IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002139
UI-2023-002141

First-tier Tribunal No:
HU/52755/2022
HU/52754/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

DARREN BILSON-ASARE
IVAN BILSON-ASARE
(ANONYMITY ORDERS NOT MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S. Karim, Counsel instructed by Mascot Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 3 October 2023

DECISION AND REASONS

Introduction

1. The Appellants appeal against the decision of Judge Moffatt (hereafter "the Judge") who dismissed their appeals against the Respondent's decisions to refuse their applications for Indefinite Leave to Enter under paragraph 297 of the Immigration Rules.

2. The applications were made on the basis that their father (hereafter "the Sponsor") resides in the UK with Indefinite Leave to Remain and has sole responsibility for their upbringing.

3. Permission to appeal was granted by First-tier Tribunal Judge Sills on 16 June 2023 with no restriction on which Grounds could be argued.

The decision of the Judge

4. In the Judge's decision the following record/findings are made:

    a. The Sponsor has been in the United Kingdom with Indefinite Leave to Remain since October 2016, para. 1.

    b. The Sponsor and the biological mother of the Appellants divorced in 2021 and the Appellants claim that they have lived with their paternal aunt since January of that year, para. 8.

    c. The Sponsor told the Tribunal that his sister could not continue to look after the Appellants as she was old and has an amputated leg, para. 14.

    d. It was also the Sponsor's evidence that the Appellants' mother does not communicate with him; has some contact with the Appellants at times but does not always answer the phone when they call. He also asserted that when the Appellants want anything they call him and he is responsible for taking care of their clothing needs, school fees, money for food and for any other needs they have, para. 15.

    e. The Judge went on to find that there was evidence of regular payments to one of the Appellants since 2019 (para. 26). The Judge also referred to a letter from the aunt indicating that the Appellants came to live with her on 5 January 2021 after the Sponsor and his wife separated (para. 26); in that letter she also states that she is ageing but does not claim that she is unable to continue looking after them or that she has disability to prevent her from doing so (para. 26).

    f. The Judge concluded that there was some inconsistency between the witnesses about how ill the paternal aunt is and to what extent but without any further explanation.

    g. The Judge also observed that the Sponsor's claim that the Appellants' mother's health had deteriorated leading to her not being able to look after them was not corroborated and there were no call logs to show

that the Sponsor had been a constant part of his sons' lives after they returned to Ghana (para. 28).

h. The Judge further criticised the evidence for not corroborating the Sponsor's claim to be financially responsible for the Appellants since 2007 (para. 29).

i. The Judge further concluded that there was no evidence to demonstrate that the Appellant (meaning here *the Sponsor*) made the major decisions in the Appellants' lives (para. 29).

j. The Judge therefore found that the Sponsor had not made out that he has sole responsibility for the Appellants and that the Appellants' circumstances in Ghana were not otherwise exceptional.

Findings and reasons

5. I have ultimately concluded, for the reasons which I set out below, that the Judge did materially err in their assessment of the initial question of sole responsibility under para. 297(i)(e). The sub-rule states: *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*.

6. In TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 the Tribunal formulated the substance of the test in the following way: "*The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life*."

7. In respect of the overlapping point made in Ground 1 and Ground 2, Mr Karim contended that it was simply wrong for the Judge to state at para. 29 of the judgment that there was "*no evidence*" to demonstrate that the Sponsor made the major decisions in the Appellants' lives.

8. In this part of the argument, Mr Karim referred to the oral evidence given by the Sponsor in respect of his role in making those important decisions in the Appellants' lives as well as the detail of that decision making in his witness statement, and the Appellants' joint witness statement which corroborates that narrative, see for instance para. 8.

9. Mr Karim also directed my attention to the summary of the Respondent's representative's submission in the case at para. 19. The Judge records the submission that the Appellants had not demonstrated that they did not have contact with their mother; the proximity of their residence to that of their mother's would suggest that ties not be severed completely and there was no medical evidence to corroborate the aunt's disability. The submission does not appear to challenge the credibility of the core evidence given by the Sponsor and the Appellants as to his involvement in their lives from the UK.

10. Whilst I see some force in Ms Isherwood's submission that the evidence before the Tribunal did not seem to fully engage with some of the adverse points raised by the Respondent in the refusal letters, I nonetheless accept the Appellants' submission that the Judge did materially err at para. 29.

11. It is clearly a mistake of fact for the Judge to say that there was *no evidence* of the Sponsor making the important decisions in the lives of the Appellants when there clearly was. If the Judge meant to say that the evidence about this issue given by the Sponsor and the Appellants in their witness statements was not reliable or otherwise not sufficient to meet the standard of proof, then that should have clearly been stated with appropriate reasoning.

12. I also note that Ms Isherwood did not contest the Appellants' other points in Ground 1 that certain aspects of the key adverse findings made by the Judge at paras. 28 & 29 were not put to the Sponsor either by the Respondent's representative or by the Judge.

13. I fully recognise that the judge is not required to put every point which is an issue to a sponsor/appellant especially where they are legally represented, applying Secretary of State For the Home Department v Maheshwaran [2002] EWCA Civ 173, but the question of whether or not the failure to do this equates to unfairness is one that must be seen in the relevant overall context of the particular appeal.

14. In my view there was procedural unfairness in the Judge not putting to the Sponsor the concerns that they had about, for instance, para. 11 of the Sponsor's witness statement. The Judge, at para. 30, found that this part of the Sponsor's evidence "implies" that he was not aware of how the first Appellant had become involved in church activities or what the second Appellant was doing at the relevant youth club.

15. I conclude that it was unfair for the Judge to make this finding without putting the issue to the Sponsor, this is especially the case when the Sponsor had otherwise detailed his direct involvement in the major decisions in the Appellants' lives in numerous other paragraphs of his statement. I therefore find that the Judge had to put this to the Sponsor in order to ensure procedural fairness.

16. I further conclude that Ms Isherwood had no answer to the point made by the Appellants that the Judge had materially mischaracterised the evidence from the Appellants' school at para. 27.

17. In my judgement it is plainly incorrect for the Judge to say that the school evidence states *only* that the Sponsor was paying the relevant school fees. In my view it is plain that the letter dated 27 August 2021 from Mr Gyimah expressly states that the Sponsor is "*one of the best known parents of the school who acts promptly with his fee payment and responses to issues related to Darren*."

18. I therefore conclude that the Judge materially erred in fact in their consideration of the school evidence when assessing the question of sole responsibility.

19. Overall, I accept Mr Karim's submission that the findings made by the Judge in respect of sole responsibility are disparate and do not adequately focus on the central question asked by this part of the rules, that being: whether the Sponsor in question has the sole responsibility for the major decisions in the children's lives.

20. Whilst the health/disability of the Appellants' aunt was not irrelevant to the evidential landscape which the Judge had to grapple with, I nonetheless consider that this was not the central issue in respect of sole responsibility albeit it would be much more relevant to the alternative question of whether or not there were serious and compelling family or other considerations in para. 297(i)(f).

Notice of Decision

21. I therefore find the Judge did materially err in law, for a number of reasons and that these errors also infect the rest of the Judge's conclusions in respect of exceptionality more broadly. I therefore set the decision aside in its entirety.

DIRECTIONS

22. On the basis that the remaking of the hearing will require full fact-finding, I conclude that the appeal should be remitted to the First-tier Tribunal to be heard by a judge other than Judge Moffatt.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 October 2023