



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/17826/2013

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke-
on-Trent
On 14th September 2015**

**Decision & Reasons Promulgated
On 7th October 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

**MISS KIMELIA CAMEO POWELL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - KINGSTON

Respondent

Representation:

For the Appellant: Miss L Mair (instructed by Paragon Law)

For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, with permission, against a decision of First-tier Tribunal Judge Frankish promulgated on 18th September 2014 by which he dismissed the Appellant's appeal against the Entry Clearance Officer's Decision to refuse her leave to enter the United Kingdom as a dependent child.

2. The Appellant is a citizen of Jamaica born on 28th May 1998. She had made application to join her mother in the UK, Ms Tanisha Messem. In his determination Judge Frankish set out the basis of the Entry Clearance Officer's Decision as follows:-

- The Appellant applied for settlement in 2011 leading to a failed appeal in 2012. On that occasion the Respondent was not satisfied the UK mother had sole responsibility given that the Appellant lived with her father and mother had only visited three times in 2005, 2006 and 2011. Mother also lacked the means to support the Appellant and her two siblings in the United Kingdom. On this occasion the Appellant relies upon frequent contact with mother through Skype and Facebook. There is a Sky telephone bill from the Sponsor which shows some telephone calls to Jamaica from September 2012 to April 2013 but nothing before that. There are some Facebook transcripts between Appellant and Sponsor from 2011 and 2012 but nothing before that. There is evidence of the Sponsor shipping a barrel of goods to the Appellant in November 2012 and remittances several times in 2012 and 2013 but nothing prior to that. There are Bridgeport High School reports for 2011-2012 and 2012-2013 but none of these refer to the mother as guardian. There is a Bridgeport High School letter dated 17th May 2013 which states that the Appellant is in Grade 9 but neither states that the Sponsor has supported the Appellant or is her guardian.
- During the mother's visit to Jamaica in May 2012, the father is said to have told her he "had to go out looking for construction work in the countryside" and therefore it would be better for the Appellant to live with maternal aunt Tracy-Anne Scott in Portmore until the Appellant goes to the UK. There is no evidence of this change in the father's circumstances, his whereabouts or why he had stopped caring for the Appellant at that point contrary to what he had previously done throughout the Appellant's life. There is a letter from Tracy-Anne Scott to say she has cared for the Appellant for the past year, has to go to evening classes which makes it unsafe to leave the Appellant home alone, that she plans to start frequent trips to the USA and the Appellant would be best off with her mother.
- There is evidence of some financial support from the mother recently and of contact with her over the past three years through Facebook and telephone calls, also of four visits since she left Jamaica for the United Kingdom. However, there is insufficient evidence of her providing emotional support over the years or of making the important decisions in the Appellant's life. As a Jamaican, there is no reason why the father cannot continue as the carer as he was before. The mother might have had a role and it is a role which has increased in recent years but she has not had sole responsibility for the Appellant's upbringing.
- The Appellant lives with maternal aunt Tracy-Anne Scott but says her plans mean it would be better for the Appellant to be with her mother.

These are not credible reasons for the aunt being unable to care for the Appellant. Furthermore, the father remains in Jamaica and there are no credible reasons why he cannot resume care for the Appellant. There are no serious or compelling reasons which make exclusion undesirable, this being nothing than a personal choice of the mother.

3. Judge Frankish then noted that the Appellant had filed a bundle of 367 pages which included her witness statement and those of her mother dated 24th May 2013 and 27th August 2014. He then noted that the Appellant's evidence was that she did not recall when her mother left Jamaica. She stayed with her father whose girlfriend sometimes stayed. The paternal grandparents from Saint Martin's also used to visit. In 2011/2012 the grandparents retired and returned to Jamaica. They were frail. Father thought it best for the Appellant to go to mother. Mother asked Aunt Tracy-Anne Scott to care for the Appellant while she obtained a UK visa for her. Aunt became frustrated at this as the Appellant's stay dragged on. She would quarrel with her partner over the Appellant's intrusion upon their privacy. She also sometimes kept some of the money sent by the mother for the Appellant. The aunt would leave the Appellant with strangers when she went out. The Appellant felt unable to complain because she had nowhere else to go. He then set out that apart from not living with her, the mother did everything for the Appellant: school fees; maintenance money; clothes and items for school sent from the UK. They speak daily by Skype, email and telephone. She advises the Appellant to study rather than being distracted by boys. She tries to visit once a year and make a fuss of the Appellant.
4. He noted the Appellant's evidence that since she had been placed with her aunt she had not seen her father, he had not made enquiries about her school progress. She has spoken to him by telephone twice in the past two years and he provides no money or chattels.
5. The Appellant sets out also that the second refusal was received during a visit by the aunt. The Appellant was very disappointed when she eventually found out, especially as the Respondent had granted aunt a visit visa to the UK to visit maternal grandmother in the UK when she left the Appellant in the care of a stranger. The Appellant's school work has begun to suffer. She received a lot of money from her mother for her 16th birthday but her aunt kept most of it. She said that her relationship with her aunt had recently improved because the aunt thinks she will soon be rid of her.
6. The sponsoring mother's evidence, as set out by Judge Frankish, was that she was granted leave to remain in the UK in 2005 whereupon she immediately visited the Appellant in November of that year and again in October 2006 when she stayed with her stepfather. She said that the Appellant was with her father but increasingly begrudgingly on his part. The mother's relationship with her husband in the UK broke down in 2009 when she moved into her own house after which she focussed on bringing the Appellant to the UK, her first application being refused in 2011. Her

second application with the assistance of her current representatives was again refused and appealed unsuccessfully. She said that the Home Office had obstructed her from visiting the Appellant as often as she would have liked by taking a long time to renew her passport.

7. Her next visit to Jamaica was on 6th November 2012 when she stayed with her stepfather again along with the Appellant who was then aged 14. It was on that occasion that father told mother that he had to go out looking for construction work in the countryside and that the Appellant would have to be on her own as his parents were not able to care for her. It was then that they agreed that the Appellant should stay on a temporary basis with mother's sister.
8. In August 2013 mother again visited the Appellant in Jamaica and visited the school. She then received a third refusal of the application and visited the Appellant once more in February 2014 when she travelled to Jamaica along with her two other daughters and on this occasion stayed with her sister. She visited the school and was told that the Appellant's performance was declining and the Appellant told her that she was unhappy with her aunt.
9. Judge Frankish then noted a letter from father dated May 2014 stating that he was of no fixed address but using the address of his parents for correspondence. In that letter he indicated that mother had always played her role as a positive mother in the Appellant's life financially and emotionally with constant communication. He said that he had tried as a dad but as times have changed there had become the need for him to seek a job outside his parish in the country area so the opportunity presented itself where he could work on construction sites on the north coast of Jamaica and thus it was only right that the mother should take full responsibility for the Appellant.
10. Judge Frankish also referred to a letter from the aunt dated 13th May 2013 and another of 28th August 2014. That letter indicated that she had been handed temporary guardianship of the Appellant from 2012. He indicated that it was time for the Appellant to join her mother and that her presence in her house was causing strain. She had chosen not to have children and did not expect to have to look after somebody else's. She also indicated that father had no interest in caring for the Appellant.
11. Finally Judge Frankish noted there was a supportive letter from the Appellant's sister and a letter written by the Appellant to her mother. There were school reports for 2012/2013 and 2013/2014 indicating that the Appellant needed to work harder to produce better grades which were all well below 50% except for English and Social Studies but even those were lower than the previous year. There was a medical report confirming that the mother had consulted her GP in the UK in connection with headaches which she attributed to the problems with immigration. There was also a supporting letter by the maternal grandmother and another aunt.

12. Judge Frankish then turned his attention to the previous determination from 2011 which found that there was no evidence of any remittances from the Sponsor to the Appellant and that the Sponsor had spent no more than a few weeks with her over a period of ten years. The father had signed a statutory declaration in February 2011 which made no mention of any financial remittances from mother and it was said that mother's husband in the UK had prevented contact whilst they were married.
13. Judge Frankish then referred to the oral evidence particularly mother's evidence that she advised on choosing school subject choices, hair appointments, appropriate dentists and clothing. She also persuaded aunt to take the Appellant to a Roman Catholic Church and mother arranged for a driver to bring the Appellant home from school.
14. Having set out the appropriate requirements of paragraph 297 of the Immigration Rules Judge Frankish then noted that there were a number of points that were not in issue. Maintenance and accommodation were accepted and there was no challenge to the visits to Jamaica or monies and remittances and parcels that had been sent nor was there a challenge to the communication via electronic means.
15. The facts of this case were that the sponsoring mother had come to the UK in 2001 when the Appellant was aged 3. She had come to the UK to see her mother because she felt lonely in Jamaica without her. She then stayed illegally after her visit visa expired, marrying in 2004. Her husband prevented any contact with the Appellant and she had two children by her husband born in 2004 and 2009. She separated from her husband in 2009 and rekindled her connection with her daughter in Jamaica but a settlement application was refused and that started the process of applications and refusals leading to the appeal before Judge Frankish.
16. The Judge in the 2011 appeal was not satisfied that the sponsoring mother had sole responsibility for her daughter and in that regard Judge Frankish set out the law defining and giving guidance as to the meaning of sole responsibility. He then noted at paragraph 30 of the determination that it was certainly the case that the sponsoring mother had succeeded in "plugging many of the gaps identified in the first determination, notably evidence of: financial remittances and at least one parcel; further visits; electronic communication and how the witness statements came to be taken."
17. He then went on at paragraph 31 to note that the background to this case was that in fulfilment of her own desires and contrary to the Appellant's interests the sponsoring mother had come to the UK to join other family members here because she said she felt lonely. She then stayed on as an illegal immigrant with no right to earn money until she was eventually granted leave as a spouse in 2005. He noted she went on to have two further children without first securing the interests of the Appellant by acceding to a marriage between 2004 and 2009, a condition of which was to eschew all contact with the Appellant.

18. He noted at paragraph 32 that throughout the above events and until 2012 sole care had rested with the Appellant's father with whom she resided. He noted that in short the father had been both mother and father to the Appellant until recent times when she went to stay with her aunt and he identified that the issue was whether against that background the father had indeed abandoned all but the most peripheral involvement in the Appellant's life. However, at paragraph 34 of his decision the Judge noted that despite the purported work on the north coast of Jamaica, the letter from father gave the address of the paternal grandparents. The Home Office Presenting Officer had demonstrated with the aid of a map that that was in the same vicinity as the home of the aunt where the Appellant now lives. He noted that accordingly a number of lacunas began to emerge in the evidence. First and foremost why the father, having brought up the Appellant until she was 14 should suddenly want nothing to do with her whatsoever. The context is one of discussion between Sponsor and father in which it was agreed that the Appellant should move to the aunt. That is indicative of collusion in an arrangement to secure entry to the UK. Secondly, the grandparents had supported the entire household during all their years of work in Saint Martin's. They, in common with the father, live in walking distance of the Appellant. Having supported her and their son all the Appellant's life, there was no explanation given for why she or they want nothing further to do with one another, especially now that they are said to be becoming old and frail but with the grandmother making visits to the USA to visit her daughter. There is no evidence whatsoever of the purportedly frail condition of the grandparents. Thirdly, the Judge noted there was absolutely no evidence whatsoever that the father had in fact had to go away to undertake construction work at an unspecified location on the north coast. The aunt stated that he was hard to track down and mother had claimed that she eventually succeeded by persistent visits to the grandparents. There were no particulars of where he was said to have been in the interim. For all of those reasons Judge Frankish concluded that it was a matter of family choice for the Appellant to have moved from father to aunt solely to support an application for better economic prospects and an income more akin to the mother than the father. The father, as stated, had been mother and father to the Appellant until she was 14 and Judge Frankish simply did not accept that following a discussion with mother in November 2012 he had forsaken any parental role from that time forward. Accordingly, he found that the requirements of paragraph 297 were not met and also he found that there was neither sole responsibility with mother nor serious or compelling circumstances to make exclusion undesirable.
19. Permission to appeal against that Decision was granted on the basis that it was arguable that the Judge had not considered all of the material evidence before him or applied the sole responsibility test. The Judge also thought it arguable that he had erred in concluding Article 8 was not engaged when this was a case involving a minor child wishing to join a parent.

20. Miss Mair before me expanded upon the grounds and in relation to paragraph 297 submitted that the Judge had failed to make any clear findings as to who had exercised responsibility for the Appellant in this case and had made a number of assumptions on the lack of evidence rather than on the evidence that was before him. In paragraphs 32 to 34 he did not accept father had disappeared from the Appellant's life after 2012 but there was no positive finding as to what role he continued to exercise especially when case law indicates it can be more than one person involved on a day-to-day basis but that did not prevent an absent parent having sole responsibility. She argued that it was incumbent upon the Judge to find what role the father still had and to make findings as to what role the mother had and whether that amounted to sole responsibility.
21. She argued there was a great deal of evidence about the role of mother in relation to continuing emotional and financial support, frequency of contact and the level of decision making in the Appellant's life exercised by her. All of that, she argued, pointed to sole responsibility. She accepted that the Judge had made clear findings that until 2012 sole responsibility had rested with the father, he had failed to make findings about who had responsibility for her now. Even if the Judge's conclusion that father had not forsaken his parenting role after 2012 that did not necessarily mean that mother did not have sole responsibility and just because father was in the same locality did not mean he had involvement in his child's life. She also referred to evidence of his having left the locality. I find that the grounds upon which permission to appeal was granted and submissions by Miss Mair amount to no more than a disagreement with the Judge's conclusions. He has set out very clearly his findings in this case. It is perfectly clear, as I have indicated when I have detailed his findings above, that he quite simply did not accept that parental responsibility had transferred from father to mother. The fact that mother had increased her contact and involvement, he found to be a deliberate attempt to gain entry to the UK for the Appellant and concealing the true fact that the Appellant had always been and remained in the sole responsibility of her father. He quite clearly simply did not accept that father and father's parents had abandoned the child that they had brought up for fourteen years without any assistance from mother.
22. Where I find that the Judge did fall into error was in failing to consider Article 8 and in finding in the final paragraph of his judgment that "Article 8 was not engaged, there being no family life in the UK". There does not need to be family life in the UK for Article 8 to be engaged and where the Appellant is the daughter of a sponsoring mother with whom she has regular contact then Article 8 is engaged. In failing to deal with Article 8 at all the Judge erred and I indicated that in that regard only I set aside his Decision and I would deal with Article 8 on submissions.
23. Miss Mair submitted that careful consideration should be given to all of the evidence in this case and the evidence of the Appellant herself that she wanted to live with her mother and that it was her overwhelming

desire to do so. Her aunt does not want her and that is all supported by evidence from the family. Mother is her primary emotional support and she gives great detail in her evidence as to how she counsels her daughter on a whole range of matters on such diverse matters as her school work, her clothes and hairstyle all of which is consistent with what might be expected between a mother and her teenage daughter. Consideration also must be given to the interests of the sponsoring mother and her two children in the UK who are the half siblings of the Appellant. The three siblings ought to be enjoying family life together. She argued that these all amounted to compelling circumstances as to why the appeal ought to be allowed notwithstanding the fact that the Immigration Rules could not be met and there was no doubt that the Appellant's best interests lay with being permitted to enter the UK to live with her mother and half siblings.

24. I disagree that there are compelling circumstances in this case. For all of the same reasons that Judge Frankish found mother did not have sole responsibility I find a lack of compelling reasons. The Appellant has spent all her life in Jamaica, having been brought up by her father. She clearly has a close parental relationship with him and a close relationship with her paternal grandparents. Her entire education thus far has been in Jamaica and so far as a child's best interests are concerned, particularly in their teenage years, preservation of the status quo will be particularly important. I do not accept it is in the best interests of a child to be uprooted from all she has ever known and moved to another country to live with her mother with whom she has not lived since she was a very small child at a time which she will probably not remember any half siblings that she barely knows. I agree with Judge Frankish that the evidence that is before the Tribunal in terms of letters of support from family members is not persuasive and indeed is self-serving and as Judge Frankish found indicative of a collusion between family members to achieve the Appellant's entry to the UK.
25. The sponsoring mother in this case made a life choice to leave her daughter in Jamaica for a great many years to pursue her own interests.
26. I therefore conclude that there are no compelling reasons to suggest that this case should be considered under Article 8 outside of the Rules but even if it was, the Decision is entirely proportionate and it does not run contrary to the Appellant's best interests.

Notice of Decision

The appeal to the Upper Tribunal is thus dismissed.

The First-tier Tribunal found no reason to make an anonymity direction and none was applied for before me. I see no justification in making such a direction.

Signed

Dated 6th October 2015

Upper Tribunal Judge Martin