Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21635/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Determination & Reasons Promulgated**
On 29th November 2018	**On 8th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS PK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik (Counsel), Sabz Solicitors LLP
For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Durance, promulgated on 7th December 2017, following a hearing at the First-tier Tribunal on 22nd November 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of South Africa, being born on 27th April 2003, and is a female. She appealed against the decision of the Respondent refusing her application to join her sponsoring father under paragraph 297 of HC 395, such a decision being dated 15th August 2016. There had been a previous decision also in March 2016.

The Appellant's Claim

3. The Appellant's claim is that she is dependent upon her father, Bobby [C], who is presently residing in the UK, and it is he who has had sole responsibility for her upbringing, so that she can comply with the requirements of paragraph 297 of HC 395. She claims that her mother has not played a role in her upbringing because she has not been able to cope with her, and all material decisions during her life have been taken by her sponsoring father in the UK.

The Judge's Findings

4. The judge had regard to the fact that the Appellant child had been looked after by a family friend by the name of "Violet [V]", to whom the Appellant referred to as "Aunty Violet", because the allegation was that the Appellant's mother was not capable of providing the necessary care for the Appellant, or to support her and to meet her needs as a young child (paragraph 8). The judge heard how the arrangements had been made by the sponsoring father in the UK for Violet [V] to look after the child on a temporary basis. An important feature of this appeal is that there was a court order dated 26th April 2016 from the High Court of South Africa, awarding full custody of the Appellant to the sponsoring father. The mother only had visitation rights.

5. What was said before the judge was that it was the sponsoring father who had arranged home-schooling for the Appellant, and that he spent many hours teaching her online. He is the person responsible for decision making in her life (paragraph 9). The judge also heard evidence from the Appellant's grandmother, who had indicated that the Appellant's mother was actually living with the Appellant (paragraph 19), but the judge did not find the evidence before him to be credible. He observed that only selective documents had been presented before the Tribunal. These did not disclose the mother's angle (see paragraph 27(c)). When the Appellant's father left for South Africa in 2010, he had left his daughter with her mother (paragraph 27(d)).

6. The judge concluded that the Appellant's father had encountered difficulty in obtaining the Appellant's birth certificate, and this was telling with respect to the application in the appeal before him. Moreover, the High Court decision, with respect to the child welfare proceedings in relation to the Appellant, was not a credible one given that the father could not obtain a birth certificate expeditiously, leading the judge to conclude that

"the abandonment is contrived" (paragraph 27(g)). The judge firmly concluded that "the Appellant is in contact with her mother and that decision was made jointly by both parents" (paragraph 27(l)).

7. The appeal was dismissed.

The Grounds of Application

8. The grounds of application state that the judge had placed a disproportionate focus on the historic welfare concerns of the Appellant, giving insufficient weight to the custody order in favour of the sponsoring father from April 2016. The judge had made adverse credibility findings in relation to the birth certificate. The judge had also concluded that the Appellant was in contact with her mother when there was no such evidence in relation to the mother making decisions. Moreover, the judge had failed to consider whether there was serious and compelling family or other circumstances making exclusion of the Appellant undesirable.

9. On 4th October 2018 the Tribunal granted permission to appeal. It did so on the basis that the judge had concluded that the Sponsor did not have sole responsibility largely on adverse credibility grounds, that his choice to move to the United Kingdom is inconsistent with the Appellant's claimed situation from that date and that it was not accepted that the birth certificate could not be obtained sooner. It was arguable that in the light of a lack of evidence of ongoing contact between the Appellant and the mother, the judge should not have concluded that there was joint shared responsibility between the mother and the sponsoring father in the UK for the Appellant.

10. Second, there was a lack of detailed consideration of the Appellant's current circumstances in South Africa and as to Article 8, the latter being dismissed on the basis that there was no family life between the Appellant and her father, after he abandoned her by moving to the United Kingdom.

11. Third, it was arguable that family life does exist between the sponsoring father and his minor child, particularly in the circumstances where contact appears to be accepted in this case.

Submissions

12. At the hearing before me on 29th November 2018, Mr Karnik submitted that the Appellant had provided sufficient evidence that her father had sole responsibility for her. He made all the important decisions in her life, including her schooling, accommodation, and her medical treatment. Documentation to this effect was provided, as was the documentation showing that the mother was not capable of providing any care and had absolved herself of all responsibility for the Appellant. It was the Sponsor who now had full parental custody of his daughter. It was the Sponsor who had arranged for temporary accommodation of the Appellant with her

family friend (see pages 123 to 124 and pages 256 to 269 of the Appellant's bundle).

13. Furthermore, there was independent evidence indicating that the Appellant had been placed into a children's home, foster care, and then into the Sponsor's mother's care at various points in the Appellant's young life. Social sciences had been involved and there was evidence from lawyers representing the Sponsor with regard to previous applications.

14. In the circumstances, it could not be inferred from these facts, that there had been a planned contrivance at the outset, whereby the mother would simply give up her parental responsibility for the caring of her child, just in order to satisfy the Immigration Rules, whereupon the sponsoring father could then have her come to the UK.

15. Mr Karnik also argued that the Sponsor was in a position to provide proper care for the Appellant. He rented property with his family members and was in a good position to accommodate and financially maintain the Appellant in the UK without recourse to public funds (see pages 243 to 254 of the Appellant's bundle). The Sponsor was also in regular contact with the Appellant's daughter by way of Skype and this was evidenced at pages 126 to 170 of the Appellant's bundle, and that there was also mobile call evidence at pages 222 to 242 of the Appellant's bundle. There was evidence of money transactions to the Appellant from the Sponsor at pages 171 to 214 of the Appellant's bundle.

16. Mr Karnik also went on to say that the judge had conspicuously failed to give regard to essential documentary evidence that had been furnished before the Tribunal. For example, there was a letter from the Appellant's father (at page 106 of the bundle), dated 16th November 2017, and this explains the background to the neglect of the Appellant, and the various efforts being made to provide her with a degree of stability at home. This was not referred to by the judge.

17. In the same way, there is a letter from Arthur [C] (at page 108) dated 16th November 2017, and this is from the family members, and observes how in June 2010 they came to the UK:

> "In preparation for the rest of the family's arrival. I left my two children in my mother's care and Bobby [C] done the same with [PK]. Our intention was for it never to be long. Once Bobby [C] and I were staying in the UK we set about applying for visas for my two children …" (paragraph 3).

18. What Mr Karnik submitted was that this showed that a similar, and entirely genuine foundation had been laid by somebody else in the family, to bring their children over to the UK, and they had succeeded in doing so, whereas the Appellant's sponsoring father had failed in his attempts, and this was not say that there was any contrivance at all in what was being done.

19. My attention was also drawn to a Gmail trail, which culminated in a rather anxious and desperate plea from the Appellant's father, Bobby [C], to the Department of Home Affairs in Sri Lanka, requiring to provide an unabridged birth certificate for his Appellant daughter. He states, "I have exhausted all means possible in trying to acquire this document as I have been waiting for over five years to finalise the application". He goes on to say that, "I am currently residing in the United Kingdom of England and had therefore had Home Affairs official from the South African High Commission in London to sign and officialise the B1 – 1682 application form for insertion of father's details". He ends by saying, "I am duly requesting the completion of this document as soon as possible" (page 673).

20. Mr Karnik went on to say that there were no less than three sets of court proceedings, and all had ended up in favour of the sponsoring father. This is a High Court order in relation to the Appellant child, confirming that custody is to be given to the sponsoring father, but that the Appellant's mother is to have visitation rights, to the extent that the sponsoring father is to pay for the Appellant child to come from England to South Africa for each school holiday, so as to spend time in South Africa, and to meet with her mother (page 91).

21. Mr Karnik ended by saying that even if there was "contrivance" in the way suggested by the judge in this case, so as to ensure that custody was to be given to the sponsoring father and visitation rights only to the mother, the plain fact was that under the legal terms of the High Court order, the mother could not actually exercise sole responsibility, in the form of giving control and direction to the child's life, because that was a matter that was reserved for the sponsoring father in the UK.

22. In the circumstances, it was wrong for the judge to say that there was a shared responsibility between the sponsoring mother and the father. Whatever may have been the position in earlier years, after the sponsoring father left South Africa in 2010, and then the grandmother left in 2011, it had been the sponsoring father who had been looking after the Appellant child. In point of fact, there was no evidence whatsoever that decisions were made jointly between the sponsoring father and the mother. On the other hand, there was clear evidence to the contrary, not least in the form of a court order. The evidence on other deponents to the hearing all confirmed that the daughter was no longer living with the mother.

23. For his part, Mr Bates submitted that the judge was right to have concluded that the credibility of the witnesses was in issue. He was right to have concluded that they had contrived, by virtue of a court order in April 2016, to create a situation, whereby the appearance would be given of the mother having abandoned the child. There was evidence of contrivance even in the documentation that Mr Karnik referred to. For example, the letter of 15th November 2017 by Brian [C], (page 106) makes it quite clear that the Appellant child lived with them "until we migrated to

the United Kingdom in 2011. At which point Bobby [C] arranged for the child to live with her mother on a temporary basis while he applied for her unabridged birth certificate".

24. Plainly, submitted Mr Bates, much was being done behind the scenes to create a situation, the ultimate aim of which was to facilitate the entry of the Appellant to the United Kingdom, including making arrangements for the Appellant to live with her mother when it suited the parties to do so.

25. Furthermore, what was perhaps most important, however, was that under the decision in **TD (Paragraph 297(1)(e): "sole responsibility") Yemen [2006] UKAIT 00049**, it was stated that "sole responsibility" was a factual matter to be decided on all the evidence. The test was whether a parent had continuing control and direction of the child's upbringing. However, it was also made clear that where one parent is not involved in a child's upbringing, because he or she has abandoned responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child. Nevertheless, where there were both parents present, it would be only in exceptional circumstance that sole responsibility could be said not to have been shared between two parents. If the father had had sole responsivity, it did not make sense why it would have taken him such a long time to get an unabridged birth certificate for his child.

26. In reply, Mr Karnik submitted that there were large parts of the evidence in respect of which no recent decision had been given. The Appellant was currently living with Dr M G Holland, who was the family's long-time regular medical physician, and he has explained how there has been difficulty in the child's upbringing, such that it has required various arrangements to be made, at the behest of the sponsoring father, and all of this showed that the Sponsor was entirely credible in what he was stating.

27. The judge had failed once again to refer to the letter from Dr M G Holland, just as he had failed to give adequate attention to the email trail, demonstrating the sponsoring father's frustration in failing to precure a timeous unabridged birth certificate, as he had been aiming to do for no less than five years.

Error of Law

28. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

29. First, there is the question of the background evidence. The judge has taken the view that there was a contrivance here to circumvent paragraph 297 of HC 395, so as to show that the sponsoring father in the UK had exercised sole responsibility for the Appellant child. Unfortunately, the

basis of this decision is very much predicated on the sponsoring father having left his child in 2011 to come to the UK, and the judge has taken the view that there would be no family life between the Appellant and the father who had abandoned her by moving to the United Kingdom. This cannot be right. The evidence certainly does not show that the sponsoring father had "abandoned" the Appellant child.

30. Given this initial mistake as to fact, the determination of whether there had been "sole responsibility" by the sponsoring father as of 2011, has not been properly determined. The sponsoring father does not have to show that he has *always* had sole responsibility for his child. He needs only show that at the date of the decision he was a person exercising such responsibility.

31. The background evidence is properly described in the letter of Dr Holland (at page 125) which the judge does not set out, where he makes it clear that the Appellant's sponsoring mother has been a professional musician (vocalist) who has been aspiring to establish herself in a very competitive profession. Her working hours have been such that she has not been able to devote proper attention to the Appellant child in this case.

32. As a solution to this, the Appellant had been given to the care of a family friend, Violet [V], and this was an arrangement made by the sponsoring father. The care provided by "Violet cannot be faulted". However, as the child is growing up she would benefit from "a more wholesome family oriented environment" and this environment would be "most certainly provided by her father and grandparents in the UK". Dr Holland states that "the child's mother is willing" to give the child's "custody to her father …". Precisely what the circumstances were of the Appellant's mother, in the way that they have been set out by Dr Holland, have not been referred to by the judge, before the conclusion was reached as to whether the mother is providing continuing control and direction to this child on a shared basis with her sponsoring husband in the UK.

33. Second, the email trail, that Mr Karnik has brought to my attention, plainly demonstrates the frustration and anxious efforts made by the sponsoring father, over a period of some five years, to get an unabridged birth certificate for the Appellant child, and this evidence, plainly goes to an important link between the father and a daughter, in a way in which appears to have been wrongly discounted by the judge below.

34. Third, the judge does not take cognisance of the Appellant's full position in South Africa, in the way that it is set out in various testimonial letters provided by those associated with the sponsoring father in the Appellant's bundle.

35. Fourth, although the judge states, after the Appellant's father had left South Africa in 2010, he left "his daughter alone with her mother" (paragraph 27(g)), this was not strictly correct, because the child was left

in the family household consisting of the grandmother, the grandfather, other children, as well as the Appellant's mother.

36. In any event, it is not correct to say that the Appellant's father's decision to come to the UK "due to concerns about his own security" were such that "it is incredible that he would leave his daughter alone with her mother" (paragraph 27(d)).

Notice of Decision

37. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside (see Section 12(1) of TCEA 2007). I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Durance pursuant to Practice Statement 7.2.(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be remade as such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

38. An anonymity order is made.

39. The appeal is allowed.

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 Date

Deputy Upper Tribunal Judge Juss 4th January 2019