Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13709/2017**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On January 21, 2019	**On February 12, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MALCOM MYRIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Laing, Solicitor
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Jamaican national who applied for entry clearance to the United Kingdom under paragraph 297 HC 395 based on his relationship with his parents. The respondent refused that application on October 13, 2017.

2. The appellant appealed that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on October 25, 2017 and his appeal was heard by Judge of the First-tier Tribunal Henderson on October 2, 2018 and in a decision promulgated on October 22, 2018 she dismissed his appeal.

3. Grounds of appeal were lodged on November 9, 2018. Within those grounds it was argued that the Judge had erred in her proportionality assessment under article 8 ECHR in circumstances where the Judge accepted that the appellant met the requirements of the Immigration Rules and in the alternative had failed to consider whether the appellant had satisfied paragraph 297(i)(f) HC 395.

4. In granting permission to appeal on November 21, 2018 Judge of the First-tier Tribunal Swaney found it was arguable that the Judge had reached unclear findings on whether the Immigration Rules were met having stated at paragraph 31 that the appellant had met the requirements of the Immigration Rules that then at paragraph 32 the Judge reached an alternative conclusion. It was also an arguable that the Judge had failed to give due consideration to whether the appellant's mother had had sole responsibility (paragraph 297(i)(e) HC 395) or whether there were serious and compelling circumstances which made the appellant's exclusion undesirable (paragraph 297(i)(f) HC 395).

5. No anonymity direction is made.

SUBMISSIONS

6. Mr Laing adopted the content of a skeleton argument that he submitted to the Tribunal together with the grounds of appeal that had been lodged by the appellant's previous representatives. In lengthy submissions, Mr Laing challenged the Judge's decision on two fronts namely:

   (a) The finding that Michael Anthony Myrie was not the appellant's father was irrational and the Judge erred by failing to make a positive finding under paragraph 297(i)(a) HC 395; and

   (b) The finding that Lorraine Annette Baxter (the appellant's mother) did not have sole responsibility was irrational and the Judge erred by failing to make a positive finding under paragraph 297(i)(e) HC 395.

7. Positive findings under either section, he submitted, should have led to a grant of discretionary leave under article 8 ECHR in light of TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109.

8. With regard to the first issue, Mr Laing submitted that the Judge had made irrational findings with regard to the appellant's parents. The Judge had accepted Ms Baxter was the appellant's mother but refused to accept Mr Myrie was the appellant's father. There was an original Jamaican birth certificate that identified him as the child's father and there were various statements contained in the appellant's bundle that supported what both he and Ms Baxter had stated. Although the Judge found the appellant's father's and mother's accounts about the father's alleged contact to be inconsistent, there was a consistency in the fact they both stated that he was the appellant's father and his passport demonstrated that he had visited Jamaica in 2014, 2015 and 2016. There was evidence from the

appellant himself that this male was his father and there were photographs before the Tribunal showing them together. Both the appellant's mother and father had addressed why his name was not on the 2010 birth certificate and the Judge should have made a finding that the 2016 certificate was a forgery if no weight was to be attached to it especially as both names had been amended in the 2016 certificate.

9. With regard to the second issue, Mr Laing submitted the Judge had failed to properly take into account all the evidence when considering whether Ms Baxter had sole responsibility of the appellant. He reminded the Tribunal that all the appellant's mother had to demonstrate was whether she had continuing control and direction of his upbringing including making all the important decisions in the appellant's life. He submitted the evidence showed that this was the case and he placed reliance not only on the evidence of the appellant's mother but also the affidavit from the aunt, a letter from the school and the numerous money transfers that had taken place.

10. Mr Tan opposed the application and submitted in respect of the first issue the Judge had given reasons, and these were set out in her decision. The Judge differentiated between the appellant's mother and father and gave adequate reasoning for that conclusion. The Judge considered the documents and concluded they could not be relied on and that it had been open to the appellant, his mother and father to have had a DNA test done which would have conclusively confirmed the appellant's parentage. All findings made under paragraph 297(i)(a) HC 395 were open to the Judge.

11. In relation to the second issue, Mr Tan submitted the Judge considered all the evidence and concluded the test was not met. Apart from what the appellant's mother said there was a lack of independent evidence and he noted there was no evidence from the school and the money transfers were not paid by her.

12. In response, Mr Laing referred to the Tribunal to a letter dated September 24, 2018 that confirmed she was in contact with the school and she had attended the schools Parents Teachers Association meeting in 2010.

13. I reserved my decision but indicated that in the event there was an error in law it was likely the matter would have to be remitted back to the First-tier Tribunal for a de novo hearing.

FINDINGS

14. This is an appeal against the decision to refuse the appellant entry clearance as a dependent child under paragraph 297 HC 395.

15. Permission to appeal had been granted on the basis Judge of the First-tier Tribunal Swaney found there was an inconsistency in the Judge's findings in paragraphs 31 and 32 and the Judge had arguably erred in her approach to sole responsibility and had not considered the position as at the date of

decision. There was also an arguable error made in respect of paragraph 297(i)(f) HC 395.

16. Two of these issues can be dealt with quite swiftly. I am satisfied that any inconsistency between paragraphs 31 and 32 of the decision was a typographical error. This issue was not pursued by Mr Laing at the hearing and I am satisfied, having read the whole decision, that where the Judge concluded, paragraph 31 of the decision, that the appellant satisfied the Immigration Rules she meant that he had "not" satisfied the Immigration Rules as evidenced by the numerous findings she had made. The other matter was the alleged error in respect of paragraph 297(i)(f) HC 395. This matter was not pursued by Mr Laing and on reading the record of proceedings I am satisfied this was not advanced before the Judge.

17. Mr Laing spent a considerable period of time addressing me on paragraph 297(i)(a) HC 395. The Judge had noted that when the original hearing was adjourned due to a lack of time the Judge had given directions permitting further evidence from the appellant, including a DNA report, to be served at least five days before the next hearing date.

18. The appellant's previous representatives took the view that the respondent should bear the cost of such a report because the decision letter did not state there were any doubts that Mr Myrie or Ms Baxter were the appellant's parents. However, it is clear from the decision letter that the respondent was not satisfied that they had demonstrated their relationships were as claimed or that they were the appellant's parents. Why the appellant's representatives suggested otherwise is unclear because the obtaining of a DNA report would have ultimately led to paragraph 297(i)(a) HC 395 being met if the report supported their claims.

19. The Judge was entitled to have concerns about the lack of a DNA report in circumstances where the appellant was not only relying on a birth certificate that post-dated his birth by almost 17 years but a certificate which contained different information to the one that had been issued on June 7, 2010. The 2016 certificate included Mr Myrie's details for the first time and a slightly different spelling to Ms Baxter's middle name.

20. Mr Laing argued vociferously that the original 2016 certificate had been produced and if the Judge wished to reject it, he would have had to be satisfied, by the respondent, that it was a forgery. I disagree with that submission. The document was obtained as a result of information being provided by Mr Myrie to a Registrar who then issued the certificate. The respondent was not suggesting the certificate was a forgery or a fraudulent document but simply invited the Judge to consider the date on the certificate and the fact that the father's name had not been entered on the 2010 certificate when considering the weight to attach to the document. Contrary to Mr Laing's submission, the Judge considered the explanations put forward and was not satisfied with the anomalies between the aforementioned documents.

21. Mr Laing submitted that if the Judge accepted Ms Baxter was the appellant's mother then she should have accepted Mr Myrie was his father because both names had been altered on the 2016 certificate. I disagree with that submission, as did the First-tier Judge. She accepted the spelling error in relation to the mother was adequately explained and she addressed this in paragraphs 25 and 28 of her decision.

22. There was a significant difference in the positions of the mother and father. In their statements they gave different accounts as to the role played by Mr Myrie. He claimed he saw his son at least once a week when he was in Jamaica whereas Ms Baxter made it clear in her witness statement that she remained in contact with him and informed him about their child's upbringing, but nowhere did she state that he visited his son as he claimed. At paragraph 29 of her decision the Judge considered the evidence and preferred the mother's evidence.

23. Mr Laing referred to photographs that had been submitted and there was no dispute there were photographs or that Mr Myrie had visited Jamaica. However, the photographs were all recent and did not satisfy the Judge, to the relevant standard, that Mr Myrie was his father. They were simply a snapshot of a recent visit.

24. There was a witness statement from the appellant's aunt. She stated at paragraph 11 of her statement that Mr Myrie had visited the appellant in 2011, 2013 and 2016 and they spent "quite a bit of time together". The Judge considered this evidence but placed greater weight on the absence of independent evidence such as letters or telephone records or earlier photographs to conclude that the appellant could not satisfy paragraph 297(i)(a) HC 395 and having considered the Judge's decision I am satisfied that the findings on this specific issue were open to the Judge.

25. The issues raised by Mr Laing in relation to paragraph 297(i)(a) HC 395 were an attempt by a new advocate to re-argue the points that had been presented to the Judge. His claims of irrationality were not made out as the Judge had correctly asked herself, "why the appellant and his parents were not advised to obtain DNA test results which would have ended the speculation surrounding his parentage as a result of the changes to his birth certificates". There was no error of law on the first issue.

26. With regard to paragraph 297(i)(e) HC 395, Mr Laing submitted that there was overwhelming evidence that Ms Baxter had sole responsibility and the Judge had erred by seeking evidence to show longstanding sole responsibility.

27. At paragraph 31 of the Judge's decision she set out the leading authority on "sole responsibility". The Tribunal in TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 considered the correct approach court should take when considering who had responsibility for a child's upbringing and whether that responsibility was sole responsibility would be a factual matter to be decided after having regard to all the

evidence. It was necessary to look at who exercised responsibility for the child, and it was possible that such responsibility may have been exercised for a short duration with the arrangements having begun quite recently.

28. The appellant was born in October 1999 and when he was born only his mother registered the birth. He lived with his mother until October 2002 during which time she claimed that she was solely responsible for his upbringing, welfare, education and general needs.

29. When she came to the United Kingdom, she made arrangements for the appellant's grandmother to look after the appellant and he lived with her for seven years until she died.

30. The appellant's claim was that his mother remained in regular contact with his grandmother and him by telephone and that his mother made all the important decisions in his life. Such decisions included enrolling him in Castleton Basic School and thereafter Castleton Primary and Junior and High School. After the death of the appellant grandmother, the appellant stayed with his great-aunt until November 2013 when she went to live in the United States of America at which time the appellant's aunt took over responsibility and he continues to live with his aunt as at today's date.

31. The appellant provided evidence of communication between himself and his mother. His mother stated in her witness statement that she organised his schooling and made all the important decisions regarding his education and welfare and that money was sent to him through her partner on a regular basis. There was a letter from the school confirming her involvement and evidence of regular sums being sent to him since 2015.

32. At paragraph 30 of her decision the Judge concluded that the "most likely scenario" was that the responsibility of looking after the appellant was shared jointly by the appellant's mother and other family members with the latter carrying out everyday responsibilities for his care and the former working to support him. It is in this area that it is argued there is an error in law.

33. In assessing overall responsibility, the Judge concluded there was little evidence prior to 2015 which made it difficult to assess the extent to which the mother could be said to have had overall responsibility. The Judge made an adverse finding against her because she had not been back to see him and concluded that she could not demonstrate sole responsibility.

34. Permission to appeal had been given on the basis it was arguable the Judge had applied too high a test when considering whether the appellant had sole responsibility. The Judge had evidence before her that the appellant was being financially supported through payment sent by his mother's current partner and there was evidence of ongoing dialogue and telephone calls and the school confirmed her involvement. There is no doubt that relatives cared for him on a daily basis but the question the

Judge should have considered was whether they were caring for him at the behest of his mother and whether she made the day to day decisions. Importantly, it is unnecessary for his mother to show she had sole responsibility since 2002. If she can demonstrate sole responsibility for a shorter period, such as 2015 to 2017, then case law suggests this would be sufficient.

35. Bearing in mind sole responsibility can be for a short period and does not have to cover a period prior to 2015 but simply a period prior to the date of application I accept Mr Laing's submission that there is an error in law because there is documentary evidence that supports his claim that his mother had sole responsibility for him with everyday help from family members.

36. I considered whether to adjourn for a further hearing but concluded no further evidence would assist me to remake this decision. I find that having found the Judge erred by applying too narrow a definition when assessing sole responsibility, the only outcome would be to allow this appeal on the basis that the appellant satisfied paragraph 297(i)(e) HC 395.

37. The appeal cannot be allowed under the Immigration Rules but following the Court of Appeal decision in TZ, to refuse him entry clearance under article 8 ECHR would be disproportionate. I therefore allow his appeal under article 8 ECHR.

Notice of Decision

There is an error of law and I set aside the original decision and I remake the decision and allow the appeal.

Signed Date 21/01/2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award as I have allowed the appeal based on the evidence placed before the First-tier Tribunal.

Signed Date 21/01/2019

Deputy Upper Tribunal Judge Alis