Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05908/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reason Promulgated**
On 4th March and 27th May 2015	**On 3rd June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANGEL NAEVEH GRIFFITH

Appellant

and

IMMIGRATION OFFICER, Heathrow Airport (Terminal 3)

Respondent

For the Appellant: on 4 March 2015, Mr A Caskie, Advocate, instructed by Latta & Co., Solicitors; on 27 May 2015, Mr R Gibb, of Latta & Co

For the Respondent: Mrs S Saddiq, Senior Presenting Officer

DETERMINATION and REASONS

1. The appellant filed notice of appeal to the First-tier Tribunal on 29th January 2014. The attached decision to be brought under appeal was the Immigration Officer's refusal on 12th January 2014 of an application made on 13th June 2012 "for indefinite leave to remain as the child of a parent present and settled in the UK whilst you were on temporary admission in the UK". Also attached is a "reasons for refusal letter" dated 28th October 2013 and signed on behalf of the Secretary of State. Although it may make no practical difference, I think the respondent in these proceedings is correctly the Immigration Officer not the Secretary of State.

2. There on file an "additional respondent's bundle" listing items A, B and C but which has attached a further series of items, without index or pagination. Among these further items is an Explanatory Statement signed by an Immigration Officer and by a Chief Immigration Officer on 11 March 2014, supplementing the reasons for refusal in light of the appeal grounds. (These further items may be from an initial respondent's bundle, although it is difficult to tell.)

The hearing on 4 March 2015 – error of law.

3. Designated Judge Murray dismissed the appellant's appeal by determination promulgated on 14th August 2014. On 8 December 2014 UT Judge Warr took the view that although the matter was perhaps finely balanced, as a young child was involved it was appropriate to extend time and to grant permission to appeal to the UT.

4. Mr Caskie, who was not the author of the grounds of appeal to the UT, did not rely upon them in any detail although he contended that there was sufficient in their terms and in the grant of permission on which to base his arguments. Although the grounds say that the appeal should have succeeded under the Immigration Rules (paragraph 301 rather than 298) Mr Caskie accepted that there was no error in the outcome under the Immigration Rules. He submitted that the judge took a "case-hardened" approach to the evidence from the sponsor which led her also to doubt for no good reason the evidence that the appellant (who did not give evidence orally) wished to remain in the UK. In those respects and more generally he contended that the judge approached Article 8 of the ECHR on a mistaken view of the facts and of the outcomes open to the family members affected.

5. Mrs Saddiq argued that the evidence, particularly from the sponsor, had rightly been found to be self-contradictory, incomplete and unsatisfactory. The sponsor had given various different accounts. She had been capable of organising her own visa to come to the UK as a spouse and it must have been evident from that procedure that she also needed a visa for her daughter. The judge had been right to be sceptical and had not simply taken a case-hardened attitude. The situation raised major questions about the best interests of the child and the proper procedure for moving residence of a child from one country to another, leaving one parent behind, and where a court in the country of nationality had been involved in regulating matters. The decision makers involved rightly formed serious concerns and reasonably requested appropriate evidence which the sponsor and appellant failed to produce over a lengthy period, with no good explanation. It was evident that further court documentation including a parenting plan existed and that the sponsor was under a duty to notify the relevant authorities of changes in parenting arrangements and of any change of address. Although concerns about the consent of the father had to some extent been mitigated by the telephone call made initially by Immigration Officers soon after arrival in the UK, that remained the only evidence from him. Even if he was not particularly co-operative there was no sensible explanation of why other evidence was missing. Removal of a child from one jurisdiction to another without proper parental and court documentation was a very serious matter.

Without production of the evidence there had to remain concerns that there were reasons for non-disclosure going beyond the feeble explanations from the sponsor.

6. As to Article 8, Mrs Saddiq submitted that there was no material error at paragraph 64 of the determination. If error were to be found, she asked for the adverse factual findings to be preserved in any remaking of the decision.

7. I indicated that in my view the determination errs as follows:

   (i) The principle to be derived from *Chikwamba* is that applications should not routinely fail only on the procedural ground that the application should be made from the home state. However, this was not a case where the only justification for refusing the application was that it should be made from abroad. The respondent had other substantial concerns.

   (ii) If this had been a "*Chikwamba* case" there would have been no good reason for the appeal not to succeed. Serious shortcomings can be identified on the part of the sponsor but not of the appellant. There would be no good reason for enforcing her return if it were no more than a formality to secure re-entry.

   (iii) The judge assumes without examination there is an alternative of the sponsor, stepfather and appellant taking up family life in the USA. There were good reasons to think that that might not be a realistic possibility.

   (iv) The most likely outcome of enforcement of the adverse decision would be that the appellant's mother would also return to the USA, that they could not readily return to the UK, that the sponsor's partner would not be able to live in the USA on a permanent basis for reasons both practical and legal, and the present family unit would be split up. It did not follow that the appeal had to be allowed under Article 8, but that could only be resolved on a realistic appraisal of the likely outcomes.

8. The determination therefore needed to be set aside and the decision remade. As to any preserved findings, it was sufficient to indicate as follows. There is no legal error in the judge's adverse view of the sponsor's evidence. The judge did not reach a conclusion about the appellant's preferences. However, I thought (a) it is understandable given her age that it was not thought necessary for her to give oral evidence, and (b) the natural expectation is that she would wish to continue living with her mother as she always has, wherever her mother might live.

9. In course of submissions and on reference to the Rules the position taken for the appellant about remaking the decision came to be as follows. As at the date of the First-tier Tribunal the appeal could not have succeeded under the Immigration Rules, principally because the sponsor did not then have indefinite leave to remain. She has since secured that status. The appellant seeks to show that she now qualifies for leave to remain under the Immigration Rules, Appendix FM, Section E-LTRC (conveniently to be found in *Phelan and Gillespie, Immigration Law Handbook*, 9th ed., at pp. 1160 - 1162). She would rely upon the alternative in E-LTRC.1.6(b):

> "the applicant's parent has had and continues to have sole responsibility for the child's upbringing *or the applicant normally lives with this parent and not their other parent*."

10. Mr Caskie accepted that the requirement cannot be met by a *de facto* situation brought about regardless of the law. Arrangements must be shown to be legal and acceptable to the other parent, or to the authorities in the jurisdiction of origin, or both.

11. The appellant would also rely on paragraph E-LTRC.2.3(a)(vi) on the basis that the sponsor's partner receives personal independence payment. There was some evidence on file, although Mr Caskie acknowledged it was not presently sufficient to establish the point. Nor is there evidence to meet the rest of the requirements of the Rules, including those relating to accommodation.

12. The papers in this case were not in good order. The responsibility lay partly with the parties and also perhaps in less than perfect file keeping by the FtT and the UT. The parties did not comply with directions issued on 16th February 2015 for service of bundles and indexes. It was not desirable that there should be multiple and confusing sets of similar documents, but it was hoped that there might be greater clarity at the next hearing by way of properly indexed and paginated inventories of the evidence relied upon to remake the decision.

13. In terms of good practice, of the Tribunal Procedure (Upper Tribunal) Rules 2008, of the UT Practice Directions and of the directions mentioned, the appellant's representatives should have been able to invite the UT to make the decision without adjournment. Failing that, the UT would have been justified in dismissing the appeal because the appellant, having been given every opportunity over a period of several years, has failed to bring the evidence obviously required to support her case. However, given the history to date and as the appellant is a child, I agreed that the hearing should be adjourned.

14. Mr Caskie said that to obtain further documentary evidence from the USA might involve instructing agents there. He asked for two months for the appellant to do assemble her case.

15. The appellant through the sponsor and legal representatives thus had yet another opportunity to put matters right. If that opportunity was not taken, the case would fail to meet the requirements of the Immigration Rules. Failing satisfactory evidence under the Rules, it was difficult to see that there might be success outside the Rules.

16. A decision and directions in terms of this determination up to this point were issued to the parties on 6 March 2015.

The hearing on 27 May 2015 – remaking the decision.

The appellant's position.

17. The appellant filed a "consolidated inventory of productions" including a skeleton argument and further evidence.

18. The further materials include a notarised statement from the appellant's father dated 7 April 2015 and communications with an attorney in Tennessee. The skeleton argument explains that these aim to show that the Court there has been advised of the change of address to the UK and that the present arrangement is "legal and acceptable to all parties concerned".

19. The argument next identifies that (contrary to the line advanced at the previous hearing) Appendix FM of the Rules does not apply, and that this is a case governed by paragraph 298. Mrs Saddiq agreed, so that is the provision I consider.

20. Paragraph 298 provides:

> The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:
>
> (i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
> (b) one parent is present and settled in the United Kingdom and the other parent is dead; or
> (c) one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing or the child normally lives with this parent and not their other parent; or
> (d) one parent or a relative is present and settled in the United Kingdom 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) has or has had limited leave to enter or remain in the United Kingdom, and
>
> (a) is under the age of 18; or
> (b) was given leave to enter or remain with a view to settlement under paragraph 302 or Appendix FM; or
> (c) was admitted into the UK in accordance with paragraph 319R and has completed a period of 2 years limited leave as the child of a refugee or beneficiary of humanitarian protection who is now present and settled in the UK or as the child of a former refugee or beneficiary of humanitarian protection who is now a British Citizen, or
> (d) the applicant has limited leave to enter or remain in *t*he United Kingdom in accordance with paragraph 319X, as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom and who is now present and settled here; or
> (e) was last given limited leave to remain under paragraph 298A; and
>
> (iii) is not leading an independent life, is unmarried, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds in accommodation which the parent, parents or relative the child was admitted to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds; and

(vi) does not fall for refusal under the general grounds for refusal, and

(vii) if aged 18 or over, was admitted to the United Kingdom under paragraph 302, or Appendix FM, or 319R or 319X and has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with Appendix KoLL.

21. The argument concedes that the appellant cannot meet 298(ii). She meets 298(iii). It is submitted that she can be accommodated and maintained without recourse to public funds, any shortfall in the income of her mother and step-father being made up by third party provision. Therefore, it is said, it is only because the appellant does not have limited leave to enter or remain that her case falls under Article 8. "The only way that she could bring herself within paragraph 298(ii) would be by returning to the USA to apply for entry clearance. It has already been held that such a requirement would be contrary to Article 8 … the fact that she meets all the other requirements of the relevant rule must be strongly in her favour in terms of the said Article". The argument asks accordingly for the appeal to be allowed under Article 8.

The respondent's position.

22. Mrs Saddiq did not accept that the appellant met the requirements of paragraph 298 apart from (ii). She pointed out that the sponsor and her husband both presently depend on public benefits. There was no schedule of income and expenditure to show how the appellant was to be accommodated and maintained without recourse to public funds. Third party support is permissible in principle but all that was put forward was a vague assurance from the husband's sister, with an indirect indication that his parents would also help if required by letting the parties move back in with them. Third party support had to be assured and quantifiable. There was also the possibility that support might lead to some reduction of benefits. The case fell well short of paragraph 298. The Article 8 issue was therefore not a simple "*Chikwamba* question" of whether the appellant should comply with a formality.

23. The sponsor had changed her version of events and her description of the child's father, had been tardy or had failed to produce important evidence, and had rightly been found to be an unreliable witness. The evidence should be examined in that light. There was no full copy of the divorce decree. It referred to a parenting plan but no copy of that in either its original or amended version had ever been produced. The latest explanation, in the father's affidavit, was that a workmate accidentally threw it out and as the sponsor was out of the country nothing could be done to replace it. That was unsatisfactory. There was no apparent reason why the sponsor could not sign such an agreement while abroad. The father now said that he wanted matters resolved so that the original intention of the appellant visiting him in the

summers could be fulfilled. That was understandable but it had to be wondered what pressure might be put upon him in that light. His affidavit mentioned the appellant also seeing her brothers and sisters in the USA. The sponsor had not previously disclosed the existence of such siblings (presumably half-siblings). There was a discrepancy in the documentary evidence, being a change of date in the notification to the court of a UK address. The case raised serious issues concerning the best interests of a child. The respondent was entitled to expect clear evidence about such matters. The sponsor had at one stage maintained that the father did not wish anything to do with the child, but it now emerged that it was the sponsor by her actions who had thwarted contact. It would be perverse for the case to succeed under Article 8 when it arose entirely from the sponsor taking her child from the USA to the UK without the proper permissions to do so. The appellant lived in the USA until age 8, and has lived in the UK to age 11. Her mother could return with her. She clearly has a number of relatives in the USA, including grandparents, with whom the sponsor had said she might stay on a visit. It was not shown that her best interests would be adversely affected by return. Even if the case resulted in the sponsor "getting her way", her conduct so far suggested there was no guarantee that she would facilitate visits by the appellant to her father and other family in the USA. Any adverse effects on the family life of the sponsor and her partner should be given little weight. The case smacked of the sponsor holding the respondent and the tribunal to ransom. The case did not warrant consideration outside the Rules. Alternatively, and taking the best interests of the child into consideration, the outcome was proportionate.

Response for appellant.

24. Mr Gibb acknowledged that a financial schedule should ideally have been provided, but said that was not practicable because the sponsor only recently gave up employment for health reasons and her benefit entitlement had not yet been resolved. She had worked consistently since she came to the UK and hoped to be able to return to employment soon. While it was difficult to pinpoint likely future income any shortfall from the expected (benefit equivalent) levels would be small. There was no reason to doubt the support offered by the sister of the sponsor's husband and by his parents, with whom they could reside again if necessary. The primary consideration was the best interests of the child and that should outweigh any impact on public funds. The best outcome for her would be one which maintained the *status quo* and which was now shown to suit both her parents. The situation was brought about not by the appellant but by the sponsor. The appellant as a child should not suffer for the sponsor's actions. To uproot her would lead to loss of connection with relatives here to whom she has become close – the sponsor's husband and his sister and parents. If she had leave that would enable her also to have contact with her relatives in the USA. There was nothing sinister in non-production of the parenting plan, because there was now evidence from the father who explained its absence and that all it said of relevance went to visitation and travel expenses. If the appellant had to remove, the family here would be split up. That would impact on the family life interests of those persons here who had naturally taken on an important role in her life. It would involve the family's main

breadwinner (the sponsor) leaving the UK. Any public funds impact from allowing the appeal was likely to be temporary and minor.

Conclusions.

25. Parties were at odds over whether any adverse inferences should be drawn from ongoing failure to disclose full legal documentation from the USA and whether the father's now stated position should be viewed sceptically because of possible pressure from the sponsor. I understand why the respondent continues to express doubts, and there are still gaps in the evidence, but as a whole it does now show that arrangements are legal and acceptable to the other parent and to the authorities in the jurisdiction of origin. The appellant's father said at the outset when telephoned by the respondent that he had no objection to the appellant living in the UK. He confirms that in a recent affidavit. There is evidence from an attorney that this is a situation of no concern to the court. It is unsurprising that unless objections are raised by one of the parents, the court does not intervene. I do not infer that the full versions of the divorce decree and parenting agreements contain something sinister which the sponsor has been at pains to conceal. The explanation is more likely to be muddling along by both parents rather than an attempt by the sponsor to hide something significant from the respondent and the tribunal.

26. The dispute over "near-compliance" with paragraph 289 of the Rules falls to be resolved in favour of the respondent. It is for the appellant to make her case. The evidence falls short of establishing that more likely than not she can be accommodated and maintained without resort to public funds. The submissions that there would be no shortfall, or that it would be minor and temporary, or that it would be made up by third parties, are an over-optimistic gloss on a weak evidential base.

27. Having resolved those factual disputes, this is not a *Chikwamba* case in the sense that an appellant might be excused the formality of applying from abroad when she would otherwise be likely to succeed. She would not at this time be likely to succeed under the Rules on such application. It is worth noting however that there probably have been stages in the history of the case when the accommodation and maintenance requirements would have been met.

28. That leaves an Article 8 judgment to be made, in which the best interests of the appellant, as a child, are a primary consideration but not a paramount one. Her interests do not dictate the outcome.

29. The sponsor has brought about the situation by her disregard for important legal requirements (not mere formalities) affecting the appellant, so little weight should be given to any adverse effect on the sponsor. That criticism does not attach to her husband but family disruption does often arise from the operation of the Immigration Rules. He might have to live apart from his wife but visits can take place in both directions and there is some possibility of life together on a more settled basis at some future stage e.g. if and when the requirements for the appellant's entry to the UK under the Rules could be met, or on other change of circumstances. On

return to the USA the appellant would be distanced but not necessarily entirely separated from the relatives of the sponsor's husband. She would have contact with her father, siblings and grandparents which presumptively would be of considerable value to her. Those features would at least counter-balance the loss of contact with persons in the UK who do not stand in such close degrees of relationship. The absence of contact with the appellant's father and other relatives in the USA for three years, and non-compliance with the parenting agreement, are due to the sponsor not to any obstructive bureaucratic attitude of the respondent. The respondent's position has been in my opinion well judged throughout. It would have been cavalier in respect of the interests of the appellant to have taken any other approach. It is only at this very late stage that anything like satisfactory evidence of the position in respect of the child's father and the court in Tennessee has emerged.

30. All that said, I think that the most beneficial outcome from the appellant's point of view is as wished by both her parents, who have her interests at heart: that she should continue to reside with her mother in the UK and be able to visit her father in the USA. She would then have contact with both parents and with wider family on both sides of the Atlantic. There is strength in the respondent's objections that the sponsor should not be allowed to gain from her irresponsible conduct, but any penalty for that should not be applied to the appellant. A decision made now has to acknowledge the reality of the situation three years on from arrival. In all the circumstances, and although on a fine balance, I do not think it is reasonable to require the appellant to leave the UK. This is a case where the better outcome for the child outweighs the public interest in the maintenance of effective immigration control through the Rules.

31. The determination of the First-tier Tribunal is **set aside,** for the reasons given under the heading of error of law above; and the decision is remade, on the basis of the best interests of the appellant, by **allowing** the appeal under Article 8 of the ECHR.

32. No anonymity order has been requested or made.

29 May 2015
Upper Tribunal Judge Macleman