Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/07133/2018
HU/07135/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2019	**On 22 July 2019**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL MONSON

Between

(1) ALIMAT [T]
(2) AHMED [T]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Youseffian, Counsel instructed by Perera & Co Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of the First-tier Tribunal (Judge Housego sitting at Harmondsworth on 13 February 2019) dismissing their appeals against the decision of an Entry Clearance Officer to refuse them entry clearance for the purposes of settlement as the dependent children of their mother. The Judge dismissed their appeals as he was not satisfied that their mother had sole responsibility for their upbringing; or that there were serious and compelling family or other considerations which made exclusion of the children undesirable. The Judge was also not satisfied

that the appellants had provided the specified evidence to show that the financial requirement was met.

Relevant Background

2. The appellants are related to each other as sister and brother. Alimat [T] was born in Nigeria on 27 April 2000, and Ahmed [T] was born in Nigeria on 1 April 2002. They applied for settlement on 24 November 2017. They said that they did not know the whereabouts of their father. Their legal guardian in Nigeria was Lukmon Alabi (a maternal uncle). They had been living with him for the last four years. Their mother had arrived in the UK on 21 June 2013.

3. On 5 March 2018 an Entry Clearance Officer issued separate notices of refusal to each of the appellants. They had provided letters from Royal Anchor School and Royal Crown Comprehensive School stating that their mother was financially responsible for their fees, but these letters did not show their mother's abiding interest in their upbringing, welfare and well-being over a substantial period. The remittances to Mr Alabi did not equate to their mother having sole responsibility. There was also no Court documentation to confirm that their mother had sole custody of them.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. The appellants were legally represented before Judge Housego. There was no Presenting Officer. The appellant's solicitors had compiled a large bundle of documents containing witness statements from the appellants, their mother and their mother's spouse. The bundle also contained a letter of support from Strong Tower Hospitals; a letter of support from the appellants' uncle and guardian; school letters in respect of each of the appellants; and a printout of WhatsApp communications in 2017 and 2018 which were indexed as communications between the mother and both her children. However, they appear to relate entirely to communications between the mother and her daughter.

5. The Judge received oral evidence from the appellant's mother and from her husband, Mr [S]. At paragraph [38] of his decision, the Judge set out the evidence which he had elicited from Mrs [S] in response to his questions. He asked her why the application was made when it was made. She said it was because her brother Lukmon was having issues with his wife. His wife used to hit him. They had now separated, but occasionally she came back. Her brother lived with his three children as well as her own children. His children were born in 1995, 1998 and 2002. They lived in a 5-bedroomed flat which he owned. He worked in construction as a Site Manager. She had come to the UK as the spouse of Mr [S], leaving the children behind. She had left the children behind because she did not know the situation in the UK.

6. Mr [S] agreed in answer to questions from the Judge that the trigger for the application was that the children had started to complain that their uncle and aunt were fighting.

7. In his closing submissions on behalf of the appellants, Counsel submitted that as the father had disappeared, the starting point was that the active parent had sole responsibility. Whilst it could be that responsibility was shared with the uncle, the nub of the test was what important decisions were taken in the child's life and by whom? He submitted that Mrs [S] not only paid for but had control over what the children did. Modern means of communication meant that she was able to play, and did play, an active and controlling role in the children's lives, even though they were thousands of miles away. There was ample evidence of regular contact.

8. The Judge set out his findings of fact at paragraph [45] onwards. He found that the appellants had not been the sole responsibility of their mother. Their witness statements recorded that their mother "*had always consulted with my uncle which school I should attend.*" At paragraph [55], he said that, applying **TD (Yemen)**, the sponsor did not have the sole responsibility for the appellants. The uncle's role was plainly more than feeding and housing the appellants.

9. The Judge concluded at paragraph [56] that the Immigration Rules were not met at the date of decision, as the sponsor did not have sole responsibility for the appellants. She had left them in the care of her brother. Also, at the time of the application, the sponsor did not demonstrate in accordance with Appendix FM-SE that the financial requirement was met.

10. On the topic of whether there were serious and compelling family or other considerations which made the exclusion of the children undesirable, the Judge held at paragraph [48] that there had been domestic discord in the uncle's house, but the aunt had left the house in February or March 2018, and there was no relationship difficulty between the uncle and the appellants.

11. Having found that the appellants did not meet the requirements of Appendix FM, the Judge went on to consider an Article 8 claim outside the Rules at paragraphs [58] onwards. The children were able to have frequent contact with their mother by various forms of modern media. There was no difficulty for her to travel to Nigeria, and she had done so. There was no evidence that the children were being damaged by the physical absence of their mother. The first appellant was now an adult, and the second appellant would be an adult shortly. The Judge continued in paragraph [62]: "*One would naturally expect family ties to loosen as adult children develop their own independent lives, and going to University is part of that process. The s55 duty does not extend to the first appellant. The second appellant [is] in suitable accommodation and cared for by his uncle, insofar as he needs any care. He is not deprived of companionship. He has lived without his mother since he was about 11*

years old, and he is now within weeks of being 18. The domestic discord of which they speak is gone with the departure of the uncle's wife. The decision is not wrong by reason of s55."

The Reasons for the Initial Refusal of Permission to Appeal

12. On 17 April 2019 Judge Wilson gave his reasons for refusing permission. Contrary to what was stated in the grounds, in a careful and focused decision, the Judge has set out and applied the correct law and evidence. The Judge was entitled to place weight upon what was said in the witness statement. It suggested that the uncle was involved in important decision-making for the appellants, and the Judge was entitled to place weight upon that statement.

The Reasons for the Eventual Grant of Permission to Appeal

13. Following a renewed application for permission to appeal to the Upper Tribunal, on 4 June 2019 Upper Tribunal Judge Gill granted permission to appeal for the following reasons:

> "It is arguable that the Judge did not evaluate the role of the uncle and the role of the mother in order to reach his finding that the mother did not have sole responsibility. It is therefore arguable that the Judge failed to apply the Guidance of **TD**, as contended in Ground 2. This is arguably material to the Judge's assessment of proportionality in relation to Article 8."

The Hearing in the Upper Tribunal

14. At the hearing before me to determine whether an error of law was made out, Mr Whitwell informed me that Ground 1 was conceded. Ground 1 relates to the financial requirement.

15. Mr Youseffian, who did not appear below, developed the case pleaded under Ground 2, which was that the Judge had erred in law in his assessment of sole responsibility. He put the case in two ways: either the Judge had not taken into account all of the relevant evidence, or his conclusion was inadequately reasoned. In the course of oral argument, he accepted that it was open to the Judge to find that the uncle's role was plainly more than just feeding and housing the appellants, but he submitted that it was not clear how the Judge had reached this finding.

16. On behalf of the Entry Clearance Officer, Mr Whitwell submitted that it was reasonable for the Judge not to take the father's absence as the starting point, in the light of the way the case had been put by Counsel at the hearing. He submitted that the letter of support from the uncle supported the Judge's finding that the mother did not have sole responsibility. Although the Judge's reasoning on the issue of sole responsibility was very thin, it was sufficient.

17. I asked the Representatives what should happen in the event that an error of law was made out. They were in agreement that I should remake the decision on the evidence as it stood.

Reasons for Finding an Error of Law

Ground 1

18. At paragraph [51], the Judge held that at the time of application the appellants were not able to show that the financial requirement was met, but they were now able to do so. At the date of application there were documents missing from a sequence, "*but evidential flexibility would not have assisted as the sponsor's husband was not able to get copies of the missing documents from his employer."*

19. Mr Whitwell accepts that what the Judge said at paragraph [51] was factually incorrect, in that the two missing payslips had been provided in a supplementary bundle and so were before the First-tier Tribunal. Although all the relevant requirements of Appendix FM-SE were not shown to be met at the date of application, they were shown to be met – retrospectively - at the date of the hearing. So this ground of objection raised by the Entry Clearance Officer fell away, and the Judge was wrong to hold otherwise.

Ground 2

20. The far more controversial issue is whether Ground 2 is made out. In the end, the factor which tips the argument in the appellants' favour is that Mr Whitwell was unable to defend the Judge's reasoning process solely be reference to the evidence that was rehearsed by the Judge in his decision. Mr Whitwell had to look beyond the decision to the letter of support from the uncle, to which the Judge makes no reference at all. It was incumbent on the Judge to explain to the appellants why they had lost. I do not consider that his decision adequately discharged this function in circumstances where the appellants were relying on various different sources of evidence to make out the case that their mother had had sole responsibility for their upbringing. For the above reasons, the Judge's finding on sole responsibility cannot stand and must be remade.

The Remaking of the Decision

21. In remaking the decision, it is important to recognise that the error of law challenge does not extend to the Judge's finding that there were not serious and compelling family or other considerations which made exclusion of the children undesirable. However, this is academic. For if the appellants succeed on the issue of sole responsibility, they will qualify for entry clearance under Appendix FM.

22. As pleaded in Ground 2, ultimately the issue of sole responsibility is a fact-rich issue, to be determined by reference to all the circumstances of the particular case. Where one parent has disappeared from the child's life

and so relinquished or abdicated his or her responsibility for the child, the starting point must be that it is the remaining active parent who has sole responsibility. There is no challenge to the mother's evidence that the father of the children has long been absent from their lives, and so I am prepared to accept that she had sole responsibility for them at the time that she left them in the care of her brother in order to join her husband in the UK.

23. The issue is whether thereafter the brother exercised only delegated responsibility for the children's day-to-day care, as distinct from sharing responsibility with Mrs [S] for their care and upbringing.

24. The clear thrust of the evidence from Mr and Mrs [S] is that she has always retained sole responsibility for their upbringing. However, this is not demonstrated by the evidence emanating from the children's doctor or their schools. This evidence corroborates her involvement in their health and education, but does not preclude the uncle from also playing a significant role as their legal guardian. More significantly, the letter of support from the uncle is more consistent with him sharing responsibility for the appellants' upbringing than it is with him simply acting under the direction of his sister.

25. In his letter of support dated 9 January 2019, Mr Alabi said:

> "My sister's children have lived with me and my wife since 2013. Although I love them dearly, unfortunately I can no longer care for them as before. I am facing marital problems with my wife as she is causing great tension in my household. The problems between my wife and I is making it very difficult to continue to care for my niece and nephew.
>
> I am not in the right frame of mind most of the time and cannot give the children the love and attention they require. My wife and I need our space to work on our marriage. Although my sister supports me every way I think it is time for her to be reunited with her children in the UK.
>
> I know the children would have a much better life than what I can give them in the UK. They are also unhappy living in this household because my wife and I are always arguing. I ask that you allow my niece and nephew to join their mother in the UK as that is where they belong."

26. Judge Housego elicited the evidence that the aunt had in fact left the household in February or March 2018, and so marital discord was not an ongoing problem at the time that this letter was written. I am also unable to find any evidence of unhappiness on the first appellant's part in the disclosed WhatsApp exchanges which she has had with her mother. On the contrary, she presents as a very happy young person who does not have any domestic issues, either at her uncle's home or at the university where she resides during term-time.

27. But the main consideration for present purposes is that the uncle does not present as acting under his sister's direction. On the contrary, as highlighted by Mr Whitwell, he presents as sharing responsibility for the children's upbringing in line with his designation as their legal guardian in

the Entry Clearance applications. Aside from the decision to leave them in the care of their uncle, the most important decision in the children's lives thus far has been the decision to attempt to reunite the children with their mother and step-father in the UK. In his letter of support, Mr Alabi presents as having taken this decision himself, in the children's best interests. While the surrounding evidence indicates that this was a joint decision between him and his sister, it is nonetheless indicative of Mr Alabi sharing responsibility for the children's care and upbringing, and not simply acting as their day to day carer under the direction of his sister.

28. Similarly, the fact that Mrs [S] is said to have consulted Mr Alabi about their education is also indicative of brother and sister having joint responsibility for the appellants' care and upbringing.

29. Another relevant consideration is that Mr Alabi says he loves the appellants dearly, and that he has been bringing them up since 2013 alongside his own children, who are of similar age to the appellants. Against this background, it is unlikely that he has not been as much involved with the care and upbringing of the appellants as he has been with his own children.

30. Accordingly, having considered the evidence in the round, I find that the appellants have not discharged the burden of proving that their mother has had sole responsibility for their upbringing since 2013 or that she has sole responsibility now. For that reason, and that reason alone, the appellants do not qualify for entry clearance under Appendix FM.

31. There is no error of law challenge to the Judge's findings on proportionality, and I do not consider that these findings require to be revisited. The Judge accepted that the appellants and their mother had family life for the purpose of Article 8 ECHR, and that Questions 1 and 2 if the **Razgar** test should be answered in the appellants' favour. Question 3 and 4 of the **Razgar** test must be answered in favour of the respondent. The fact that Grounds 1 and 2 have been made out has no bearing on the sustainability of the Judge's proportionality assessment. The Judge accepted that the financial requirements were met as at the date of the hearing. He found that the refusal decision was proportionate as the appellants did not meet the relationship requirements of Appendix FM. I have reached the same conclusion, and so the maintenance of the refusal decision is proportionate.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals are dismissed.

I make no anonymity direction.

Signed Date 13 July 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have dismissed these appeals on remaking, there can be no fee award.

Deputy Upper Tribunal Judge Monson

Signed Date 13 July 2019