

**Upper Tribunal
(Immigration and Asylum
Chamber)**
OA/13206/2013



Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

On 5th August 2014

Determination

Promulgated

On 20th August 2014

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS ENKH UCHRAL ALTANSHAGAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Jack, Home Office Presenting Officer

For the Respondent: Miss Revill, of Counsel

DETERMINATION AND REASONS

1. The Respondent Enkh Uchral Altanshagai was born on 7th August 1997 and is a minor citizen of Mongolia. I shall hereafter refer to the Respondent as “the Appellant” and to the Appellant (the SSHD on behalf of the ECO Beijing) as “the Respondent” as they were respectively before the First-tier Tribunal.
2. The Appellant had appealed to the First-tier Tribunal against the decision of the Respondent dated 13th May 2013 refusing to grant her entry

clearance to the United Kingdom as the dependent child of her mother Unurbayer Buyanbaatar “the Sponsor”.

3. The main issue before the First-tier Tribunal revolved around whether the Appellant’s Sponsor had sole responsibility for her as claimed. When the appeal came before the First-tier Tribunal the Judge stated at [12] that he had followed the guidance in *TD* (paragraph 297(i)(e): “sole responsibility”) *Yemen* [2006] UKAIT 00049, where it was held that: “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) 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 upbringing, including making all the important decisions in the child’s life...”
4. The First-tier Judge allowed the appeal.
5. The Respondent sought and was granted permission to appeal. The grounds seeking permission argue that the Judge erred in his approach to sole responsibility under paragraph 297 of the Rules. In addition he had made a finding that the Appellant lived in the Philippines when in fact she lived in Mongolia. It was claimed that the Judge’s reasoning for his conclusion that the Sponsor exercised sole responsibility for the Appellant, was defective in that it identified only one important decision made by the Sponsor on behalf of the Appellant which was the decision for the Appellant to live in the UK if her application was successful. There was no analysis of the evidence to show that the First-tier Tribunal had turned its mind to *TD* and addressed the contradictory evidence which had been placed before it. Permission having been granted the matter came before me to determine whether the First-tier Tribunal decision contained legal error such that it needed to be set aside and the decision remade.

The Hearing Before Me

6. Mr Jack on behalf of the Respondent relied on the grounds seeking permission. He submitted that the determination contained a genuine lack of reasons and that the evidence before the Judge clearly pointed to the Appellant living with and being looked after day-to-day by her grandparents not the sponsor.
7. Furthermore in [14] the Judge said that,

“This application is very nicely poised but what ultimately decides the matter is my finding that it is the Sponsor who controls the child’s destiny, in particular whether she resides in the Philippines (sic) or in the United Kingdom if she is permitted...”
8. Mr Jack submitted that it would seem that the Judge had confused this case with another and even if he had not, his approach was incorrect. What he had to decide was whether the Sponsor could be shown to have

continuing control and direction over the Appellant's upbringing and that could only be shown by reference to the evidence of what had occurred in the past. The determination should be set aside and the matter remitted to the First-tier Tribunal for full and clear findings of fact to be made. There was nothing that could be preserved from this determination.

9. Miss Revill on behalf of the Appellant unsurprisingly submitted that the determination should stand. She accepted that paragraphs [13] and [14] contained errors in that the Judge confused the Philippines with Mongolia but said that those errors were not material because if one read the determination as a whole it was clear that the Judge had the Appellant's case in mind. The decision should not be set aside on that basis.
10. She further submitted that paragraph [13] contained findings which were adequate to show firstly that the Appellant's level of contact with her father was according to the Judge something that would not detract from the Sponsor's sole responsibility. The Judge had identified that if the Sponsor does not have sole responsibility it is because it is shared with the Appellant's grandparents. Having formed the conclusion that the Sponsor controlled the Appellant's destiny, the Judge's reasons could be said to be concise but were enough to justify his decision.

Has the Judge Erred?

11. I am satisfied that the determination of the First-tier Tribunal must be set aside for legal error. My reasons for this are as follows. It is clear that the main issue in this appeal revolved around whether the Sponsor could be said to have sole responsibility for the Appellant within the meaning of the Immigration Rules. The Judge referred to the test in *TD* and identified in [13] that if the Sponsor does not have sole responsibility it is because it is shared either with the Appellant's father or with her grandparents. He discounted her father's involvement but did state that clearly her grandparents have day-to-day control but that is merely one factor to consider.
12. Therefore what was before the Judge was the need to resolve the question of whether the Sponsor had continuing control and direction over the Appellant's upbringing or whether such responsibility was shared with the grandparents who had the day-to-day care of her. What the Judge has failed to do is carry out a fact specific analysis of that evidence and resolve those issues.
13. All that he has done is to say that the application is nicely poised but what ultimately decides the matter is a finding that it is the Sponsor who controls the child's destiny. That is an incorrect approach and I find force in Mr Jack's submissions that the determination lacks clear reasons for the conclusions given. That lack of reasoning amounts to legal error such that the decision needs to be set aside and reheard.

14. Because of the lack of a factual matrix in this appeal, I find it necessary to remit this matter for fully analysed findings of fact to be made.

DECISION

15. The First-tier Tribunal determination is set aside for legal error. The matter is remitted to that Tribunal (not Judge M R Oliver) for a full rehearing of the appeal and for fresh findings of fact to be made.

No anonymity direction is made

Signature

Judge of the Upper Tribunal

Dated