the Appellant was three months old. The Appellant moved in her godmother, [IM], with whom she was left when the Sponsor came to the UK in 2001, as a student; she subsequently obtained indefinite leave to remain as a spouse, in 2007. The Appellant remained with [IM] until the latter's death in 2007.

5. Miss [H] next went to live with [JD], a family friend, though Ms [JD] had been unable to accommodate her once her own family grew, having already had two children and being pregnant with another one. The Sponsor could not return to Jamaica to look after her at that time, as by now her nursing career was progressing in the UK; she had become a staff nurse, and was undertaking a university course from 2010 to 2013. An application to join her mother was made on 2 June 2008, and refused; the ensuing appeal was dismissed on 5 March 2009.

6. Miss [H] then moved out of Ms [JD]'s accommodation and lived with another family friend, [SK], from 2010. This was intended to be a temporary arrangement, but in fact endured for a significant period. The second entry clearance application was made in 2012, and the appeal against its refusal was dismissed by Judge Moore on 12 February 2014, at which time Miss [H] still lived with Ms [SK].

7. The current application was made on 14 October 2015. By now Miss [H] had lived with [MM] since April 2015, there being nobody else available to care for her; a letter from Ms [MM] of 23 November 2015 explained that she had seen this as a temporary measure that would hopefully not last for more than six to eight months; she decided to help the Sponsor, who was a friend from their younger days, because of the latter's desperation. The Sponsor had made trips to see Miss [H], taking her other daughter with her.

8. The application leading to the appeal now before me was refused on 26 October 2015, the Entry Clearance Manager maintaining that decision on 7 July 2016.

Past appellate findings

9. The Tribunal which dismissed the appeal in March 2009 identified discrepancies in the evidence as to the circumstances surrounding the Appellant's residence with [JD], having formed the impression that the evidence of the Sponsor and Ms [JD] had been contrived to give a false impression of the extent of the Sponsor's involvement in her daughter's upbringing.

10. In his decision of February 2014, against the refusal of the application made in 2012, Judge Moore saw no reason to differ from the 2009 appeal findings. He also noted that the Sponsor's witness statement indicated that the problem with Ms [H]'s ongoing residence with [SK] was that the accommodation was unsuitable, but at the hearing the Sponsor had stated that there had been a relationship breakdown between them. There was also a discrepancy between the evidence given now and the application form, which had indicated that the Appellant had always lived with [SK]; Judge Moore was unimpressed by the explanation given for that statement. Judge Moore accepted that the Appellant had consistently lived with family friends since the Sponsor's departure for the UK in 2001, albeit she had extended family in Jamaica too. Overall he did not accept that the Appellant had exercised sole responsibility for her daughter's upbringing, albeit that he accepted that she had paid towards her school fees and kept in regular contact with her. The evidence indicated that [SK] had instructed and advised the Appellant to a significant degree. So he rejected the assertion that the Sponsor held sole responsibility for her upbringing at that time.

The present refusal

11. The application was refused in the decision now appealed against because it was not accepted that there was sufficient evidence that the Sponsor took a significant role in the Appellant's upbringing; the evidence of communications between them was considered limited, and photographs supplied were undated. It was not accepted that the Appellant's present living arrangements were dangerous or precarious. The decision was maintained following the receipt of grounds of appeal, an updated explanatory statement of July 2016 concluding that now the Appellant's need for parental care was lessening as she approached majority. The present appeal was allowed in a decision by the First-tier Tribunal of 6 May 2017, but was subsequently remitted for re-hearing.

The findings of the First-tier Tribunal below

12. In its decision which forms the subject matter of this appeal to the Upper Tribunal, the First-tier Tribunal accepted that the Appellant had established

and maintained family life with her mother and younger sister. She had lived with her present carer, [MM], for some time, as there was nobody else who would take her in. Whilst the separation of mother and daughter had justified the past appellate findings of a lack of sole responsibility at the time they were made, since 2015 the Judge accepted that the Sponsor had now shown that she had held parental responsibility for her; she had chosen her secondary school and guided her educational aspirations albeit within the context of her daughter making the final choice for herself. Additionally the Sponsor had maintained regular contact via daily phone conversations and visited her six times since herself leaving Jamaica in 2001.

13. A witness who gave evidence before the First-tier Tribunal, Ms Osbourne, credibly stated their relationship appeared to be a very close one, which was based not only on the word of the Sponsor but also on her personal knowledge of the relationship, having herself met the Appellant in Jamaica in 2016 and subsequently spoken to her by telephone.

14. The Judge acknowledged the Home Office submission that the provision of financial support did not itself show sole responsibility; however here it was apparent that the Sponsor had done all that she could to support her daughter emotionally too. The Judge went on to accept her explanation that the delay in applying to bring her daughter to the UK between 2001 and 2008 was due to not understanding that she could bring her here whilst a student, plus problems with her husband following their marriage in 2005.

15. As to the question of serious and compelling reasons demonstrating Miss [H]'s exclusion to be undesirable, the Sponsor's evidence that her father had left her whilst a baby had not been challenged; she had no family in Jamaica to care for her. Her care arrangements with Ms [MM] were only intended to be temporary.

16. In conclusion, the First-tier Tribunal found that the Secretary of State had failed to give the application the appropriate care and attention, particularly vis-á-vis Miss [H]'s best interests having regard to the statutory duty to safeguard children and promote their welfare. Balancing the competing interests, there would be no adverse impact on immigration control in allowing the daughter to join her mother; accordingly the interference with family life occasioned by the refusal of entry clearance was disproportionate.

17. On 12 October 2018 the Secretary of State lodged grounds of appeal to the Upper Tribunal against that decision, arguing that

    (1) The "lower standard of proof" had been referenced at the outset of the decision;

    (2) No adequate consideration had been given to the previous appellate findings;

(3) Whilst the First-tier Tribunal had effectively endorsed the earlier appellate findings, it had failed to consider that their plain implication was that the Sponsor had had no involvement in her daughter's upbringing until the latter was aged 17;

(4) No adequate reasons had been given for the finding, in the alternative to "sole responsibility", that there were "serious and compelling reasons" rendering the child's exclusion undesirable.

18. Permission to appeal was granted on all those grounds by the First-tier Tribunal on 22 November 2018.

19. Mr Tufan submitted that *Devaseelan* applied; negative credibility findings had been made in earlier appeal proceedings, and they should have been treated as the starting point for subsequent findings. Furthermore the wrong standard of proof had been applied, which was a threshold error that cast doubt on all the findings made on the appeal.

20. Ms Bexson submitted that the Judge was clearly aware of the earlier decision from Judge Moore, but that she was nevertheless entitled to reach a different decision on the evidence.

Findings and reasons

21. It is expedient to address the Secretary of State's grounds of appeal in turn. It seems to me that each of the grounds has some force.

Devaseelan – past findings on sole responsibility

22. The Immigration Directorate Instructions addressing sole responsibility have consistently stated the following:

> "A parent claiming to have had 'sole responsibility' for a child must satisfactorily demonstrate that he has, usually for a substantial period of time, been the chief person exercising parental responsibility. For such an assertion to be accepted, it must be shown that he has had, and still has, the ultimate responsibility for the major decisions relating to the child's upbringing, and provides the child with the majority of the financial and emotional support he requires.
>
> …
>
> There are a number of factors which should be taken into account when deciding whether, for the purpose of the Rules, a parent has established that he has had the "sole responsibility" for a child to the exclusion of the other parent or those who may have been looking after the child. These may include:
>
> * the period for which the parent in the United Kingdom has been separated from the child;

* what the arrangements were for the care of the child before that parent migrated to this country;

* who has been entrusted with day to day care and control of the child since the sponsoring parent migrated here;

* who provides, and in what proportion, the financial support for the child's care and upbringing;

* who takes the important decisions about the child's upbringing, such as where and with whom the child lives, the choice of school, religious practice etc;

* the degree of contact that has been maintained between the child and the parent claiming "sole responsibility";

* what part in the child's care and upbringing is played by the parent not in the United Kingdom and his relatives."

23. 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." So the critical question on the appeal, as to whether the Sponsor has sole responsibility, is a question of fact, and geographical separation from her daughter is of only limited relevance. The Respondent's IDI is helpful in giving practical examples of what factors might be relevant in the application of the test. As noted by the Deputy President in *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049: "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." Referring to *Nmaju* [2001] INLR 26, the *TD Yemen* Tribunal went on to state at [30]: "The Court of Appeal 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."

24. As indicated by *Mundeba* [2013] UKUT 88 (IAC), citing Article 3 of the Convention on the Rights of the Child which Home Office policy has long made central to immigration decision making: "An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".

25. Where there has been a prior judicial determination on the issues in the appeal, that assessment represents the starting point for the subsequent appeal as set out in *Devaseelan* (*D (Tamil*) [2002] UKIAT 00702): in short the

prior determination is the authoritative historic resolution of the case. A Judge is entitled to take account of subsequent facts, though they should treat the adduction of further evidence relating to the historic situation with circumspection.

26. Here, the First-tier Tribunal's focus was on the arrangements for the Sponsor's daughter's upbringing in recent years, particularly from 2015 onwards. The Judge's reasoning is very concise. The legal framework that it needed to engage with is as set out above. So far as it goes, the Judge's reasoning was consistent with the guidance found therein. However, whilst brevity of reasoning is not necessarily a bad thing, here it was necessary to address two issues: that assertions of fact emanating from the Sponsor had previously been rejected on appeal, and that any period of sole responsibility was for a relatively short period, for only the final year of Miss [H]'s minority.

27. It seems to me that more detailed reasons were needed than those provided to address the Secretary of State's case on these issues. It is not possible from the reasoning expressed to determine why the Home Office refusal reasons were rejected. It is perfectly possible that a Sponsor may demonstrate sole responsibility over a recent period of time whilst not having done so in the past. But such a finding has to engage with the relevant backdrop.

Standard of proof

28. At the outset of the conclusions on this appeal, and before the factual findings were made, the Judge stated "In human rights appeals, the burden of proof is on the appellant, the standard of proof is lower than the normal civil standard …"

29. Of course, in reality the standard of proof for appeals brought other than on protection grounds is the balance of probabilities. This is the case notwithstanding that the relevant events may have taken place abroad. One can readily envisage an entry clearance "sole responsibility" case where the standard of proof is not necessarily determinative of the appeal's outcome, because the background facts are not contested. However, here the extent of the Appellant's involvement with her daughter's upbringing had been challenged by the Respondent in the refusal letter, and had additionally been the subject of the adverse judicial decisions just referenced above.

30. A generalised misdirection as to the standard of proof is likely to permeate the entirety of the factual findings on an appeal, unless there is some overt indication within the fact-finding elsewhere that the appropriate standard was applied. There is no such indication within the remainder of the decision.

Serious considerations rendering exclusion undesirable

31. The other issue that arose was whether there were compelling considerations making the Appellant's exclusion undesirable. The Secretary of State's statement of policy in SET 7.9 set out in *SG (child of polygamous marriage) Nepal* [2012] UKUT 265 (IAC) which sets out, as relevant considerations in the enquiry to be undertaken:

> "The ECO should consider all the evidence as a whole, deciding each application on its merits:
>
> · Are the circumstances surrounding the child exceptional in relation to those of other children living in that same country?
>
> · Are there emotional/physical factors relating to the sponsoring parent in the United Kingdom?
>
> · Are there mental/physical factors relating to the non-sponsoring parent? Where the physical/mental incapability of the non-sponsoring parent has been established, an entry clearance should normally be granted.
>
> But not considered acceptable as a serious and compelling reason under this provision:
>
> · that the UK offered a higher standard of living than in the child's own country".

32. That gives an accurate précis of the relevant considerations, though of course guidance cannot replace the terms of the Rule. Unfortunately, the First-tier Tribunal conducted no detailed enquiry into the circumstances of Ms [H], and as to whether any alternative accommodation would be available to her (given, for example, the reference to extended family in Jamaica in Judge Moore's decision, and having regard to the fact that subsequent events have not suggested that her welfare was seriously endangered at the date the application was made). Its reasoning is not sufficient for a sustainable finding on this issue, given it was contested by the Secretary of State.

Conclusion

33. Unfortunately, notwithstanding the long history of these proceedings, there being material errors of law in the decision below, the matter must be re-heard. Given that all findings will have to be re-assessed by reference to the appropriate standard of proof, this requires re-hearing afresh in the First-tier Tribunal.

34. Any future hearing of the appeal should bear in mind that the Rules effectively stop the clock in terms of an Appellant's age at the application date (here the Appellant was around seventeen and a half years of age at that point), a consideration which must be relevant in so far as the Rules are a relevant benchmark against which to assess human rights considerations.

> This does not mean that a Judge should ignore post-application developments that shed light on the situation appertaining previously, but it does mean that the Appellant's case on sole responsibility should be assessed on the basis that she was a child when she applied to join her mother.

Decision

The appeal is allowed to the extent it is remitted to the First-tier Tribunal for hearing afresh.

Signed Date 28 January 2019

Deputy Upper Tribunal Judge Symes