Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number OA/16431/2014**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 1 July 2022	**On the 13 September 2022**

Before

Mr C M G OCKELTON, VICE PRESIDENT, & UT JUDGE MACLEMAN

Between

DOREEN NABBAALE

Appellant

and

ENTRY CLEARANCE OFFICER, Pretoria

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Uganda, born on 20 September 1997, living in South Africa. She applied in 2014 for entry clearance to join her mother, "the sponsor", in the UK. She was then a child. By the date of the hearing before us, she had been an adult for almost 4 years.

2. The ECO refused her application on 28 October 2014 because (i) her mother held discretionary leave, which did not render her eligible to sponsor a family member to join her in the UK, and entry was sought for a purpose not covered by the immigration rules; and (ii) there were no

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"compelling, compassionate circumstances" to justify consideration outside the rules.

3. The appellant appealed to the FtT.

4. The starting point is paragraph 301 of the rules, although there has been remarkably little direct citation of it in the long course of these proceedings. It presently stands in these terms:

> **Requirements for limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement**
>
> 301. The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:
>
> (i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:
>
> (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or
>
> (b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or
>
> (c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively; and
>
> (iva) can, and will, be maintained adequately by the parent or parents without recourse to public funds; and
>
> (ivb) does not qualify for limited leave to enter as a child of a parent or parents given limited leave to enter or remain as a refugee or beneficiary of humanitarian protection under paragraph 319R; and
>
> (v) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

5. Neither representative was able to tell us whether there has been any amendment while this case has been going on or, if so, which version of the rule would be relevant for our purposes. However, there is no suggestion of any amendment having been made in any respect which affects this case. We proceed as if the rule has stood as above throughout.

6. *TD* Yemen [2006] UKAIT 00049 at [52] summarises the correct approach to sole responsibility:

   i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.

   ii. The term "responsibility" in the immigration rules should not be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.

   iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.

   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.

   v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

   vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

   vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

   viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

   ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

7. FtT Judge D C Clapham heard the appeal on 21 October 2015 and dismissed it by a decision promulgated on 20 November 2015. The solicitor for the appellant appears to have contended, although on no clear basis, that the sponsor did have leave which allowed the case to be considered in terms of the rules. That is no longer argued. At [26, 27 & 33] the FtT Judge held that as the sponsor had only discretionary leave, or at that time, more accurately, leave extended under section 3C of the

1971 Act by an outstanding application, the requirements of the rules were not met. At [33] he held that sub-paragraph (i)(b) was not met either, as the sponsor did not have sole responsibility but had delegated it to others, and nor was sub-paragraph (i)(c), there being no serious and compelling circumstances. At [34] he dealt with the case outside the rules but took the view that mother and daughter had already been separated for a very considerable period, she was of an age when if not already leading an independent life she soon would be, and no case was made out "for overriding the rules".

8. The FtT and the UT refused permission to appeal.

9. The appellant petitioned the Court, which granted reduction of the UT's refusal of permission on 24 November 2017, as explained in the Opinion of Lady Carmichael, [2017] CSOH 144. The SSHD then sought to take the case to the Inner House, but withdrew the motion for review of the Lord Ordinary's interlocutor on 11 December 2018.

10. In passing, we find it extraordinary that the experienced representatives who were before the FtT did not refer Judge Clapham to *TD*, a well-established authority which is common currency in cases of this nature; and even more surprising that counsel before the Court were unable to refer to any authority, the Court discovering *TD* by itself - see [26-27]. (Neither Mr Forrest nor Mr Mullen were involved at those stages.)

11. Apart from one enquiry by the appellant's solicitors, which was answered by the UT, time went by without any action on the outstanding application for permission to appeal to the UT.

12. The UT eventually listed the case for an oral permission hearing on 4 October 2021. Counsel then told the UT that although solicitors were in touch with the sponsor, the position regarding contact with the appellant was unclear. Directions were given for production of a mandate and a witness statement.

13. Those directions having been complied with, and in light of the Court's Opinion, permission was granted on 2 December 2021.

14. Mr Forrest accepted that while error of law was to be decided as matters stood at the date of the FtT's decision, any remaking of it would be based on matters to date, including the long (and unexplained) periods when the appellant did not seek to advance her case, and her present age and circumstances in South Africa. He said that the appellant had been advised accordingly and wished to proceed.

15. Mr Forrest asked us to decide two grounds.

16. The first ground is that the FtT erred in law by not recognising that under article 14 of the ECHR, read along with article 8, the respondent unlawfully discriminated against the appellant, treating her differently from persons with forms of leave which entitled them to bring their children to the UK.

17. Mr Forrest submitted that provisions such as paragraph 310 are unlawful because they discriminate by rendering one form of immigration status inferior to another, such as between those who are “settled” and “not settled”, and that the SSHD had no reason to justify the difference in treatment between people in quite similar situations, particularly where involving the rights of a child. He accepted at first that some distinctions might not be unlawful, such as a holidaymaker in the UK whose child was at home in another country. We put the further example of students, whose positions might vary in respect of a right to bring children. Mr Forrest said that no ”bright lines” could be drawn. Eventually, as we understood it, his position came to be that the rules could not, without unlawful discrimination, make any distinction among persons who are here on any lawful basis in respect of their children’s rights to enter the UK.

18. We tried to ascertain the history of the sponsor’s status, which neither side has made entirely clear. She appears to have made an asylum claim in 2007, which led to a refusal and to an appeal being dismissed in March 2008. That decision was before Judge Clapham, who relied to an extent on its negative findings, but it cannot now be traced by either side. She then seems to have made further submissions and to have been granted “discretionary leave” from 18 June 2012 to 17 June 2015, probably due to having another child with her in the UK. Her leave continued due to an outstanding application at the time of the FtT hearing. Subsequently, she was granted indefinite leave. She has since obtained nationality.

19. Mr Mullen submitted that the appellant had not shown she fell into any class of persons subject to unlawful discrimination. At the relevant time she did not have leave “with a view to settlement” and it was not unlawful, for purposes of being joined by children, for the rules to distinguish among people with no right to be here, those with only short term rights, and those with longer term rights.

20. We decide ground 1 before dealing with ground 2.

21. Article 14 is another source to which no direct reference was made. It provides for the enjoyment of ECHR rights to be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The appellant has not identified any such ground.

22. Immigration status may be an “other status”, but it is not one requiring “very weighty reasons” to justify differential treatment – *Macdonald’s Immigration Law and Practice*, 10th ed., vol 1, 7.150, citing *Bah v UK* [2012] 54 EHRR 21.

23. As we put to counsel in course of submissions, the main function of the rules is to make distinctions, and rules must draw lines somewhere. It may be unlawful to discriminate, in certain ways, on the basis of immigration status; but it is not unlawful for differences of immigration

status to exist. The vague and broad challenge of ground 1 is close to saying that there can be no such distinctions.

24. Ground 1 was not put to the FtT. We see nothing in it of such obvious force that the FtT erred by failing to consider the issue on its own initiative.

25. The distinction between people settled or on course to be settled in the UK and those who are here for temporary purposes runs throughout the rules. We think it is obvious that persons in the first group are likely to have stronger claims to be joined by children than the second.

26. There is a clear distinction in paragraph 301, but the appellant has shown no unlawful discrimination. We do not uphold ground 1.

27. In any event, as was accepted, ground 1 would not be enough on its own. It would open the way to consideration in terms of ground 2, on sole responsibility, but the appellant would also have to succeed on that.

28. Ground 2 is that the FtT erred by concluding that the sponsor did not have sole responsibility for the upbringing of the appellant. It was argued that the FtT erred by reference to the *TD* approach, particularly as this was a case of only one surviving parent, and it was consistent with sole responsibility to delegate responsibility.

29. At [8], the FtT noted that in cross-examination the sponsor said that the misspelling of her daughter's name as "Dorren" was an insignificant mistake by someone else. At [9], the FtT noted that there was no death certificate of the appellant's father; that the sponsor had previously been found to have lied about family circumstances; could not give her deceased husband's date of birth, but thought it was in 1960; and could not adequately explain the discrepancy in saying on an entry clearance form that it was 1 January 1964. The rest of the sponsor's evidence is recounted at [10 – 20]. There is not said to be any error in that recording. At [28], the FtT found the discrepancy over the date of birth of the appellant's father "unsatisfactory", as he would expect someone to know the year of birth of a person with whom she was in a close relationship. At [29], he agreed that the sponsor's evidence about the appellant's education and schools attended was rather vague. At [30], he thought that evidence from the Red Cross about contact was "very unsatisfactory", noting that the sponsor did not appear to know about her daughter's medical treatment or to have been in control of that situation.

30. No error has been suggested, either in grounds or in submissions, in any of those findings and observations. They are the foundation for the conclusion at [33] that sole responsibility was not established because the upbringing of the child "had really been delegated to other people".

31. By way of notice under rule 15(2A) the appellant asks for consideration of evidence which was not before the FtT, comprising her statement dated 11

October 2021, and evidence of her mother being granted indefinite leave on 8 October 2019 and naturalised on 29 June 2021. The apparent intention is for this to be considered in any remaking of the decision. It is not said to bear on any error by the FtT. We were not referred to it in course of submissions thereon.

32. The appellant's statement mentions nothing of note about her mother directing her upbringing, even indirectly, or making any important decisions over the years. She says generally at [15] that her mother pays her rent and provides money for all her needs. We note that she offers no statement from her mother explaining how she conducted her long-range part in the appellant's upbringing, or any decisions she made.

33. Rather inconsistently with the application to introduce further evidence, the appellant's skeleton argument invites us to remit to the FtT, based on the same matters.

34. By reference to the specific findings and observations of Judge Clapham, and to the underlying evidence identified in course of submissions, the appellant's case on sole responsibility came to appear worse, not better.

35. Judge Clapham did not overlook that this was advanced as a "one parent" case; that is clear throughout his discussion. Nor did he fail to appreciate that geographical separation would necessitate some sharing of responsibility. His conclusion is plainly not conditioned on anyone apart from the sponsor having some day-to-day responsibility, but on the evidence not showing her to have continuing control and direction of the child's upbringing or to make all the important decisions in the child's life.

36. Although *TD* was not cited to him, the decision of Judge Clapham has not been shown to be inconsistent with the approach that case requires.

37. Beyond that, we find it hard to see that any Judge might have found the evidence to justify a conclusion that the sponsor did have sole responsibility. If we had found reason to set aside the decision of the FtT, we would have had no difficulty in finding the evidence, including the updated evidence, to fall far short of establishing sole responsibility at any period of the appellant's childhood. There is remarkably little evidence that she has ever had much to do with the appellant.

38. The appellant has not shown by either of her grounds that the FtT's resolution of the case before it involved the making of any error on a point of law. The decision of the FtT shall stand.

39. No anonymity direction has been requested or made.

22 July 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.