



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/20625/2012

THE IMMIGRATION ACTS

Heard at Birmingham
on 2nd May 2014

Determination Promulgated
on 30th May 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MANPREET KAUR

Respondent

Representation:

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.

For the Respondent: In person but assisted by Mr Singh her sponsor.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Sommerville promulgated on 5th February 2014 in which he allowed the appeal against the refusal of entry clearance for the purposes of settlement by Miss Kaur with her father in the United Kingdom.
2. Miss Kaur is a citizen of India born on 24th January 1995. The date of decision is 27th September 2012. The sponsor attended the hearing and gave evidence. Judge Sommerville sets out his findings from paragraphs 12 of the determination. He found the sponsor to be a truthful witness. It was found Miss Kaur lives with her mother and was at the date of the application an 18-year-old young woman whose mother would have been involved in certain aspects of

her life and that following TD an exceptional case would have to be shown [15]. The Judge then made the following findings in paragraphs 16 and 17 of the determination:

16. However, I propose not to follow TD because I note that that decision is now almost 8 years old and in the intervening period the world has changed. In those 8 years there has been an exponential growth in communication technology. The appellant and the sponsor have been able to take advantage of mobile phone technology to an extent which was not so when TD was decided.
 17. I believe that the time has come for this Tribunal to recognise that by means of mobile phones and Skype a parent and child who are separated by continents can in effect have a relationship which is almost as strong and influential as if they were living together. This is particularly so, as here, where the “absent” parent has retained strong family connections and there is a culture of strong family values which are upheld by the head of the family (usually but by no means always, the father). By these modern means of communication the sponsor has maintained his position as head of the family and as such I find that he has in fact exercised sole responsibility for the appellant.
3. In relation to the maintenance issue Judge Sommerville records that the Presenting Officer accepted that the sponsor earned £20,000 a year, that the minimum level required to meet the ‘Social Security’ benefit levels is £124.32 per week and accordingly that the sponsor's income exceeded the required minimum level of funding [18].

Error of law finding

4. I find Judge Sommerville has made legal errors in the determination material to his decision to allow the appeal and now give my reasons.
5. The Entry Clearance Officer was not satisfied that the UK-based sponsor has sole responsibility for Miss Kaur’s upbringing (297 (ie)) or that the sponsor was in receipt of the income and employment claimed, leading to it being said that Miss Kaur had not proved that she could be maintained without recourse to public funds (297 (v)).
6. Judge Sommerville correctly identified that the relevant case when assessing sole responsibility is TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049. In this case the Tribunal said 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. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".

7. It must have been accepted by Judge Sommerville on the evidence that the sponsor did not have sole responsibility for in paragraph 15 he refers to the need for an exceptional case to be shown, notwithstanding his later contradictory finding that the sponsor had sole responsibility [17].
8. The Judge then appears to attempt to circumvent this requirement by justifying not following TD which is a reported determination of the tribunal. It is not a determination based upon country conditions that may have changed significantly after a period of eight years but a case that sets out guidance on the approach to be taken when assessing whether the facts of a particular case establish that the necessary test has been met. The fact that technology has moved on and there are now more advanced means of communication than may have been available at the date TD was decided, although it has not been shown that Skype and other such means of communication were not available in 2006, did not entitle the Judge to depart from such guidance. Whether responsibility is shared or exercised by one parent or whether exceptional circumstances exist, is a question of fact. The existence of modern means of communication may prove the ability to maintain contact between the absent parent and the child but the important question the Judge should have asked is whether the nature of those communications and other events that are relevant to this child proved the sponsor had sole responsibility or satisfied the test of exceptionality. I find that the Judge has erred in departing from the guidance in TD without justification for doing so and without giving adequate reasons for this course of action in the determination.
9. I also find the Judge materially erred in concluding in paragraph 18 that a concession was made where there is no evidence of any such concession. The income support figure provided by the Judge is incorrect as the correct figure is £210.03 per week. The Presenting Officers note of the hearing indicates that she only accepted that the sponsor has an income of £12,000 per annum which is less than the £14,000 required to satisfy the minimum level required.
10. I also note the finding by the Judge that Miss Kaur was an 18 year old living with her mother at the date of the application which is also factually incorrect as she was 17. Had she been 18 she would have not been able to apply by this route in any event.
11. I set the determination aside although the findings regarding the nature of the relationship, the means of communication, and sponsors immigration history shall be preserved findings.

Discussion

12. In proceeding to remake the decision oral evidence was heard from the sponsor Mr Singh and all available documents considered. He submitted a number of additional documents regarding his income which is derived from his work as a preacher and rental income, although before the Upper Tribunal the evidence does not substantiate his claim to receive an income of a sufficient level to enable Miss Kaur to succeed under the Rules.
13. Mr Smart also raised the question of adequacy of accommodation as the sponsor's evidence was that the property he lives in is occupied by others who pay rent with there being no available rooms for Miss Kaur unless one of those tenants vacates the property. This does not appear to have been evidence that was shared with the First-tier Tribunal or the Entry Clearance Officer. Although Mr Singh claimed that those in occupation would vacate to allow Miss Kaur to live at his house this was not supported by any evidence from the tenants.
14. I also find Miss Kaur has not discharged the burden of proof upon her to show there is sufficient evidence to avoid reliance on public funds. Mr Singh has provided documentary evidence including tax returns but the only complete tax return is for the tax year ending 2012 which reflects his April 2011 income and which shows a gross income of no more than £7400. Insufficient evidence has been adduced to substantiate the claim there was an income in excess of £12,000 per annum available which is the sum required to meet the minimum income support payment at the date of decision. There is also the issue that part of Mr Singh's income is made up of the rental income and if the tenants have to vacate to allow Miss Kaur to occupy his property with him, that income will be lost reducing the available income further. I found Mr Singh somewhat evasive when discussing this element of the case. The documents show the tax he has paid and bank statements show some receipts but not his complete financial situation. The HSBC statement he produced for 2014 is post decision evidence.
15. Although Mr Singh submitted that he has sole responsibility for his daughter this has not been established on the evidence. Judge Sommerville was correct to find that responsibility is shared between Mr Singh and Miss Kaur's mother and that the test is therefore whether there are exceptional circumstances such as warrant a grant of leave. Such exceptionality has not been proved on the facts. I accept that Mr Singh and his daughter maintain a close relationship and that he gives her advice when required but it is clear that her mother is in fact her primary carer and it has not been established that Miss Kaur's position in India gives rise to any cause for concern in relation to her well-being at this time or that in refusing the application such consequences would arise.
16. I therefore find Miss Kaur has failed to discharge the burden of proof upon her to the required standard to show that at the date of decision she was able to

meet the relevant requirements of the Immigration Rules. On this basis the appeal must fail.

Decision

- 17. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

- 18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee Award.

Note: this is **not** part of the determination.

- 19. In the light of my decision to re-make the decision in the appeal by dismissing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award as the appeal is without merit and has been dismissed.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30th May 2014