IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19740/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 9th January 2015	**On 21st January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS MARIAME ELIANE ROLINE CISSE
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ACCRA

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Pacey promulgated on 23rd May 2014, following a hearing at Birmingham Sheldon Court on 14th May 2014. In the determination, the judge dismissed the appeal of Mariame Eliane Roline Cisse. 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 minor aged 17 years, who was born on 11th April 1997. She is a citizen of the Ivory Coast. She appealed against the decision of the Respondent dated 27th September 2013, rejecting her application to join her British settled father, Mr Moussa Cisse, as his dependent child under paragraph 297 of HC 395.

The Appellant's Claim

3. The Appellant's claim is that she has been looked after by her father, Mr Moussa Cisse, because her mother's current whereabouts are unknown, she suffered a brutal rape, which was reported to the police, and that there is evidence of telephone calls, and money transfers, and objective evidence of child rape in the Ivory Coast. Her claim is based upon the fact that her father has had "sole responsibility" for her or that her exclusion would otherwise be undesirable because there are serious and compelling circumstances in her case.

The Judge's Findings

4. The judge observed that the Respondent had decided to reject the Appellant's application because she had been living apart from her father for thirteen years and was currently living with her grandmother. Her father had come to the UK and had left the Appellant with her biological mother. Although the whereabouts of the biological mother were at present unclear, there was no consent from the mother for the Appellant's travel and no documentary evidence that the Appellant's grandmother could no longer care for her (see paragraph 5).

5. On the other hand, Mr Cisse claimed that he was the only person who could look after his daughter. She was not the same person anymore after her rape. He called her every day. He had described to the judge the rape that his daughter had suffered and how this had been reported to the police. An application had been made for the Appellant to come to the UK in 2009 but this was refused. The assault had happened in 2011 (paragraph 15).

6. The judge concluded that, "I accept from the medical evidence that the Appellant was assaulted as she claimed" because the medical report records and gives a medical diagnosis, following a medical examination, which is independent of what the Appellant had told the doctor. The judge found that, "moreover, her blouse and skirt being ripped are matters of fact, which the doctor clearly saw for herself. I also note that the reporting doctor is a gynaecologist, a logical speciality to examine a female who has been sexually assaulted" (paragraph 20).

7. The judge then went on to say that, "however, what is material here is the effect of that horrific incident" (paragraph 21). The judge observed that there was substance in the criticism of the government representative that

"the Sponsor had on the evidence not done anything to help his daughter after the attack. The Sponsor argues that the police in Africa do not behave as those in the UK" because "it would not be expected that they would follow up the Appellant's report of the attack". But the judge held that, "given the horrific nature of the attack, I do not accept that a loving father, particularly one with, as he claims, sole responsibility for his daughter, would not, bluntly, keep pestering the police to do something ..." (paragraph 22). The judge was also of the view that the sponsoring father also "did not arrange for any counselling or any ongoing medical treatment for his daughter" (paragraph 22). The judge concluded that, "the lack of action can in my view only reasonably be explained by the father's not having sole responsibility for the Appellant ... " (paragraph 23).

8. There were discrepancies in the Sponsor's evidence, which the judge held to be material. For example, there was the question of when the rape took place and when it was reported to the police. It was said that the rape took place on 8th November 2011 and that it was not reported to the police until three days afterwards "because she needed time to recover and the family told her not to go to the police. The police did nothing" (paragraph 24).

9. At the hearing before the judge, the Appellant's representative had also argued that, "it was reasonable to suggest that the Sponsor, who had not been there at the time, would mix up a day or so" (paragraph 25), but the judge held that this was not plausible because the sponsoring father should have taken steps afterwards to familiarise or re-familiarise himself with the precise details of the incident so as not to get confused (paragraph 25). Furthermore, the grandmother, with whom the Appellant currently lives, had said in a letter dated 28th August 2012, that there were no problems with the Appellant herself, and this the judge took to mean that "by the following summer she had recovered from the effects" of rape (paragraph 26).

10. Finally, the judge held that whereas there were "documents provided" in the form of telephone cards, and money transfer receipts", nevertheless "these can only stand as evidence of contact, not of sole responsibility" (paragraph 31). This was a case where both the Sponsor and the grandmother were involved in taking decisions relating to the Appellant (paragraph 32). Therefore, there could be no sole responsibility on the part of the sponsoring father.

Grounds of Application

11. The grounds of application make two essential points. First, that the judge failed to give any consideration to the "exclusion undesirable" arm of paragraph 297(i)(f) of the Immigration Rules, even when arguments were made by the Appellant's advocate at the hearing on this point.

12. Second, that the Section 55 of the BCIA 2009 obligation upon the responsible party had been overlooked by the judge because this was a case where the statutory guidance issued under Section 55 had to be taken into account because this was "an action concerning children ... undertaken by ... administrative authorities". Reliance was placed upon the judgment of Blake J in **Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 88** and the earlier case of **T (Section 55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483**.

13. On 2nd September 2014, permission to appeal was granted on the basis that given that the Appellant had been raped in the Ivory Coast, as accepted by the judge, the failure to make any findings upon the issues raised in the Grounds of Appeal amounted to an error of law, especially given what the judge had said at paragraph 20 of the determination.

14. On 10th September 2014, a Rule 24 response was entered to the effect that the judge had found that there was insufficient evidence of sole responsibility and that the judge had found that the Sponsor had taken insufficient steps to help his daughter after the attack.

Submissions

15. At the hearing before me Mr Cisse, who was unrepresented and appeared as the father of the Appellant, simply said that he had only on Monday this week returned from the Ivory Coast (today being Friday 10th January 2015 of the same week) and that he was very concerned about the condition of his daughter because her grandmother, with whom she was staying, was increasingly unable to look after her and that "my daughter is in a bad condition".

16. In reply, Mr Smart submitted that he would rely upon the Rule 24 response. It was accepted that paragraph 297(i)(f) had not been considered relating to exclusion being undesirable but on the facts as found by the judge the sponsoring father had not shown that he had exercised sole responsibility for his daughter or done enough for her.

17. Mr Cisse responded to say that he had done what he could. He was in the United Kingdom. He was not in the Ivory Coast. Rape was routine in that country. The police did not react to such cases. The rape happened on 8th November 2011. She was taken to the hospital in the afternoon because she was bleeding. She stayed there because she could not walk. She was still unrecovered the next day. It was on the third day that a police report was made. He had explained this at the hearing (as set out at paragraph 24), but he was not physically himself there, and his concern over his child was of greater importance to him, and the assurance of her wellbeing, then precisely when a police report was made.

Error of Law

18. 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 (see Section 12(2) of TCEA 2007). My reasons are as follows.

19. First, this is a case where, as the Grounds of Appeal made clear, there were detailed submissions before the judge in relation to there being serious and compelling circumstances which rendered the Appellant's exclusion undesirable. The judge focused solely on sole responsibility.

20. Second, a spate of recent decisions (starting with UGO), especially by Mr Justice McCloskey in the Upper Tribunal, now make it ever more important, that the Section 55 duty in the BCIA 2009 is to be applied in a parallel and principled manner before a decision involving a child in immigration matters can be lawfully rendered. The failure to deal with Section 55 is an omission such that it amounts to an error of law.

Remaking the Decision

21. I remake the decision on the basis of the findings of the original judge, the evidence before her and the submissions that I have heard today. I am allowing this appeal for the following reasons.

22. First, it is important to recognise that the "sole responsibility" test in paragraph 297 of HC 395 is a distinct and separate test from the finding of there being "serious and compelling circumstances" which render a person's "exclusion undesirable". To say that just because, judged from the vantage point of a decision maker in the United Kingdom, a parent did not take such steps as he may or may not have taken, following the rape of his child in a country like the Ivory Coast, such that he fails thereby to show that he has "sole responsibility", does not mean to say that because of this there are no serious and compelling circumstances which render the Appellant's exclusion undesirable.

23. Second, there are facts here that are clearly in the sponsoring father's favour. The judge accepted that there was evidence in the form of telephone cards and money transfer receipts (see paragraph 31). There was evidence before the judge that the sponsoring father "called her every day" (paragraph 15). It was accepted that medical evidence proved that the Appellant had been sexually assaulted and there was "recent haemorrhagic defloration" and that "her blouse and skirt had being ripped are matters of fact" (paragraph 20).

24. In this respect two other matters were of great significance, and both of these were brought into evidence by the Appellant's side. These were that there was "objective evidence of child rape in the country" (paragraph 18) and that "the police in Africa do not behave as those in the UK" (paragraph 22), such that the arrest and punishment of the offenders in a country like the Ivory Coast was more unlikely than likely.

25. But in any event, to deduce from this that, "I do not accept that a loving father, particularly one with, as he claims, sole responsibility for his daughter, would not, bluntly, keep pestering the police to do something" (paragraph 22) is arguably to deduce too much given the two features that I have already highlighted above. It certainly does not show that a failure to do this, in the given circumstances highlighted above, amounts to a failure to demonstrate "sole responsibility". The same applies for the absence of counselling. Whereas it may very well have been desirable to provide counselling, the failure to do so maybe on account of any number factors, and it would be wrong, from the vantage point of a judge sitting in the United Kingdom, to simply surmise what the reasons for this may be.

26. It is equally likely that a parent living so many thousands of miles away in the United Kingdom, may have resigned himself to what has happened, in a country where this is all too often an occurrence. What is important is not to deduce any more than one reasonably can do. What is clear, and it is worth repeating this, is that the sponsoring father has been in regular contact on a daily basis with his daughter, that there is evidence of telephone cards, and there is evidence of money transfer receipts, and this was accepted by the judge.

27. Third, and in any event, the appeal succeeds on the basis of the child's exclusion being undesirable because it is clearly in the child's welfare and the best interests of this child that she be with her sponsoring father in the UK. The judge stated that, "there was nothing to make the refusal disproportionate. Section 55 had been considered" (paragraph 17). Nothing further was said about Section 55, however.

28. The case of **Mundeba** makes it clear that once an immigration decision engages Article 8 rights, due regard must be had to the European Convention on the Rights of the Child. This is because the admission of a child under 18 is "an action concerning children ... undertaken by ... administrative authorities" and in these circumstances Article 3 of the Convention applies so that "the best interests of the child shall be a primary consideration". It is true that the Section 55 UKBA 2009 duty applies only to children within the UK, but the established cases now make it clear that the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under Section 55.

29. The child's welfare includes her emotional needs. The reference to "other considerations" means a reference to other aspects of a child's life that are serious and compelling, and these would, as Mr Justice Blake found in **Mundeba**, mean "an applicant is living in an unacceptable social and economic environment".

30. Yet this is a case which is stronger. This is a case where the medical evidence showed the Appellant child to have been the victim of a very brutal sexual assault. This being so the focus needs to be on the circumstances of the child in the light of her age, social background, and

developmental history. This will involve an enquiry, especially where the Section 55 duty bites, of evidence of neglect or abuse, and evidence of unmet needs and evidence of stable arrangements for the child's physical care. Ultimately it needs to be asked whether the combination of circumstances are sufficiently serious and compelling to require admission. The established cases make it clear that the "starting point" of an enquiry into the best interests of a child is that these are served by being with both or at least one of the parents.

31. In this case, there is evidence of the sponsoring father having provided support and care for his child in a country where there is evidence of child rape and lack of police action with respect to this. This evidence is not contested. The Appellant only has to prove her case on a balance of probabilities. It does not have to be proved beyond all reasonable doubt. So what we are left with, therefore, are the following circumstances.

32. The facts of this case clearly indicate that the Appellant's welfare would be jeopardised by exclusion from the United Kingdom, in circumstances where she has been raped, where the threat of child rape exists, and where police inactivity is a fact of life. The evidence of the Sponsor before me today, having just returned on Monday from the Ivory Coast, was that the grandmother looking after the Appellant, is in failing health and finding it hard to look after the Appellant. The Appellant is now 17 years of age. She will have demands that any 17 year old adolescent child has. The judge below did not find the Sponsor to be lacking in credibility and I have found his evidence to be entirely plausible in this respect. It is possible that if one has regard to the "exclusion undesirable" provisions of the Immigration Rules, and the extra statutory guidance to the Entry Clearance Officers to apply the spirit of the statutory guidance in circumstances where children are involved, that the balance is in favour of the Appellant (see **T (Section 55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483**). It is clear that the best interests consideration is not irrelevant to an Article 8 evaluation. In fact, Article 8 is the *genus* and "best interests" is the *specie* where children are involved.

33. The established case also makes it clear that, "it is difficult to contemplate a scenario where a Section 55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not" (see paragraph 29 of **T (Section 55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483**). When the facts of this case are considered it is plain that there is no moral or physical danger to the Appellant in the United Kingdom in the way that there is to this Appellant in the Ivory Coast. She is a young woman. She is in the formative years of her age. She is being looked after by her grandmother. The starting point, as I have indicated above, in a Section 55 duty, is for a child to be with either one or both parents. That is the basis of the "best interests" to begin with. As against a grandmother in failing health, the Appellant has a father in the UK who can provide maintenance and accommodation and who has a clear desire to care for his daughter. In these circumstances, the requirements of Article 8 are plainly met. This is for the following reasons.

34. If one applies Lord Bingham's tabulations in **Razgar** (at paragraph 17) the following emerges. First, it is plain that the continued exclusion of the Appellant is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellant's right to respect for her family life. This family life is qualitatively different with the one that the Appellant is enjoying in the Ivory Coast, where her carer is a grandmother whose health, as the Sponsor maintains, is no longer good as is to be expected, as against which the family life that the Appellant will enjoy with her father, is one where he is keen and able to look after the Appellant, and this is especially the case given the Appellant herself has suffered from a horrific rape, being hospitalised, and where no police action has been taken.

35. Second, the interference here does have consequences of such gravity as to potentially engage the operation of Article 8 (bearing in mind that this is a low threshold). Third, the interference is not in accordance with the law because the Appellant can comply with the Immigration Rules as far as paragraph 297(i)(f) is concerned in that, on the evidence before me, her exclusion is undesirable because there are the compelling and compassionate circumstances that I have set out above. Fourth, the interference is not necessary in a democratic society, because it is not necessary for the economic wellbeing of the country, or for the prevention of crime, or for the protection of the rights and freedoms of others. There is no hint whatsoever of any wrongdoing or illegality by any of the parties concerned. In fact, all the evidence is that the Appellant's mother has left and that the grandmother is finding it difficult to look after the 17 year old Appellant child. Fifth, all in all, the interference here is not proportionate to the legitimate public end that is sought to be achieved.

36. It is well accepted that the material question engaging the proportionality of an administrative decision that threatens to break a family is whether it is reasonable to expect the Appellant to remain separately from her natural parents, which in this case means her natural father, who is now a person with legitimate legal status in the UK and is settled. On the facts of this case, it is not reasonable.

37. Finally, as far as the "sole responsibility" test is concerned, I find that given that there is an issue with the ability of the Appellant's grandmother in the Ivory Coast to look after her, and given that the starting point of the evidence is always the narrative presented in the evidence, unless it is properly rejected, I find that the Appellant's father, who has physically been visiting the Appellant child whenever he can, and has maintained an interest in the Appellant child, as borne out by the cards and remittances that have been submitted, that the "sole responsibility" test is satisfied, especially as the term is understood to mean that there can never be absolute "sole responsibility". The phrase is not to be taken literally. It is a term of art. It is a relative matter. In these circumstances where the mother is absent and the grandmother is in ill health, I find that the Sponsor as the Appellant's natural father is a person who has exercised practical care and day-to-day support for the Appellant from the UK.

Whether or not he could have done more when the Appellant was raped, and different decision makers may take different views on this given that the sponsoring father was in the United Kingdom thousands of miles away and not in the Ivory Coast, does not mean to say that he has not had sole responsibility. It is clear on the evidence that he has singularly been involved in the welfare of this Appellant child. The test is one of balance of probabilities. Applying the test, I am so satisfied.

Notice of Decision

38. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under Article 8.

39. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st January 2015