Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07025/2018
HU/07028/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2020	**On 28 January 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

JAMES HAYFORD
SAMUEL HAYFORD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mrs G Fama, Counsel, instructed by Harding Mitchell Solicitors
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Thorne (the judge) who, in a decision promulgated on 11 June 2019, dismissed the appellants' human rights appeals against the respondent's decisions of 1 December 2017 refusing their entry clearance applications under Appendix FM of the immigration rules.

Background

2. The appellants are nationals of Ghana. The 1st appellant was born in 2000. He was 17 years old at the date of the respondent's decisions. The 2nd appellant, who is the brother of the 1st appellant, was born in 2004. He was 13 years old at the date of the respondent's decision.

3. On 7 September 2017 the appellants sought entry clearance to accompany their father, Isaac Heyford (father), who was seeking to join Naomi Matey (sponsor), his spouse, a British citizen.

4. The father's application was refused on the basis that relevant documents were not provided. As their father's application was refused, the appellants' applications were also refused. This was based on E-ECC.1.6 of the eligibility requirements of Section E-ECC of Appendix FM. This reads,

> 'E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and
>
> (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
>
> (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or
>
> (c) 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.'

5. As the appellants' father was not "being granted" entry clearance, the appellants' applications were refused. Nor was the respondent satisfied that "the sponsor" the appellants intended to join in the UK had sole responsibility for their upbringing. I note however that there is no requirement in Appendix FM that the sponsor has sole responsibility for the children; the requirement of sole responsibility relates to an applicant's parent – in this case, the appellants' father. The respondent considered whether there were "serious and compelling family or other considerations" making the appellants exclusion from the UK undesirable but concluded that there were none.

6. The appellants and their father appealed the respondent's decisions pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

7. On 7 March 2018 the respondent wrote to the father informing him that the decision refusing his entry clearance application had been reviewed and that, as a result, the decision refusing his entry clearance application had been withdrawn. The letter indicated that his case would be reconsidered by the Decision Making Centre. This was because of additional evidence submitted with the grounds of appeal. The father was informed that the Decision Making Centre

where his original application was decided would contact him "in due course with further information about any next steps" he needed to take. On 23 March 2018 the First-tier Tribunal issued to the father a Notice of Home Office Decision Withdrawal. The father's appeal was withdrawn.

8. The appellants' appeal was listed for hearing on 25 January 2019. On 3 December 2018 an Entry Clearance Manager (ECM) reviewed the refusals of entry clearance. The ECM noted that the father's appeal had been withdrawn. The ECM stated,

> "That notwithstanding in the evidence before me I have been unable to establish whether the father has sole responsibility for the appellant[s] or not."

9. It is apparent from the ECM review that the issue of sole responsibility was in contention.

10. The appeal hearing listed for 25 January 2019 was adjourned and relisted for 19 February 2019. The February 2019 hearing was also adjourned. It appears that the Tribunal may have directed the respondent to "send an email" to the appellants "regarding their visa". This is based on a letter, dated 14 March 2019, sent by the appellant's legal representatives to the Presenting Officer's Unit. I can however find no formal directions issued by the First-tier Tribunal on this date. The purpose of the 'email' and its content remain unclear. The letter of 14 March 2019 identified the correct email address for the appellants' father for the purposes of the First-tier Tribunal's directions. Follow up letters were sent on 4 April 2019, 25 April 2019, and 1 May 2019. A further hearing listed for 8 April 2019 was adjourned and the matter was listed again on 15 May 2019.

The decision of the First-tier Tribunal

11. At the appeal hearing on 15 May 2019 the appellants were legally represented and the respondent was represented by a Home Office Presenting Officer (HOPO). During the hearing the HOPO informed the judge of an email in her file purportedly sent to the appellants' father on 24 April 2018. At [11] the judge stated,

> "During the hearing the HOPO informed me that according to her file and email from "UK Visa ECO" had been sent to F [the father] on 24/04/18 saying, "The decision to refuse your visa application has bee [*sic*] overturned and our office is now ready to issue you a UK visa." The email required F to submit further information and pay a fee. However the email was sent to the wrong address and was never followed up. F did not chase the matter. The appellants solicitors apparently did not case [*sic*] the matter either. Therefore there was no record of a visa having been issued to F."

12. The judge then recorded the absence of any witness statements from the appellants, their father, or their sponsor. The judge did refer to a declaration from the appellants' biological mother in which she

indicated that she had no objection to the father bringing the appellants to the UK [13]. The judge heard oral evidence from the sponsor, noting that the sponsor had never met the appellants' mother and knew nothing about her. The sponsor last saw the appellants in Ghana the previous year and was aware that the 1st appellant was at boarding school and the 2nd appellant attended a day school. The sponsor indicated that the appellants and their father were all in good health and happy.

13. At [23] the judge stated,

> "... the appellants have not proved on the balance of probabilities that their mother is not alive and is not living in Ghana. They have also not proved on the balance of probabilities that F is in the UK with a limited leave to enter or remain, or is being granted, or has been granted, entry clearance, as a partner or a parent. There is simply inadequate evidence about this. The position appears to be that he has not taken up the offer made by R [the respondent] about this but it is unclear. I also conclude that it has not been established that S [sponsor] is a parent of the appellants for the purposes of the Rules. There is inadequate evidence that she has "stepped into the shoes" of the appellants' biological mother."

14. At [24] the judge stated,

> "In addition, the appellants have not proved on the balance of probabilities that F has had and continues to have sole responsibility for the appellants' upbringing. There are no witness statements from F or the appellants about this and no documentary evidence concerning this matter. It is clear that S has only very limited knowledge about the appellants' mother and what part she has played and continues to do so in their lives. In addition (if it is relevant) it is clear that S does not have sole responsibility for the appellants."

15. The judge went on to refer to the best interests of the children and to consider the Article 8 appeals outside the immigration rules. The judge set out, in copious detail, legal principles and legislative provisions relating to Article 8 and extracts from case law. The judge concluded that the refusal to grant the appellants entry clearance would not constitute a disproportionate interference with Article 8 ECHR. The appeals were dismissed.

The challenge to the judge's decision

16. The grounds contend that it was unclear how the judge concluded, at [11], that neither the father nor the appellants' solicitors failed to "chase the matter" regarding the father's entry clearance visa. Reference was made to the letter sent by the solicitors on 14 March 2019 referring to a direction issued by the First-tier Tribunal requiring the respondent to "send an email to the Appellants regarding their visa", and to the follow-up letters. The grounds submit that, given the unclear position relating to the father's visa, the fair course of action would have been to adjourn the case in order to have these issues

clarified. Alternatively, the judge failed to consider that the chasing letters demonstrated the father's intention to have his UK visa issued.

17. The grounds contend that, if the respondent had responded to the solicitors letters and sent the details to the correct email address for the appellants father, then he would have been issued with his entry clearance. This would, it was submitted, have had a material bearing on the outcome of the appellants' case. The father would have been able to enter the UK prior to the appellants' hearing and give evidence of the nature of his relationship with his children.

18. The grounds further contend that the judge erroneously considered whether the sponsor had sole responsibility for the appellants. The grounds additionally contend that the judge's conclusion that there was no evidence of serious and compelling family or other considerations making the appellants exclusion undesirable ignored evidence that the father was in a position of having a UK visa issued to him had the respondent since the details to the correct email address.

19. At the 'error of law' hearing Ms Bassi provided 'Application Details' relating to the father's entry clearance application. She confirmed that the emails inviting the appellants' father to pay the Immigration Health Surcharge and to then take his passport to the visa application centre had been sent to the wrong email address. She confirmed that the correct email address was only used for the first time on 15 May 2019, the day of the appeal hearing before the First-tier Tribunal. She initially stated that the father had not paid the Immigration Health Surcharge, but she later accepted that the Immigration Health Surcharge had been paid after being shown an email from the appellants' solicitors on the sponsor's mobile phone.

20. Ms Fama submitted that the failure by the respondent to request payment of the Immigration Health Surcharge using the correct email address prevented the appellants from being able to show that their father was being granted entry clearance. If this mistake had not occurred, then the father would have been granted entry clearance. Ms Fama accepted that there had been no chasing letters sent by either the father or the appellants' solicitors from the date that the father was informed of the withdrawal of the respondent's decision in respect of his entry clearance application and the 1st letter sent by the solicitors on 14 March 2019, a period of almost one year. Ms Fama accepted that there was no evidence that, even if the Immigration Health Surcharge had been paid, the father had taken his passport to the visa application centre or that he had been was in the process of being issued with his entry clearance. Ms Farma accepted that there was no documentary evidence of proof of the father's sole responsibility other than the absence of any objection by the appellants' biological mother to them coming to the UK.

21. Ms Bassi submitted that no adjournment application had been made before the judge, despite the fact that the appellants were legally represented. There was no evidence at the date of the First-tier Tribunal hearing that the father had paid the Immigration Health Surcharge or that he was being granted a visa. There was no evidence before the judge that the father had sole responsibility for the appellants.

22. I indicated that I would reserve my decision.

Discussion

23. It is accepted by both parties that the email sent on 24 April 2018 requesting the appellants' father to pay the Immigration Health Surcharge and to then take his passport together with a copy of the email to the visa application centre where he initially made his application was sent to the wrong email address. At the 'error of law' hearing Ms Bassi provided Application Details relating to the father's entry clearance application. The 'Notes' section indicated that, on 24 April 2018, an email was sent to the wrong email address relating to the father's entry clearance application. The email indicated that the decision to refuse his visa application had been overturned and that the office was now ready to issue him a UK visa. The email required 2 steps: the father had to pay the Immigration Health Surcharge, and he then had to take his passport with a copy of the email to the visa application centre where he initially made his application. Further emails in similar terms were also sent to the wrong email address on 6 June 2018, 9 July 2018 and 16 July 2018. On 19 February 2019 it was noted that the wrong email address had been used to contact the appellants' father. Nothing however appears to have been done about this until 15 May 2019, the date of the appellants' appeal hearing. On this date an email was sent to the correct email address requesting the payment of the Immigration Health Surcharge by 22 May 2019. The Application Details document contained no further information. It was for this reason that Ms Bassi initially submitted that the father had not paid the Immigration Health Surcharge. An email receipt however was provided by the appellants' solicitors suggesting that the Immigration Health Surcharge was paid on Friday, 17 May 2019.

24. Although the appellants do not couch their challenge to the judge's decision in terms of fairness, they are essentially contending that the respondent acted in a procedurally unfair manner by sending the request for the Immigration Health Surcharge to the wrong email address. Had this been sent to the correct email address, then the appellants' father would have been granted entry clearance and the appellants would have met the requirement of E-ECC.1.6.

25. Because of the respondent's mistake the father was not informed of the need to pay the Immigration Health Surcharge, or the need to then take his passport and a copy of the email to the visa application centre. He was however informed in March 2018 that the decision to

refuse his entry clearance application had been withdrawn. Despite the pending appeals of his children, initially listed for January 2019, it was not until March 2019 that the solicitors sent their letter requesting "an email" (without detailing the required content or purpose of the email) be sent to the correct email address. No explanation has been provided for this delay. I accept that the judge failed to refer to the letters of 14 March, 1 May, 4 April and 25 April 2019, and that it was wrong to say that there was no chasing up of the matter. The father and the appellants' solicitors could however have raised their concerns at a much earlier time. This is relevant when assessing whether there has been any unlawful unfairness.

26. If the email sent by the respondent to the father on 24 April 2018 had been sent to the correct email address then the father may have been granted entry clearance. This was certainly the expectation as detailed in the email. The fact that the father did pay the Immigration Health Surcharge after receiving the email sent on 15 May 2019 suggests that he is likely to have been able to pay the Immigration Health Surcharge on the earlier date. There is however no evidence that the father has taken the subsequent steps necessary to be given his entry clearance. Given the length of time between the promulgation of the judge's decision and the 'error of law' hearing I am surprised at the absence of any evidence that the father has taken further steps to obtain his entry clearance.

27. The grounds of appeal content that the judge should have granted an adjournment in order to ascertain the status of the father's entry clearance application. The appellant was however legally represented at the hearing and no application to adjourn was made. Whilst a judge is entitled of his or her own volition to grant an adjournment, in circumstances where the parties are both legally represented a judge will reasonably expect the competent legal representatives to determine the best course of action for their clients. The fact remains that, at the date of the First-tier Tribunal hearing, the father was not somebody who was "being granted" entry clearance, and although he may have been granted entry clearance had he known of the need to pay the Immigration Health Surcharge, the fact that, by the date of the 'error of law' hearing he still had not been granted entry clearance, indicates that the grant was by no means certain.

28. However, even if the judge had erred in law in his consideration of whether the father was a person being granted entry clearance, and in his failure, of his own volition, to adjourn the hearing on the basis of procedural fairness, I can find no error of law in his consideration of the issue of sole responsibility. Although the Reasons for Refusal Letters themselves wrongly referred to the sponsor having to have sole responsibility, it is apparent from the ECM reviews that the question whether the father had sole responsibility was very much in issue. It is a requirement of Appendix FM that the appellant's father has sole responsibility for them. In **TD (Paragraph 297(i)(e): 'sole**

responsibility") Yemen [2006] UKAIT 00049 the Tribunal indicated that questions of "sole responsibility" under the immigration rules should be approached as follows:

i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.

ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.

iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.

iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.

v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.

vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

29. There was limited evidence before the First-tier Tribunal that the appellants' father had sole responsibility for them. The letter dated 13 September 2017 accompanying the initial applications stated that the appellants' biological mother divorced the father in 2011 and that the appellants were living with their father. It referred to the biological mother, Ms M Agyeiwah, giving her full consent for the children to settle in the UK with their father and stepmother. It did not state that the father had sole responsibility for the children or that the biological

mother was not involved in their upbringing. A statutory declaration by Ms Agyeiwah, dated 27 June 2017, indicated that she had no objection to the appellants "staying together at the United Kingdom" and that she had given her full consent to the father to travel with the children. This statutory declaration made no reference to whether the father had sole responsibility for the appellants. Neither the solicitor's letter of 13 September 2017 nor the statutory declaration of the appellants' biological mother indicated whether Ms Agyeiwah was involved or not in the upbringing of her children. The fact that she was divorced from their father and that they were living with him is not sufficient to infer an abdication of her parental responsibilities. There were no witness statements from the father or the appellants clarifying the situation. As the judge pointed put, the sponsor had only limited information about the appellants' mother and what part she played in their lives. There was little other evidence before the judge relating to the issue of sole responsibility.

30. The grounds focus on a reference at [24] of the judge's decision where he noted that the sponsor did not have sole responsibility for the appellants. the judge however prefaces this by stating, "(if it is relevant)". It is not relevant that the sponsor has sole responsibility, but it is manifestly clear from the rest of [24] that the judge has focused his attention on the position of the father. The grounds further contend that the father, had he been granted entry clearance, would have been able to attend the hearing and give evidence as to his relationship with the appellants. The appellants were however aware of the need to meet all of the requirements of the immigration rules, including the need to show that their father had sole responsibility for their upbringing. It was open to the appellants and their solicitors to provide evidence of sole responsibility for the First-tier Tribunal hearing. It was open to the father to provide a witness statement and, if necessary, to provide independent supporting evidence. This was not done.

31. I can deal briefly with the contention that the judge erred in law in concluding that there was no evidence of serious and compelling family or other considerations making the appellants exclusion undesirable. The appellant's father had not been granted entry clearance, and was not being granted entry clearance at the date of the First-tier Tribunal decision. the only evidence before the judge relating to the appellant's circumstances was that they were in good health and happy and lived in a "very nice" seven-bedroom house [17]. In the absence of any other evidence of the appellants' circumstances, or the intentions of the father if he was granted entry clearance but not his children, the judge was unarguably entitled to his conclusions.

32. I can detect no error on a point of law in the judge's assessment of the issue of sole responsibility. This being the case, the appeals could

not have been successful. I find there has been no error on a point of your requiring the decision of the judge to be set aside.

Notice of Decision

The appeals are dismissed

D.Blum

Signed

23 January 2020

Date

Upper Tribunal Judge Blum