**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2024-003285**
**First-tier Tribunal No: HU/57824/2023**
**LH/03397/2024**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 07 October 2024**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**Anthony Nmasichkwu Chidubem Dike**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**REPRESENTATION**

For the Appellant: Mr H Broachwalla, instructed by Michael Stevens Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

**Heard at Field House on 2 October 2024**

## DECISION AND REASONS

### INTRODUCTION

1. The appellant is a national of Nigeria and was born in April 2009. On 10 March 2023 he made an application for entry clearance as a child. His application was considered by the respondent under paragraph EC-C.1.1 of Appendix FM of the Immigration Rules and refused for reasons set out in a decision dated 7 June 2023.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Clarke ("the judge") for reasons set out in a decision dated 31 May 2024.

**© CROWN COPYRIGHT 2024**

3. Permission to appeal was granted on limited grounds by First-tier Tribunal Judge Dainty on 11 July 2024. Judge Dainty said:

> "2. It is averred that the judge made an error of law as to sole responsibility and failed to engage or engage properly with certain items of evidence. It is further said that the judge failed to consider the best interests of the minor half siblings of the Appellant and in respect of the Appellant's best interests has failed to consider the starting point that the best interests of a child are to be with éither one or both parents. Finally, it is said that no or no proper Razgar-compliant balancing exercise was carried out.
>
> 3 There is no error on the sole responsibility point as full reasons have been given citing the relevant evidence. Conversely it is arguable that there are errors in the balancing exercise namely a failure to conduct proper balancing exercise weighing one set of factors against another, which balancing exercise arguably ought to have taken account of the importance of living with a parent and the interests of minor siblings. It is not the case that they would inevitably have outweighed other factors, but it is arguable that for all of those reasons no balancing exercise compliant with the relevant case and statutory law has been completed."

4 The application for permission to rely upon the remaining grounds was renewed to the Upper Tribunal. Permission was refused by Upper Tribunal Judge Gill on 22 August 2024. Judge Gill said the judge applied the approach referred to in *TD (Paragraph 297(i)(e):0 "sole responsibility") Yemen* [2006] UKAIT 00049 and had regard to the relevant evidence when considering whether the appellant had sole responsibility for the appellant. The judge had also plainly considered the best interests of the appellant. Judge Gill said:

> "The judge made findings of fact on the sole responsibility issue and best interests that were unarguably open to her on the evidence, for the reasons she gave. There is no arguable error of law."

## The Hearing of the Appeal before me

5 At the outset of the hearing Mr Broachwalla accepted that the focus of the sole ground upon which permission has been granted is upon the judge's assessment of whether the decision to refuse entry clearance is proportionate to the legitimate aim. He refers to the decision of the Court of Appeal in *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630 in which Green LJ confirmed, at [32], that the list of relevant factors to be considered in a proportionality assessment is " *not closed* ". It is a fact sensitive assessment that is required. Mr Broachwalla submits that here the judge failed to have regard to four relevant factors in particular.

6 First, the evidence before the Tribunal as to why the sponsor had previously been unable to travel to Nigeria. In her witness statement, the sponsor explained that she was caring for her sister and her children. Her sister died from cancer on 8 June 2019 and she was then granted a

'guardianship order' in respect of her sister's children. She now has two young children of her own.

7 Second, the judge failed to have regard to the well established principle recorded in headnote (v) of the decision of the Upper Tribunal in *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 00088 (IAC) that as a starting point, the best interests of a child are usually best served by being with both or at least one of their parents. There was evidence before the Tribunal regarding the health of the appellant's grandparents and Mr Broachwalla submits, the evidence establishes they are unable to provide the care required by a 15 year old.

8 Third, paragraph GEN.3.2 of Appendix FM requires that the decision maker must consider whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because the refusal would result in unjustifiably harsh consequences for the applicant, a relevant child or another family member whose Article 8 rights it is evident would be affected. The impact of the refusal upon the appellant, his sponsor and his half-siblings, and their relationship, was a relevant factor but was not considered; See *KF and others (entry clearance, relatives of refugees) Syria* [2019] UKUT 00413 (IAC)

9 Fourth, there was evidence before the FtT that in recent times, the appellant's education has suffered. There was a letter dated 3 July 2023 from the Iwerekun Community Junior High School which noted the appellant "..*has not been coming to school regularly and he has not been participating in extra-curricular activities during the 2nd and 3rd term 2022/2023 academic session..".* The school noted that the appellant cited his grandfather's health as the reason.

10 Mr Broachwalla submits the failure to have regard to these factors and to consider all the evidence in the round, amounts to a material error of law and the decision of the FtT must be set aside.

11 In reply, Mr Wain adopted the respondent's Rule 24 response dated 19 July 2024. He submits the judge referred to and considered all relevant factors. She carried out a proper analysis of the Article 8 claim having regard to the strengths of the respective relationships. The judge found that it is the appellant's grandparents who have been the ones who have made the significant decisions throughout the life of the appellant about his upbringing after the sponsor had left him with them at a young age to care for her sister. The judge referred, at [26], to the best interests of the appellant. In *Mundeba* the Upper Tribunal had in fact said:

> "v. As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939."

12 Here, continuity of residence, Mr Wain submits, is plainly relevant and it was open to the judge to find that it is in the best interests of the appellant to remain in the home he has always known with his grandparents and to continue with his studies at his school. The judge did not accept that there are serious and compelling family or other considerations which make his exclusion undesirable and was satisfied that suitable arrangements have been made for his care. In reaching her decision, the judge referred to the evidence before the Tribunal regarding the health of the appellant's grandparents and said the grandparents are more than capable of caring for the appellant despite the grandfather being bed-ridden. The judge found that the grandmother is more than capable caring for and meeting the needs of the appellant.

13 The Judge considered whether there are any exceptional circumstances and having concluded that the requirements of the immigration rules are not met, found that the decision does not lead to unjustifiably harsh consequences for all involved and that the public interest outweighs the fact that the appellant and his biological mother remain living in different countries. The decision, Mr Wain submits, is one that was open to the judge.

## Decision

14 The assessment of an Article 8 claim such as this and the consideration of whether a decision to refuse entry clearance is proportionate, is always a highly fact sensitive task.

15 The judge set out the issues in the appeal at paragraph [6] of the decision:

> "The parties agree that I must resolve the following factual disputes about the appellant's ability to meet the requirements of immigration rules: relationship; sole responsibility and Article 8 outside the Rules."

16 The judge's findings and conclusions are set out at paragraphs [8] to [29] of the decision. The judge rejected the appellant's claim that his mother, the sponsor, has had and continues to have sole responsibility for the appellant's upbringing. The judge went on to address the best interests of the appellant and noted the sponsor is married and the appellant has two half-siblings with whom the sponsor wishes the appellant to be united. Nevertheless, the judge found that it is in his best interests to remain in the home he has always known with his grandparents and to continue with his studies at his school. She found the appellant has only ever known living in Nigeria, and the sponsor can visit him in Nigeria and continue with remote contact to avoid upheaval for the appellant.

17 The judge did not accept that there are serious and compelling family or other considerations which make the appellant's exclusion undesirable and found that suitable arrangements have been made for his care. In reaching her decision, the judge approached the appeal on the basis of the evidence that the grandfather is limited in the care he can now offer, but found the grandmother is more than capable of caring for and meeting the

needs of the appellant. The judge found, at [28], that the grandparents continue to exercise parental responsibility for the appellant having done so for most if not all of his life. She found there are no exceptional circumstances because the appellant can continue enjoying family life with his grandparents who have exercised parental responsibility over him, and the sponsor can continue to have contact with him remotely and remit money for the household. The judge concluded:

> "29. Taking into account my findings above, the appellant has not met the requirements of the Immigration Rules, and the best interests are to remain in his country, and there is no interference to his family life which continues as it has done for the vast majority of his life, and it is proportionate and does not lead to unjustifiably harsh consequences for all involved because of this, and the public interest outweighs the fact that the appellant and his biological mother remain living in different countries."

18 The sponsor's evidence set out in her witness statement that she was not able to visit the appellant because she was caring for her sister and her children was directed to her claim that she had maintained sole responsibility for the appellant. That claim was rejected by the judge. The fact that the appellant has two young children adds nothing and would not prevent the sponsor, and indeed his half-siblings, from visiting the appellant. As Mr Broachwalla accepted, the evidence of the sponsor was very limited and did not address any obstacles that now lie in the way of the sponsor visiting the appellant. The appellant and sponsor may wish to live together in the UK, but that does not equate to a right to do so.

19 The leading authority on section 55 remains *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are "a primary consideration", which, she emphasised, was not the same as "the primary consideration", still less "the paramount consideration". True it is that in *Mundeba (s.55 and para 297(i)(f))* the Tribunal said that as a starting point, the best interests of a child are usually best served by being with both or at least one of their parents. However that is to read the headnote selectively. In fact, as Mr Wain submits, the Tribunal went on to say that continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important. At paragraph [28] it is clear the judge had in mind the evidence before the Tribunal regarding the health of the appellant's grandparents, and his grandfather in particular.

20 In reaching her decision, it is clear from what the judge said at paragraph [28] and the conclusion set out at paragraph [29] that the judge had in mind whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because the refusal would result in unjustifiably harsh consequences for not only the appellant and sponsor, but "for all involved". In *Al Hassan & Ors. (Article 8; entry clearance; KF (Syria))* [2024] UKUT 00234 (IAC), the Upper Tribunal said in the headnotes:

> "2. Properly interpreted, KF and others (entry clearance, relatives of refugees) Syria [2019] UKUT 413 is not authority for the proposition that it is only a UK based sponsor whose rights are engaged. while the rights of the person or persons in the United Kingdom may well be a starting point, and that there must be an intensive fact-sensitive exercise to decide whether there would be disproportionate interference, it is not correct law to focus exclusively on the sponsor's rights; to do so risks a failure properly to focus on the family unit as a whole and the rights of all of those concerned, contrary to SSHD v Abbas"

The judge clearly adopted the correct approach.

21 In paragraph [20] of her decision the judge referred to the letters from the school attended by the appellant "regarding the conduct of the appellant and his progress in school" and there is in my judgement no reason to believe that the judge failed to have regard to the letter that is referred to by Mr Broachwalla in her analysis of proportionality. To say that the appellant has not been coming to school regularly and he has not been participating in extra-curricular activities during the 2nd and 3rd term 2022/2023 academic session, is not to say that his education has suffered. In fact, what Mr Broachwalla failed to refer to, was the letter from the school dated 20 June 2023 in which it is said that the appellant *"..has been effective and highly efficient in school activities"*.

22 The findings and conclusions reached by Judge Clarke were in my judgment, based on the particular facts and circumstances of this appeal and the strength of the evidence before the Tribunal. It was plainly open to the judge to conclude that the public interest outweighs the fact that the appellant and his mother remain living in different countries. It was open to the judge to conclude that the decision to refuse entry clearance is proportionate and to dismiss the appeal for the reasons she gave.

23 It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding Tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. Here, the decision of Judge Clarke must be read as a whole. She gives adequate reasons for the findings and her conclusion followed the fact-sensitive analysis that was required. The findings and conclusions reached by the judge were neither irrational nor unreasonable in the Wednesbury sense. Where a judge applies the correct test, and that results in an arguably harsh conclusion, it does not mean that it was erroneous in law.

24 In my judgment, the grounds of appeal do not disclose a material error of law capable of affecting the outcome of the appeal.

25 It follows that I dismiss the appeal.

## Notice of Decision

26 The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Clarke stands.

**V. Mandalia**
**Upper Tribunal Judge Mandalia**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**3 October 2024**