Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15580/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 April 2019	**On 17 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS DANIQUE DANIVEE MARSDEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms Ishrat Mahmud, Counsel instructed by Bassi Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal dismissing her appeal against the decision of an Entry Clearance Officer to refuse her entry clearance under Rule 297 as the dependent child of a person present and settled here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Jamaica, whose date of birth is 13 August 1999. On 25 July 2017, shortly before her 18th birthday, she applied for entry clearance under Rule 297 to join her mother, [AP], in the UK.

3. On 26 October 2017 the Entry Clearance Officer ("ECO") gave his reasons for refusing the application. She had been looked after by her grandparents since her mother had left for the UK in the year 2000. If her mother had had sole responsibility for her upbringing, they would expect to see evidence that she took the important decisions about her upbringing - for example, where she lived, her choice of school and her religious practice. She had not provided any evidence that her sponsor was responsible for making these decisions. So, the ECO was not satisfied that she had one parent who was present and settled in the UK and who had had sole responsibility for her upbringing.

4. The evidence provided with her application stated that she was currently being looked after by her grandparents, and that her mother travelled to Jamaica to see to her welfare. The evidence provided did not indicate that this arrangement could not continue. She was 17 years old at the time of application, and had now turned 18. The ECO was not satisfied that there were serious and compelling family or other considerations which made her exclusion undesirable, or that suitable arrangements had been made for her care in the UK.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Lodge sitting at Birmingham on 10 October 2018. Both parties were legally represented. The Judge received oral evidence from the sponsor, who was cross-examined by the Presenting Officer.

6. In his subsequent decision, the Judge set out the sponsor's evidence in some detail at paragraphs [7] to [16]. At paragraphs [19] to [37] (comprising 2 closely-typed pages), the Judge gave very detailed reasons for finding that the appellant had not discharged the burden of proving that her mother had had sole responsibility for her upbringing; and that it was in fact the appellant's grandparents who made all the important decisions with regard to her upbringing. Alternatively, if he was wrong about that, he found that the appellant had only established that the sponsor shared joint responsibility for her upbringing with the grandparents.

7. At paragraphs [39]-[48], the Judge gave his reasons for finding that the appellant had not shown that she met the requirements of Rule 297(i)(f). He did not accept that there was no room for the appellant in her grandmother's new house, and hence that she was homeless. He did not accept that her grandmother would not feel any continuing responsibility

towards her to make sure that there was somewhere for her to live. The Judge continued:

> "Whatever the situation, I am not satisfied that the appellant has established evidence of neglect or unmet needs. The glowing letter from the school dated 2 October 2018, only the day before the statement of the grandparents, does not suggest any problems. It speaks of her blossoming. I have no reliable evidence [that] there are not stable arrangements for her care."

The Application for Permission to Appeal

8. Ground 1 was that the Judge had materially misdirected himself in law in his approach to Rule 297(i)(e). Ground 2 was that the Judge had erred in law in failing to give reasons as to why he had entirely disregarded the evidence of the appellant's grandparents on the issue of sole responsibility. Ground 3 was that the Judge had erred in law in adopting an old-style approach to the claim under Article 8 ECHR - whereas following **MM & Others [2017] UKSC 10**, he ought to have treated the Rules as merely the starting point for an Article 8 consideration.

The Reasons for the Grant of Permission to Appeal

9. On 30 November 2018 First-tier Tribunal Judge Scott Baker granted permission to appeal on all three grounds, although she indicated that, in her view, the first ground had little merit.

10. There was no evidence from the school corroborating the appellant's claim that her mother had made the important decisions in her life, and whilst there was no express reference to **TD (Yemen - sole responsibility) [2006] UKAIT 0049**, this case had been cited to the Judge in the skeleton argument and submissions, and his findings were arguably in line with that decision.

11. However, the decision on Article 8 was arguably inadequate, as the exceptionality test referred to at [49] engaged an earlier test and did not reflect the guidance in **Agyarko [2017] UKSC 11**. The assessment was also arguably flawed in that the Judge had not engaged with all of the evidence which he had before him and he had failed to make findings on the medical evidence relating to the grandparents.

Discussion

Ground 1

12. It is argued that the Judge erred in law in not taking as his starting point the proposition that the sponsor has had sole responsibility for the appellant, given that he accepted that the appellant's father had disappeared from the appellant's life in 2004. Reliance is placed on the following passage in paragraph [49] of **TD (Yemen)**: "*Where one parent has disappeared from a 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".

13. While the Judge did not expressly remind himself of this guidance, he was well aware that this was the central thrust of the appellant's case, and he engaged directly with it.

14. At paragraph [22], he pronounced himself satisfied that the sponsor had simply made a decision to abandon her daughter to take up the opportunities of a better economic life in the UK. He found that in 2004 the sponsor had given birth to a second child in the UK, and in the same year the appellant's father had abandoned the appellant, leaving her in the care of her grandparents.

15. While the Judge accepted that there was documentary evidence of the sponsor making financial remittances to the appellant in the period 2001 to January 2002, and then from 2005 to 2018, on the above findings of fact it was open to him not to treat the sponsor as falling within the paradigm case envisaged in **TD (Yemen**) at [49]. It was open to him not to treat the father's relinquishing of parental responsibility for the appellant by handing her over to her grandparents in 2004 as constituting a transfer of parental responsibility to the sponsor in the UK. For, on the facts found by the Judge, the sponsor was not a remaining active parent in 2004.

16. In any event, the operation of the principle did not relieve the appellant of the obligation to prove that her mother had in fact been exercising sole responsibility for her upbringing "*in the recent past even for a relatively short period up to the date of application or the present date*", as the Judge correctly directed himself at paragraph [19].

17. It was open to the Judge to find that the sponsor had not been exercising sole responsibility for the appellant's upbringing either in the distant past, the recent past or indeed in the present. It was open to the Judge to find that, aside from mere assertion by the sponsor and the grandparents, there was "*a woeful lack of evidence"* with regard to the sponsor making all the important decisions in the appellant's life. It is clear from paragraph [30] that what the Judge had in mind was a woeful lack of "*official or objective"* evidence.

18. In the same paragraph, the Judge observed that the latest letter from the appellant's school reported that she was doing well, but said nothing about any involvement of the sponsor in her education. He noted that the sponsor gave evidence that she had no school reports and that she had not had contact with the school prior to 2016. She said that the school reports were not sent directly to her, but were collected by the grandmother or were all sent to the grandmother.

19. The Judge also took into account that there was no evidence from the appellant's GP of the sponsor's involvement in monitoring the appellant's

health; and that there were two letters from the churches which the appellant attended; but neither letter said anything about the sponsor's involvement in regard to the appellant's religious upbringing.

20. In the absence of corroborative evidence from an independent source, it was open to the Judge to find that Rule 297(i)(e) was not made out for the reasons which he gave.

Ground 2

21. Ground 2 also relates to Rule 297(i)(e). Each of the grandparents made statements asserting that if there were any decisions to be made in relation to Danique's schooling or religious upbringing and the like, [A] made all of those decisions. It is pleaded that the Judge erred in law in failing to consider the grandparents' evidence on this issue or in failing to set out reasons why it was not accepted.

22. The Judge made it abundantly clear why he did not accept the evidence of the grandparents. This was because they were not an independent or impartial source of information; and their evidence was not corroborated by "*official or objective*" evidence emanating from the appellant's school, GP, or church.

Ground 3

23. Ground 3 has some merit. The Judge's disposal of the claim under Article 8 ECHR did not follow the guidance given in **Agyarko [2017] UKSC 11**. However, the Judge's error was not material for two reasons. The first is that he had already effectively engaged with the Article 8 claim by making findings on the applicability of Rule 297(i)(f). The second is that, having reached a sustainable and unchallenged finding that Rule 297(i)(f) was not satisfied, there was no realistic prospect of the appellant succeeding in the alternative under a free-standing Article 8 claim.

24. The Judge's self-direction as to the factors which he needed to consider under Rule 297(i)(f) was entirely in line with the guidance given in **T (S55 BCIA 2009 entry clearance) Jamaica [2011] UKUT 00483 (IAC)** and in **Mundeba (S55 and para 2971F) [2013] UKUT 88 (ICA)** where the Tribunal held that the exercise of a duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there were family or other considerations making the child's exclusion undesirable, inevitably involved an assessment of what the child's welfare and best interests required. The Judge directed himself as follows at paragraph [39]: "*The focus here needs to be on the circumstances of the child in the light of her age, social background and development history and involve an inquiry as to whether there is evidence of neglect or abuse, unmet needs that should be catered for and whether there are stable*

arrangements for the appellant's physical care. The assessment involves consideration as to whether the combination of circumstances is sufficiently serious and compelling to require admission."

25. The grounds of appeal contain no error of law challenge to the Judge's findings under Rule 297(i)(f). It is not asserted that the Judge did not give adequate reasons for finding that the requirements of Rule 297(i)(f) were not met.

26. The only additional matter which the Judge is said to have failed to consider in the context of an Article 8 claim are the best interests of the appellant's half-brother, [D], who is a British citizen. But it was never suggested that the sponsor would be forced to relocate to Jamaica with [D] in the event that the appellant was not granted entry clearance, thereby uprooting [D] from his settled life in the UK, and it is not explained how the maintenance of the status quo would impact adversely on [D]'s best interests.

27. While Ms Mahmud adopted the observation of Judge Scott Baker that Judge Lodge had failed to make findings on the medical evidence relating to the grandparents, this is not a matter raised anywhere in the grounds of appeal. Nonetheless, I address the issue *de bene esse*.

28. The case under Rule 279(i)(f) was that the appellant's grandparents were now too ill and frail to look after her; that the grandfather was due to move to a nursing home following a stroke, and the grandmother was going to be living with another unidentified family member, and there was not going to be a place for the appellant in the same household "*as most of her family resides abroad".*

29. As an 18-year-old, the appellant did not need the same degree of day-to-day care and supervision as she would have needed when her grandparents were younger and fitter. As the Judge indicated in his nuanced analysis, the medical evidence relating to the grandmother did not, taken at its face value, show that she was no longer capable of looking after the appellant.

30. While one doctor said that the grandmother was not capable of caring for the appellant due to her age and health, there was – as the Judge observed - no explanation as to what health conditions the grandmother suffered from, or whether she had any age-related medical problems.

31. Another doctor, Dr Nesbeth, did condescend to some detail, but the detail did not establish that the grandmother was medically unfit to continue in her role as a responsible adult. Dr Nesbeth reported that she was diabetic and hypertensive, and very feeble. It was open to the Judge to find that the grandmother's condition, as reported by Dr Nesbeth, did not preclude the grandmother from continuing to provide a reasonable level of care appropriate for an 18-year-old, including providing her with a roof over her head and continuing companionship and emotional support.

32. Dr Nesbeth also reported on the family's accommodation situation, and asserted that there would not be a place for the appellant in the new home where the grandmother would be living with another family member. As the Judge commented at paragraph [43], any knowledge that Dr Nesbeth could have as to the appellant's accommodation problems would be from either the appellant or her grandparents. In short, as the Judge indicated, the letter from the doctor did not constitute independent corroboration of the claim that the appellant was now going to have nowhere to live, and no one to look after her. For that reason and for the other reasons given by the Judge, the finding under Rule 297(i)(f) was sustainable, and there was no scope for the appellant succeeding in the alternative on Article 8 ECHR grounds outside the Rules, since the resolution of both issues turned on the same facts.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 13 April 2019

Deputy Upper Tribunal Judge Monson