Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05185/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 February 2018	**On 8 March 2018**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MM
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the Appellant: No legal representation (father representing)
For the Respondent: Mr Duffy, Senior Home Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant herein is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. The appellant is a citizen or Zimbabwe, born [ ] 2005. On or around 15 December 2015 he made an application for entry clearance as the dependent child of his UK based father. On 8 February 2016 an entry clearance officer refused this application, pursuant to paragraph EC-C.1.1 (d) of Appendix FM of the Immigration Rules (with reference to paragraphs E-ECC.1.6.(b) and (c) thereof).

2. It is of significance that as of the date of the entry clearance officer's decision the appellant's father had limited leave to remain in the United Kingdom, conferred until 18 September 2017 - as a consequence of his marriage to a British citizen.

Hearing before the First-tier Tribunal

3. At his appeal hearing before the First-tier Tribunal ("FtT") the appellant was represented by his father, and the Secretary of State by Counsel. Counsel for the Secretary of State asserted to the FtT that the entry clearance officer had applied the wrong immigration rule in his assessment of the appellant's application, and that paragraph 297 of HC 395 should, instead, have been applied.

4. The FtT (Judge M A Khan) acceded to this submission and went on to deal with the substance of the appeal on the basis of a consideration of paragraph 297 of the Rules and, thereafter, Article 8 ECHR. It is accepted by Mr Duffy that Counsel was incorrect in this submission and that the entry clearance officer had, in fact, considered the appellant's application under the correct immigration rule. Although the appellant's father now has indefinite leave to remain in the United Kingdom this was not the case as of the date of the entry clearance officer's decision. The relevant rules the FtT were required to consider were, therefore, those contained within paragraph E-ECC of Appendix FM.

5. As it turns out, the relationship requirements under both paragraph E-ECC of Appendix FM and paragraph 297 of the Rules are the materially identical. The appellant is required to demonstrate either that: (i) his father *"has had sole responsibility for [his] upbringing;* or (ii) that *"there are serious and compelling family or other considerations which make exclusion of the [appellant] undesirable and suitable arrangements have been made for the [appellant's] care"*.

6. The only material difference in the relationship requirement between the two rules is the length of period of leave to remain the sponsoring parent is required to have. Under paragraph 297 the sponsoring parent must be present and settled in the United Kingdom (or being admitted for settlement on the same occasion), whereas under paragraph E-ECC.1.6 of Appendix FM the sponsoring parent need only be in the United Kingdom

with limited leave to enter or remain (or applying as a partner or parent under Appendix FM).

Discussion and Decision

7. I turn first turn to the FtT's analysis of the issue of whether the appellant's father has had sole responsibility for the appellant's upbringing. In this regard the sponsor asserts that the FtT failed to give adequate reasons for its conclusion and also failed to take into account material matters.

8. Consideration of these submissions requires a careful analysis of the FtT's decision. I refer first to paragraph 17 thereof, in which FtT observes that: *"The sponsor, the appellant's adopted his written witness statement dated 10/02/2017"*. Other than the grammatical errors, this observation has two obvious flaws. First, the appellant did not adopt a statement before the FtT because he was not in attendance before the FtT. Second, the sponsor has never produced a statement dated 10 February 2017 and therefore cannot have adopted such statement before the FtT. The appellant's father did produce a statement dated 10 May 2017 and, it appears, adopted this statement in evidence before the FtT. It to this statement that I assume the FtT was referring in paragraph 17 of its decision.

9. The statement of 10 May 2017 was not, however, the only statement the appellant's father put before the FtT. The appellant's father (jointly with his wife) also submitted a lengthy statement dated 29 February 2016. This statement is neither explicitly referred to by the FtT, nor in my view can it be implied from anything said by the FtT that the contents of the statement were taken into account. For the reasons that follow, I find this failure amounts to an error of law capable of affecting the outcome of the appeal.

10. On the issue of whether the appellant's father has had sole responsibility for the appellant's upbringing, the FtT concluded as follows:

> "26. The sponsor adopted his statement and gave oral evidence, which is noted above. The sponsor came to the United Kingdom in October 2005, the appellant was six months old at the time, he next went back to Zimbabwe in 2011 and then in 2014. The appellant's mother left him in 2007 when he was 2 years old. The sponsor has been supporting the appellant and his mother financially and there is evidence in the bundle of this support.
>
> 27. The appellant is currently residing with his paternal grandmother in Zimbabwe. The question of "sole responsibility" was settled by the Upper Tribunal in the case of TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, where in the headnote it is stated:
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> > "Sole responsibility is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) has abandoned or abdicated

> responsibility, the issue may arise between the remaining parent and the 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 upbringing, including all the important decisions in 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."

28. I find on the evidence before me, on the balance of probabilities, for the above mentioned reasons that the sponsor in this case has not had the sole responsibility for his son that his mother, the appellant's grandmother has been responsible for the appellant's needs, education and day to care (sic) and decision-making process."

11. Even on the evidence that the FtT took into account it is difficult to understand the reasoning process by which it is concluded that the appellant's grandmother has been responsible for the appellant's *"needs, education and day-to-[day] care and decision-making process"*.

12. The inadequacy of the FtT's reasoning in this regard is, however, significantly accentuated when viewed in the context of the statement of the 29 February 2016. Therein the appellant's father and his wife, *inter alia*, assert that it was the appellant's father who made the decision to transfer the appellant to a different school in 2013 and, in particular, to move him to a boarding school (1.3), that the appellant's father makes welfare decisions concerning the appellant (1.5), that the appellant's father does the appellant's homework with him over the telephone during the holiday period (2.2.8), and that it was the appellant's father who wrote the authorisation letter relating to the registration process for the school.

13. All these matters are relevant to a proper assessment of whether the appellant's father has had sole responsibility for the appellant's upbringing. As I have already identified, nowhere in the FtT's decision is there reference to the statement of 29 February 2016 nor, more significantly, can it be implied from reading the FtT's decision that it had this evidence in mind.

14. Had the FtT taken such evidence into account and found it to be truthful then it would have been open to it to conclude that the appellant's father had, and would continue to have, sole responsibility for the appellant's upbringing. In the face of such evidence, a contrary conclusion would require reasoning of significantly greater depth than that found in the instant decision.

15. I find, therefore, that the FtT erred in considering the wrong immigration rule and, more significantly, in its assessment of whether the appellant's father had sole responsibility for the appellant's upbringing. These errors clearly impinge on the FtT's lawful assessment of whether the ECO's decision to refuse entry clearance leads to a breach of Article 8 ECHR, the sole ground deployed by the appellant in the appeal before the FtT. It is to be recalled in particular that the Immigration Rules reflect the SSHD's (and

ECO's) view as to whether the public interest lies in the proportionality assessment under Article 8. A failure to lawfully assess whether the requirements of the Rules are met clearly, therefore, impinges on the assessment of where the public interest lies in the overarching proportionality assessment required under Article 8.

16. I next turn to the issue of whether such errors should lead me to set aside the FtT's decision. Although it is apparent that the appellant cannot meet the maintenance requirements of paragraph E-ECC of the Rules because the evidential requirements of Appendix FM-SE have not been met I, nevertheless, accept that the FtT's decision should be set aside.

17. The appellant's father now has indefinite leave to remain. Mr Duffy consented, pursuant to section 85(5) of the Nationality, Immigration and Asylum Act 2002, to the Tribunal considering this new matter on a re-making of the decision under appeal. This is of importance because any re-making would now fall to be considered under paragraph 297 of the Rules and not paragraph E-ECC of Appendix FM, as Mr Duffy concedes. This is of benefit to the appellant because under paragraph 297 he is not being obliged to adhere to the evidential requirements of Appendix FM-SE when the financial aspects of the rule are under consideration.

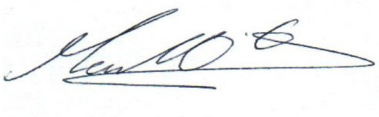
18. Taking all of this into account I conclude that the correct course is for me to set aside the decision of the First-tier Tribunal and to remit the appeal back to the First-tier Tribunal to consider afresh. I re-iterate that the Secretary of State has given consent to consider as a new matter the fact that at the appellant's father now has indefinite leave to remain.

Notice of Decision

The decision of the FtT is set aside.

The appeal is remitted to the FtT to be determined afresh.

Signed:



Upper Tribunal Judge O'Connor Date: 8 March 2018