Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00050/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 14 March 2016	**On 31 March 2016**

Before

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DENIS MUCA

Respondent

Representation:

For the Appellant: Mr A. Olufunwa of Immigration Law Practice
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In granting permission to appeal, First-tier Tribunal Judge Astle has neatly summarised the issues to be addressed in this appeal to the Upper Tribunal and I shall gratefully reproduce what he has written. In proceedings before the Upper Tribunal, the SSHD is the appellant and the

child seeking entry clearance who succeeded before the First-tier Tribunal is the respondent but, as I shall need to reproduce extracts from the decision of the judge, it is convenient to refer to the parties as they were before the First-tier Tribunal. Judge Astle said:

> "The respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Lloyd-Smith) promulgated on 26 October 2015 whereby it allowed the appellant's appeal against the decision of an entry clearance officer to refuse clearance as the child of someone present and settled in the UK
>
> The grounds argue that the judge erred in finding that the sponsor had sole responsibility for the appellant. The undisputed evidence was that the appellant resided with his mother. At best the sponsor had shared responsibility. It could not be said that the mother had abandoned or abdicated responsibility for the appellant.
>
> It is not clear to me if paragraph 297(i)(f) was argued but it is arguable that the judge erred in finding that the sponsor had sole responsibility in the circumstances. Permission is therefore granted."

2. The appellant, who is a citizen of Albania, was born on 21 July 1998 and so was 17 years old at the date of the respondent's decision to refuse his application for entry clearance. The sponsor is the appellant's father, Mr Xhevahir Muca. The decision of the respondent, made on 17 November 2014, set out the following reasons for refusing the application:

> "You have applied to join your parent in the UK. I acknowledge that you have submitted a letter from Tirana Notary Chamber which states that your mother has handed over responsibility to your father and has given permission for you to reside with him. Her reasons are that she is unable to afford your living costs, despite your father claiming to subsidise you from the United Kingdom and that she is psychologically unwell. This has not been medically evidenced.
>
> However, I am not satisfied that you have demonstrated that you have had regular contact with your father. There are only two photographs that you have submitted. One of a small child and your sponsor and another of you and your sponsor. There are no photographs of the interim period between. As evidence of contact you have provided some screenshots of missed calls. Your sponsor also states that he funds you from the United Kingdom but this is not clearly evidenced in his bank statements."

For these reasons, the respondent did not accept it had been established that the sponsor had demonstrated the sole responsibility for the appellant's upbringing demanded by the applicable immigration rule. The respondent went on to examine the evidence offered in respect of the financial requirements applicable and as specified documents in support of the sponsor's asserted earnings from self employment were not submitted, the application was refused for that reason also.

3. Before the judge it was agreed that the application had been determined under the wrong provisions of the Immigration Rules. Although it had been considered and refused by reference to Appendix FM, because the

sponsor is a British citizen, the correct rule was para 297 of HC 395. The judge recognised that one option was to remit the matter back to the Entry Clearance Officer to reconsider the application under the correct rule but it was agreed between the parties that the most appropriate course was for the judge to determine the appeal substantively by reference to paragraph 297 of the rules and this he agreed to do.

4. Para 279 provides, so far as is relevant:

> **Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom**
>
> 297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> ....
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and 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; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> ...

5. Thus, for the purposes of this appeal the erroneous application of Appendix FM rather than para 297 was in one sense not material since both provisions require the applicant to establish that the sponsor has had sole responsibility for the child's upbringing or, in the alternative, that there are serious and compelling family or other considerations which makes the child's exclusion undesirable. True it is that a different

approach is taken with regard to financial requirements to be met, but as that does not form part of the respondent's challenge to the decision of the First-tier Tribunal, in reviewing the decision of the First-tier Tribunal, it is simply the matter of sole responsibility that is in issue before the Upper Tribunal.

6. The central facts are these. It is not in dispute that the appellant is the son of the sponsor. The sponsor left Albania and came to the United Kingdom when the appellant was just 10 months old. Since then the appellant has lived with his mother in Albania although her health has deteriorated over the last three years. The sponsor is now married to his present wife in the United Kingdom. Although she supports the application for entry clearance, she has not met the appellant, explaining that during each of her visits to Albania the appellant has either been away on holiday or a visit was not possible because his mother was unhappy that the sponsor had married in the United Kingdom. The judge provided this summary of the evidence before him:

> "(The sponsor) … confirmed that he last saw his son a month ago and has been regularly returning because the appellant's mother's health has been deteriorating over the past 3 years because she suffers from depression and anxiety. His last visit was necessary because his son had been attacked and he was concerned that he would be influenced by the wrong crowd of boys who take drugs and are violent. In cross examination the sponsor confirmed that his son attends college, having completed his school education. The sponsor was unable to specify precisely what the course was that his son was undertaking and said he had yet to decide what he wants to do when he is older. He mentioned that his son was training to be a mechanic and later said he may be a policeman. He said prior to the last 3 years the appellant's mother had cared for him well but her illness has left her unable to cope. Whilst the sponsor has other family in Albania he said that they have their own families or do not live close enough to help. In addition his son has very little contact with them. When asked when he gained British citizenship the sponsor said he thought it was 3 years ago but he was not sure. He said that he had not made an earlier application because the appellant's mother had been coping and there was no need to. The sponsor said that he has had responsibility for helping his son choose which college to attend and paying the fees. He said that he has been married to his current partner for 10 years and whilst she has never met the appellant she has spoken to him on Skype regularly."

7. The judge recorded submissions made by the parties. For the respondent, although it was accepted that there had been "financial input" from the sponsor it was said that there was insufficient evidence to demonstrate that he had had sole responsibility for the appellant's upbringing and there was insufficient evidence of "serious or compelling reasons". It is not clear whether the judge recognised that the conjunctive link found in 297(i)(f) is "and" and not "or".

8. The respondent's position was that reliance could not be placed on the medical evidence offered because the translations were "garbled" and did not serve to establish that the sponsor had had sole responsibility for the appellant's upbringing. The sponsor's understanding of the course his son was engaged in was said to be "vague".

9. On behalf of the appellant it was submitted that the sponsor had provided constant support for the appellant since he moved to the United Kingdom and over the past 3-4 years had made more frequent visits to his son in Albania. That was because his mother's health was deteriorating so that he has become more directly involved in the appellant's upbringing and care. The appellant's mother has now agreed that the appellant may have legal custody of the appellant so that the sponsor and his wife now had "primary responsibility" for the appellant.

10. In reaching his findings, the judge took as his starting point that:

> "… the sponsor and his wife … have the appellant's best interests at heart and are keen to enable him to join them in this country because they have serious concerns about his present circumstances and whether he is being suitably cared for …"

The judge then considered post decision evidence provided for the purpose of a review by the Entry Clearance Manager who he criticised for failing to have proper regard to the evidence now produced establishing that the appellant's mother does have the health difficulties described and that she was now content that her son should join his father in the United Kingdom. His key findings are set out at paragraph 14 of his decision which I shall set out in full:

> "In assessing the issue of sole responsibility I have considered the relevant case law. In TD (Paragraph 297(i)(e): "sole responsibility" Yemen [2006] UKAIT 00049 the Tribunal said that "Sole responsibility" is a factual matter to be decided on all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day to day care of the child abroad. The test is whether the parent has continuing control and direction over the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility". In Emmanuel v SSHD [1972] Imm AR 69 the Tribunal acknowledged in this respect that certain tasks would almost undoubtedly be delegated to a third party and in nearly all cases there must be some sort of responsibility of a relative or other carer with whom the child lives, or who is responsible for meeting the day to day needs of a child, such as food, clothing, medical attention, and ensuring that the child attends school. The Tribunal said that it is necessary to see under whose directions these steps are taken and to ask were they taken under the direction of the UK sponsor. In Nmaju v Entry Clearance Officer IAT [2001] INLR 26 Court of Appeal, it was held that, although the duration of sole responsibility was a relevant factor to the issue of whether a parent did actually have sole responsibility has been exercised does not have to be lengthy. In R (Philippines) [2003] UKIAT 000109 it was said that it was a question of fact and degree in each case as to whether there was sole responsibility or not."

For these reasons the judge concluded:

> "Having assessed the evidence I find that since the deterioration in the appellant's mother's health the sponsor has taken over sole responsibility as opposed to having shared responsibility with the mother which he previously

> had. There is evidence that the sponsor has paid for the appellant's education and has been financially supporting him as well as emotionally as was demonstrated by the recent visit following the appellant's disappearance.
>
> It follows therefore, that on the above finding I am satisfied that the concerns of the ECO and ECM have been adequately addressed and I find that the decision meets the requirements of paragraph 297 and the appeal is allowed."

11. Presumably, the judge meant that he was satisfied that the application, not the decision, met the requirements of paragraph 297.

12. The challenge raised by the grounds, adopted before the Upper Tribunal by Mr McVeety is, effectively, that this was a perverse decision. Put another way, on the evidence, taken at its very highest, this was a conclusion not reasonably open to the judge. The undisputed evidence was that the appellant continues to reside with his mother and has done so since his father departed when he was 10 months old. It cannot be said that the appellant's mother had either abandoned him or abdicated her responsibility to him. Reliance upon *Emmanuel* was misconceived because that was concerned with a situation where the child had neither parent caring for him so that an absent parent who did have responsibility for his upbringing delegated day to day tasks to a third party non-parent, as a matter of necessity. That was not the position here because the appellant lived with his mother.

13. I have no doubt at all that those grounds are made out. On the evidence, even taken at its very highest, it cannot rationally be concluded that the sponsor can be described as a parent who has had sole responsibility for the child's upbringing. It is plain that he has not. The medical evidence came nowhere even close to establishing that the appellant's mother had become unable to continue caring for her son. The translation of that medical report which offers a diagnosis of "chronic permanent Cefalea and depressive anxious disorder" includes:

> "Beginning of the disease, the past 2 years with insomnia, anorexia, permanent headache, boredom.
>
> The situation has been psychologically aggravated with nervous irritability, psychomotor agitation and depressive condition. The patient does not talk to family members and her relatives, is unable to work and to help the family."

This does not establish that the appellant's mother, who continues to live with him, has ceased to exercise responsibility. There was, and is, no evidence of any manifestation of the illness of the appellant's mother in the sense of how that, in practice, impacts upon her engagement with her 17 year old son.

14. For these reasons, the decision of the judge cannot stand and will be set aside. That is not simply because I would not have arrived at the same conclusion but because this was a conclusion not rationally or

reasonably open to him on the evidence. That establishes that the judge has made an error of law material to the outcome of the appeal.

15. The directions sent to the parties with notice of today's hearing made clear that if the Upper Tribunal decided to set aside the decision of the First-tier Tribunal it would proceed forthwith to re-make the decision. Nothing further is offered in terms of evidence save a letter from the appellant dated 12 February 2016 addressed to his father in which he describes how his mother has been unwell for 3-4 years so that she does not cook for him and "yells all the time". He makes clear that he would prefer to live with his father in the United Kingdom because he fears that his mother "is getting worse".

16. I have read carefully all the documentary material advanced on behalf of the appellant. Taken at its highest, this is capable of establishing that the appellant's father has paid school fees for his son, at least for the 2013/2014 school year, and has made regular visits during the last three years or so. These visits are evidenced by photographs. The medical evidence indicates that the appellant's mother has a need for continuing medical treatment but there is no suggestion that she cannot continue to live at home. The sponsor says in this witness statement that his son's mother "cannot look after him over the last 3 years because she suffers from depression" but, as a matter of fact, that is precisely what has happened over the last three years. The "Notarial Declaration" is no more than a written statement by the appellant's mother of future intent, witnessed by a Public Notary, evidencing her agreement to her son coming to live with the sponsor in the United Kingdom. None of this, even taken at its cumulative highest, comes even close to establishing either that the appellant's father has had sole responsibility for the appellant's upbringing; that the appellant has been abandoned by his mother or that there are serious and compelling family or other considerations that makes the appellant's exclusion from the United Kingdom undesirable.

17. Therefore, I substitute a fresh decision to dismiss the appeal against refusal to grant entry clearance.

18. Signed 

Date: 14 March 2016

Upper Tribunal Judge Southern