Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00876/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 August 2019	**On 16 August 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

[J A]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, counsel
(instructed by Legal Rights Partnership)
For the Respondent: Ms S Jones, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by Upper Tribunal Judge Keith on 4 July 2019 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Housego in a decision and reasons promulgated on 13 December 2018. The Appellant is a

national of Ghana, a minor born on 29 April 2003, who had made an entry clearance application to join his mother and sponsor pursuant to paragraph 297 of the Immigration Rules. His application was refused on 9 November 2017, and the refusal was upheld by the Entry Clearance Manager on 22 October 2018 following service of the Appellant's Notice of Appeal.

2. Judge Housego found that the Appellant had not shown that he met the Immigration Rules and that refusal was not a breach of Article 8 ECHR. He found the Appellant's mother shared responsibility for the Appellant with the Appellant's grandmother. On a "balance sheet" assessment, the proportionality balance for Article 8 ECHR purposes fell against the Appellant, and amounted to the continuation of the *status quo* initiated by the sponsor many years ago when she left her son in Ghana and came to the United Kingdom. Hence the appeal was dismissed.

3. Permission to appeal was granted because it was considered arguable that the judge failed to explain how he had applied TD (paragraph 297(i)(e) "sole responsibility") Yemen [2006] UKAIT 00049 with sufficient reasoning or why he had reached that decision he did on sole parental responsibility, or why he had concluded that the Appellant's exclusion from the United Kingdom was not undesirable.

4. There was no rule 24 notice from the Respondent but Ms Jones indicated at the start of the hearing that the appeal was opposed.

5. Mr Mackenzie for the Appellant relied on the grounds submitted and the grant of permission to appeal by the Upper Tribunal. The judge had erred in not recognising that the Appellant's sponsor held limited leave to remain rather than ILR but that was not in itself a material error of law. The problem was that the judge had not understood TD (Yemen) (above) at [49] onwards and had not applied the correct tests. The question was who had ultimate parental responsibility.

6. The "balancing exercise" conducted was also the wrong approach, and was not as intended in Hesham Ali [2016] UKSC 60. Family life was accepted and the question was whether or not the relevant Immigration Rule was met: TZ (Pakistan) [2018] EWCA Civ 1109. If the rule was met there was no public interest in exclusion of the Appellant. The judge had not examined the current position which

was one of shared responsibility, whatever the previous position had been.

7. Paragraph 297(i)(f) of the Immigration Rules had not been addressed and was nowhere mentioned in the determination. Were there serious and compelling circumstances? The submission on the Appellant's behalf was that there were exactly such circumstances, particularly in the form of the declining health of the Appellant's grandmother. The onwards appeal should be allowed and the decision remade in the Appellant's favour.

8. Ms Jones for the Respondent submitted that the judge had addressed all relevant issues in substantial detail and depth. Careful findings of fact had been made and the judge had been entitled to find that the Appellant's mother and sponsor had not demonstrated sole responsibility. There had been a lack of evidence., e.g., from the Appellant's school. The attack on the determination was in reality a dispute with the outcome. Any error of law was not material. Reading the determination as a whole, it was clear that paragraph 297(i)(f) of the Immigration Rule had been addressed within the overall evaluation of the case. The onwards appeal should be dismissed.

9. In reply Mr Mackenzie reiterated that the judge ought to have found that the facts showed shared or joint responsibility. The question of whether there were serious and compelling circumstances had not been answered at all.

10. The tribunal reserved its decision which now follows. Because of the long delay between the original entry clearance application, refusal, review, First-tier Tribunal appeal hearing and decision, grant of permission to appeal and the present error of law hearing, the Appellant's situation and circumstances have changed significantly. Sadly the Appellant's grandmother died on 19 March 2019. The ability to make fresh or indeed parallel entry clearance applications is the only way to deal with such developments, absent a decision by Secretary of State for the Home Department to exercise discretion or an error of law finding setting aside the First-tier Tribunal judge decision. An application by the Appellant's solicitors to admit further, post determination evidence at the error of law hearing was rightly not pursued.

11. The tribunal ventures that few of the determinations promulgated in the First-tier Tribunal would escape Mr Mackenzie's courteously and properly advanced strictures.

Those determinations have to be prepared promptly after what are frequently compressed hearings, at which the level of assistance and cooperation provided to the judges can be variable. The fact that appeals in immigration cases are now human rights only has tended to result in a more complex jurisprudential analysis. The higher courts have issued regular reminders that the applicable standard for First-tier Tribunal determinations is legal adequacy rather than perfection. In the tribunal's view, Judge Housego's determination exceeds the standard of legal adequacy by a comfortable margin and discloses no material error of law, as was submitted by Ms Jones.

12. In the present appeal the First-tier Tribunal judge at first identified the relevant Immigration Rule as Appendix FM, but this was later corrected to paragraph 297 and the correct rule was set out in full, emboldened at key passages. There was no material error of law there. Mr Mackenzie accepted that the judge's misidentification of the sponsor's leave to remain was similarly not material. It is however the case that the judge did not dedicate any specific part of his determination to paragraph 297(i)(f) of the Immigration Rules but, as is explained below, rather addressed that and the closely related issue of the Appellant's best interests as part of his final evaluation of the appeal.

13. The judge's determination set out the relevant law at considerable length, including TD (Yemen), and was full, careful and well structured. Clearly no effort had been spared in its preparation. The judge began with fact finding, considered the Immigration Rules and then moved to the Article 8 ECHR analysis. That was the correct approach in law. The "balance sheet" analysis for Article 8 ECHR purposes was made at the right stage, only after the Immigration Rules had been considered and it had been found that they were not met. It has to be said that it is not altogether easy to see why permission to appeal was granted by the Upper Tribunal, particularly in the face of the refusal of permission to appeal by First-tier Tribunal Judge Parkes, dated 7 June 2019, which succinctly explained why the onwards grounds had no real substance. That refusal of permission to appeal was correct, in this tribunal's view.

14. Indeed the real quarrel in this onwards appeal is with the judge's findings of fact, in particular that parental responsibility was shared between mother and grandmother. The discussion of the evidence begins at [42] of the determination. Detailed findings of fact are set

out at [50] onwards, and secure reasons for those findings were made, again clearly set out. Weight was given to independent evidence and proper inferences were drawn from evidence which could have been provided but which was absent. The judge took a fact sensitive approach in accordance with [52] and [53] of TD (Yemen). His decision was an entirely logical one, given the Appellant's history and the grandmother's active parental role which the provision of a carer had been enabled to continue despite her recent poor health. Another judge might perhaps have reached a different decision, but this First-tier Tribunal judge heard and saw the witnesses and there is no proper basis for interfering with his decision.

15. It was asserted that the judge failed to address the question of whether or not there were compelling circumstances, as set out in paragraph 297(i)(f) of the Immigration Rules. That is not a fair reading of the determination. As noted above, the judge had not only set out the whole of paragraph 297 of the Immigration Rules early in his determination, but he had emboldened parts of sub paragraph 297(i)(f), which indicates that those elements were much in his mind. It is obvious that what counts is whether the substance of the sub paragraph was properly considered, rather than an empty repeated citation.

16. This important question, the last matter raised in paragraph 297, envisages a stepping back and review. This Immigration Rule was not changed on 9 July 2012 when Appendix FM was introduced, nor was it thought necessary to amend it after the introduction of section 55 of the Borders, Citizenship and Immigration Act 2009. It overlaps or coincides with the "best interests" issue, as noted at [65] of the determination. The judge's analysis of the facts encompassed all such matters, in true depth: see in particular [66] to [74] of the determination where the final review is conducted. The judge's findings were open to him on the evidence presented.

17. In the tribunal's judgment, the very experienced First-tier Tribunal judge produced a full and balanced determination, reflecting current law, which securely resolved the live issues. The tribunal finds that there was no material error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated** 12 August 2019

Deputy Upper Tribunal Judge Manuell