



IAC-AH-DN-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/02775/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons Promulgated
Birmingham
On 17th July 2015**

On 23rd July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR PRADIP KUMAR MODAK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Ms K Dasani (Counsel)

For the Respondent: Mr D Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Somal, promulgated on 23rd February 2015, following a hearing at Nottingham on 20th February 2015. In the determination, the judge allowed the appeal of Pradip Kumar Modak. The Respondent Secretary of State, subsequently applied to, and was granted, permission to appeal to the Upper Tribunal and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, who was born on 20th April 1996. He is the child of the Sponsor, Mr Dipak Kumar Modak, a person present and settled in the UK. The Appellant challenges the decision of the Respondent dated 30th January 2014 that on a balance of probabilities, his sponsoring father did not have sole responsibility for his upbringing or that there was an absence of serious and compelling family or other considerations which did not make his exclusion undesirable from the UK.

The Appellant's Claim

3. The Appellant's claim is that, although he is living with his mother in India, since his father came to the UK in August 2004, his mother's health has progressively deteriorated such that she is unable to look after herself "for her basic needs let alone take care of their son" (paragraph 8). She has hepatitis and problems with her hearing and struggles with colds. She is unable to cook for the children or to clean the house. There is a lady who comes to the house every day to shop, cook, and clean and another man who comes to take care of the house and to undertake household chores. He relies upon a letter from a doctor dated 12th July 2013 stating that the mother has chronic hepatitis and recommends that she has three months' bed rest. (See paragraph 10).

The Judge's Findings

4. The judge held that the sponsoring father, Dipak Modak, carried a substantial responsibility for his son in India. She set out his activities in relation to their son. First, that he "Sends money for the Appellant's maintenance, which his mother uses for all his financial needs and upkeep". Second, that "The Sponsor has financially supported the Appellant as evidenced through the money transfers. The Sponsor has stated that he alone made all the important decisions about the Appellant". The judge observed that,

"The fact that the Appellant's mother took day-to-day care of him but is no longer able to and the fact that his father lives in the UK which has been his home for the last for over ten years makes exclusion of the Appellant undesirable given his father lives in the UK".

Third, that "The parent who lives abroad cannot be described as having abdicated responsibility for the Appellant", because, "The Sponsor's evidence was clear that he alone made decisions about the Appellant". Fourth, the judge considered the specifics of the Sponsor's responsibility and pointed out that, "In particular, he has given instructions about which school his son should attend and which college. He has also chosen the son's tutor ..." (paragraph 12). On this basis, the judge was clear that the sponsoring father in the UK had exercised sole responsibility for the child and that his exclusion would be undesirable.

5. In particular, the judge observed that as far as the sponsoring father is concerned, "His wife's health deteriorated and that is confirmed by the evidence of the doctor" (paragraph 13).

6. In relation to Article 8, since the father's departure for the UK in 2004, what has transpired is that,

"There has been daily contact through phone calls and regular visits by his father who last visited in October 2014 when he stayed with them for three weeks. His mother is ill and getting worse and is unable to care for him. On the facts of this particular case, I find it would not be reasonable to expect family life to continue with indirect contact and visits from the Sponsor ..." (paragraph 14).

The appeal was, accordingly, also allowed on Article 8 grounds.

Grounds of Application

7. The grounds of application state that the judge failed to have regard to the criteria in regard to assessing sole responsibility as set out in **TD (paragraph 297(i)(e): sole responsibility) [2006] UKAIT 00049**. Second, that the judge failed to provide adequate reasons for finding that there were serious and compelling reasons to make exclusion of the Appellant undesirable. Third, that the reasoning in relation to Article 8 was also flawed.
8. On 27th April 2015, permission to appeal was granted on the basis that the judge made no reference to the criteria set out in **TD**.

Submissions

9. At the hearing before me on 17th July 2015, Mr Mills, appearing on behalf of the Respondent Secretary of State, handed up to the bench a copy of **TD (Yemen)** and **Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 00088**. He made the following submissions. First, this was a case where a 17 year old was applying to join his father in the UK in circumstances where, as the judge recounted, the Appellant was a child who "Stayed at home and helped look after his mother but could not do anything personal due to his gender and his wife relied upon the lady who visited each day to do such tasks for her" (paragraph 9) what this suggested was that the mother and the Appellant child lived together in the same household. It is in these circumstances that the judge got the "sole responsibility" test wrong. This was because the case of **TD (Yemen)** makes it clear that, although the test is whether the parent has continuing control and direction of the child's upbringing, including making all the important decisions in the child's life, nevertheless, "Where both parents are involved in a child's upbringing, it will be exceptional that one of them will have 'sole responsibility' then". Second, this was not a case where the mother had abandoned parental responsibility. Third, the judge had not explained what was exceptional about the facts of this case, in circumstances where the mother and child were living together in the same household. Indeed, the judge had not even applied **TD (Yemen)**. Fourth, the medical evidence only stated that, given the mother's hepatitis condition that the doctor "recommended she have three months' bed rest" (see paragraph 10). Finally, it was arguable that the Rules here, in

relation to the sole responsibility test, are a complete code because they set out a myriad of different circumstances to be taken into account. In that event, recourse could only be had free-standing Article 8 rights, if there was something exceptional or unusual about the facts of the case. Mr Mills asked me to make a finding of an error of law, and then to proceed to dismiss the appeal on the basis of the evidence that was before the judge.

10. For her part, Ms Dasani submitted, that both paragraph 297(e) and paragraph 297(f) were in issue before the judge, which meant that both the question of “sole responsibility” and the question of “exclusion undesirable” were in issue.
11. Second, the case of **TD (Yemen)** was within the contemplation of the judge because arguments made by the Appellant’s representative before the Tribunal were based upon these cases.
12. Third, if one looks at the determination as a whole in the round it was clear that there was no error of law. The fact was that the mother was unable to look after the Appellant child because she was unable to both cook herself or to even look after herself. This was plain from paragraph 8 of the determination. There were at least two occasions on which the judge had made it clear that the Appellant’s mother could not even look after herself.
13. Fourth, in **TD (Yemen)** itself, it was clear that there was a reference to cases from the European Court of Human Rights where a mother had remained involved in the child’s upbringing, and yet there was a finding that sole responsibility lay with the father. My attention was drawn to the case of **Alagon v ECO, Manilla [1993] Imm AR 336**. In that case the Appellant sought entry clearance to join his mother in the UK shortly before his 18th birthday. His mother had come to this country when he was aged 8 and had only made one visit to see him when he was 13 years old. The Appellant lived in the house with his father who was divorced from his mother. The house was owned by her mother. The mother provided most of the financial support for the Appellant. Relatives who lived relatively closely saw and provided some financial and other support to the Appellant. The father did not contribute financially to the Appellant’s support and himself benefited from living in the house and the financial contributions from the mother. The mother alone was consulted about all major decisions such as education and the Appellant’s future and maintenance. The father was not consulted and he took no major decisions about the Appellant. In that case, the facts showed that it was accepted that the father played “at most a passive role” in the Appellant’s life. Lord Prosser acknowledged (at page 344) that it was significant that the Appellant was living with her father, “Since any responsibility exercised by her father need not be derived from her mother, and might put in doubt the mother’s ‘sole responsibility’”.

14. Even so, the judge concluded that the Appellant's mother had indeed established "sole responsibility" for her on the basis that (at page 345), "The Adjudicator effectively found that the father is doing nothing for the child beyond the bare fact of living with her on reasonably good terms ... Moreover ... that is in the house belonging to the mother ...". The facts of this case, submitted Ms Dasani, were properly explicated in the case of **TD (Yemen)** itself (at paragraphs 39 to 42).
15. Furthermore, the principles to be derived from this were actually explained in **TD (Yemen)** itself by the Tribunal which observed that,

"In order to conclude that the UK based parent had 'sole responsibility' for the child, it would be necessary to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK based parent and was otherwise totally uninvolved in the child's upbringing ..." (Paragraph 46).
16. Indeed, what this meant was that the proper test was that set out at paragraph 52(ix) of **TD (Yemen)** itself. This made it clear that,

"The test is, not whether anyone else has day-to-day responsibility, but whether the Appellant has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, sole responsibility is shared and so not 'sole'".

On this basis, submitted Ms Dasani the judge was correct to make the findings that she did. There was no error of law.

17. In reply, Mr Mills submitted that this case was not remotely like **Alagon** because that was the case of a Filipino woman who had come to the UK to work and had left her husband behind to live with the children and the maintenance and financial support was all being provided by the mother who was working in the UK. In this case, there is only a temporary separation between the mother and their child. It cannot really be said that the mother does not have any role to play in the child's upbringing. The medical evidence only shows that the doctor recommended that the mother has three months' rest.

No Error of Law

18. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. The Upper Tribunal is a supervising Tribunal. It is not for this Tribunal to second guess the decision of the First-tier Tribunal. It is not for this Tribunal to intervene to offset a decision of an expert Tribunal below which has heard the evidence, which this Tribunal has not, and has come to firm findings on the basis of that Tribunal. This Tribunal can only intervene if the Tribunal below has fallen into error.
19. It is well-known that the standard to be applied is that set out by the words of Brooke LJ in **R (Iran) [2005] EWCA Civ 982**, where his Lordship

stated that, “It is well-known that ‘perversity’ represents a very high hurdle” (paragraph 11). His Lordship went on to explain that “Far too often practitioners use the word ‘irrational’ or ‘perverse’ when these epithets are completely inappropriate” (in paragraph 12).

20. On the facts of this case, it is not the case that, as Mr Mills maintained that
“The mother has separated on a temporary basis only from the Appellant child. The evidence before the judge was that as far as the Appellant child was concerned, he stayed at home and helped look after his mother but could not do anything personal due to his gender and his wife relied upon the lady who visited each day to do such tasks for her” (paragraph 9).
21. The evidence was that, “The Sponsor ... had always made the key decisions in his son’s life ... his father had also decided which tutor to appoint outside college for the Appellant ... the Appellant spoke with him every day ...” (paragraph 9). In this sense, the Appellant’s case is not dissimilar from the facts as found by the European Court in **Alagon**. Nothing in **TD (Yemen)** militates against this.
22. The case of **TD (Yemen)** does make it clear that where both parents are involved in the child’s upbringing it will be exceptional for one of them to have sole responsibility. In this case, however, the other parent was not involved in the child’s upbringing.
23. The findings of the judge were that she could barely look after herself. In these circumstances, the position was “exceptional” in terms of the care provided by the sponsoring father in the UK and the support that he gave to the Appellant.
24. The case of **TD (Yemen)** is clear at paragraph 52(ix) that the test is not whether anyone else has day-to-day responsibility but which parent has continuing control and direction of the child’s upbringing. The matter only has to be determined on a balance of probabilities.
25. On that basis, the decision made by the judge was entirely open to her. It is not for this Tribunal to second guess that decision.

Decision

There is no material error of law in the original judge’s decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

23rd July 2015