



IAC-BH-PMP-V1

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

Appeal Number: OA/06468/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2016
Prepared 8th January 2016**

**Decision & Reasons Promulgated
On 15th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

BS

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant: Miss C. Querton of Counsel

For the Respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of The Gambia born on 7th September 2006. She appealed against a decision of the Respondent dated 30th April 2014 to refuse to grant her indefinite leave to enter the United Kingdom as the child of her father [FS] a citizen of Gambia with indefinite leave to remain in the United Kingdom ("the Sponsor"). The Respondent had refused the application because he doubted the relationship between the Sponsor and the Appellant (this is no longer in dispute). Although the Appellant's

mother had said she was unable to look after the Appellant (due to overcrowding) that did not mean she played no role in the Appellant's upbringing. The Appellant's appeal was allowed at first instance by Judge of the First-tier Tribunal Callow sitting at Taylor House on 31st March 2015. The Respondent appealed against that decision and in a decision dated 12th November 2015 I set aside the decision at first instance and directed that the appeal be re-heard. On 12th November 2015 I gave my written reasons for finding a material error of law in the first instance decision such that it fell to be set aside. Attached to this determination is a copy of those reasons. For the sake of convenience I will continue to refer to the parties as they were known at first instance. The issue in this case is whether the Sponsor can show that he had sole responsibility for the Appellant.

The Determination at First Instance

2. At paragraph 3 of his determination the First-tier Tribunal Judge set out the facts in the case at the date of the Respondent's decision:
 - (i) The Appellant was 7 years old and was a pupil at [A- School S-]. She was only issued with a birth certificate two months before she made an application to join her father in the UK. Unlike the law in the UK for example there is no requirement to register a birth within the defined period. The norm is that birth certificates are generally applied for when the need arises. The same situation prevailed with her siblings. Birth certificates were applied for prior to them making applications for a clearance and which were not reasons for refusal.
 - (ii) The Sponsor subsequently married the Appellant's stepmother and was granted entry clearance to the United Kingdom as a spouse on 25th August 2010. He arrived to take up residence on 1st October 2010 and on 28th January 2013 was granted indefinite leave to remain. Accordingly he is present and settled in the UK. As the Sponsor had separated from the Appellant's mother at the time of his departure for the UK, arrangements were made for the Appellant and her siblings to live with their paternal aunt. The mother, due to overcrowding at her own residence, was unable to accommodate the children. She surrendered day-to-day care to the aunt subject to the sole responsibility of the Sponsor. Subsequent to taking up residence in the UK the Sponsor has regularly returned to Gambia to facilitate his children's applications and to monitor their situation. When he personally applied for entry clearance he made no mention of the Appellant as at that time her birth had not been registered. It was his understanding that the mention of his children were subject to proof of a birth certificate.
 - (iii) In her affidavit the aunt confirmed that the children were left in her care and that all the important decisions concerning their lives with regard to their welfare, upbringing and education were made by the

Sponsor. The Sponsor regularly remitted varying sums for the upkeep of the children and to pay their school fees.

3. The Judge cited both **TD [2006] UKAIT 00049** and **Buydov [2012] EWCA Civ 1739**. The test of whether responsibility for a child's upbringing was sole was a factual matter to be decided upon all the evidence. The Judge accepted that the facts showed that the Sponsor was the father of the Appellant and he was solely responsible for her despite the proximity of the Appellant's mother (who was said to live about a 35 minute drive away). The Sponsor made all the important decisions in the Appellant's life and continued to be solely responsible for her wellbeing.
4. The Respondent appealed and following a hearing on 22nd October 2015 I indicated that I would set aside the First-tier decision in this case as the Judge had not dealt properly with the second part of **TD (Yemen)** that in the case of a parent still alive whether that parent has effectively abandoned the child. The Respondent had made the point in the refusal letter that even if the Appellant's mother had surrendered day-to-day care to the paternal aunt that was insufficient to show that the Appellant's mother had abandoned the Appellant. That issue remained outstanding. The Appellant needed to show more evidence on the point of her mother's involvement than had been produced thus far. I gave directions for further evidence to be adduced and the case was listed for a re-hearing.

The Proceedings in Relation to the Appellant's Sibling

5. The Appellant had an older brother [T] born 21st March 1994. He made an application to the Respondent in January 2012 for leave to enter and settle in the United Kingdom as the dependent son of the Sponsor in this case. That application was refused on 1st March 2012 but was reversed on appeal by Judge of the First-tier Tribunal Whalan sitting at Taylor House on 13th February 2013. Judge Whalan had noted that the Sponsor at that time had three children in The Gambia; [T], the Appellant in the instant case before me and another daughter. All three children had lived with the Sponsor until the Sponsor left The Gambia in October 2010. Judge Whalan noted that the children had gone to live with the Sponsor's sister and he also noted the money transfers made by the Sponsor to The Gambia.
6. Judge Whalan had before him affidavits of [T], the paternal aunt who was looking after the children and the mother of the children. He found that they were consistent with the Appellant's case that the children had gone to live with their aunt and not their mother as she was unable to accommodate them her residence being overcrowded. The Judge found the Sponsor to be a straightforward, clear and credible witness of fact who gave his written and oral evidence consistently without apparent exaggeration or embellishment. He found that the Sponsor had exercised sole responsibility for the care of [T] and allowed the appeal. That decision was relied upon in the substantive re-hearing of the appeal before me but was not produced at the error of law hearing.

The Substantive Re-Hearing Before Me

7. The Sponsor filed a further statement dated 23rd December 2015 in which he said that the Appellant's mother had abdicated her responsibilities. It had been difficult when his relationship with the mother had ended. She had left the children with him and moved on. He only sought her consent to the entry clearance application "out of respect". In oral testimony the Sponsor explained that by respect he was referring to her position as the child's mother which he felt needed to be respected whatever the problems that he and she had between them as adults. His statement reiterated that his sister the paternal aunt would not take any decisions regarding the welfare of his children without consulting him first. In oral testimony he confirmed that his sister had never consulted the children's mother. The affidavit produced by the children's mother (which had been relied upon both in relation to the proceedings before Judge Whalen and the proceedings before Judge Callow) had been obtained by his sister. He himself had not been in contact with the Appellant's mother over the obtaining of the affidavit.
8. When he had left the children with his sister he had assured her that as soon as he was settled in the United Kingdom he would seek to take the children from her. He had not spoken to the children's mother about that. The children's mother had moved on in her life, she had a new partner. She was not involved at all with the children between 2007 and 2010 when he the Sponsor was still in The Gambia. When the Appellant went to give her DNA sample she had been accompanied by her aunt the Sponsor's sister.
9. In cross-examination he was asked why the affidavit from the children's mother had said throughout that she could not look after the children because of accommodation problems rather than saying in clear terms that she the mother had no responsibility for the children. The Sponsor replied he did not know why that was the case but the children's mother spoke Wolof but the affidavit was made in English. The Appellant did still have contact with her mother most recently over Christmas and New Year when the Appellant's mother came to visit the Appellant at the paternal sister's house.

Closing Submissions

10. In closing for the Respondent reliance was placed on the refusal letter. The issue was whether the Sponsor could demonstrate sole responsibility for the Appellant's care. The affidavit from the Appellant's mother was not given in the clearest terms which was possibly where a lot of the problems in this case arose from. The decision in relation to other family members (for example Judge Whalen's decision) did make difficulties for the Respondent's position in this case but it was clear that there was still some involvement in the child's life by the Appellant's mother.

11. In closing for the Appellant Counsel relied upon her skeleton argument. The findings of fact from the First-tier had been preserved. The additional evidence now provided by the Sponsor to clarify the issues put the matter beyond doubt. The Tribunal could be satisfied that the Appellant's mother had no involvement in the Appellant's life. Reliance was placed on the decision of Judge Whalen. Due to the DNA evidence the parental relationship between the Sponsor and the Appellant was no longer disputed. When the relationship between the Sponsor and the Appellant's mother broke down all three of their children went to live with the Sponsor and he was effectively a single parent. His evidence had been consistent about that throughout. The purpose of getting the affidavit from the Appellant's mother was to show what the position was. There was some contact between the Appellant and her mother on a yearly basis at the sister's house. That had been stated previously.
12. The Sponsor's evidence could be taken at face value, he had been found to be credible in the earlier proceedings. If in fact the mother's affidavit had been drafted in terms of the Immigration Rules it would have been criticised as being self-serving. In any event the Sponsor himself was not sure how the affidavit had been prepared. The Appellant's mother had evidently had some assistance in drafting the affidavit but it would have been less plausible if worded in exact terms. The same wording had been approved by Judge Whalen in the earlier appeal and could be approved now. Contact did not preclude the Sponsor from having sole responsibility.

The Relevant Case Law

13. In **TD (Yemen)** the Upper Tribunal had directed themselves that the question of sole responsibility was a factual matter to be decided upon all the evidence. Where one parent was not involved in the child's upbringing because he or she had abandoned or abdicated responsibility the issue might arise between the remaining parent and others who had day-to-day care of the child abroad. The test was whether the parent had continuing control of and direction over the child's upbringing including making all the important decisions in the child's life. However where both parents were involved in the child's upbringing it would be exceptional that one of them would have sole responsibility.
14. In this case it had been found as a fact by Judge Callow that whilst the Appellant's aunt, the Sponsor's sister, might have day-to-day care of the Appellant the Sponsor had continuing control and direction over the Appellant's upbringing including making all the important decisions in the Appellant's life. The issue was whether the Appellant's mother could be said to have abandoned or abdicated responsibility. In arriving at their decision in **TD (Yemen)** the Upper Tribunal carried out an extensive review of the jurisprudence up to that date. At paragraph 44 the Tribunal suggested in most cases (involving two parents) a parent based in the child's own country would be said to have abdicated any responsibility for the child "by disappearing or taking no part in the child's upbringing".

15. The responsibility was shared where a child had both parents involved in its life. It would run counter to the policy of family unity to admit a child for settlement where the parent abroad was caring for the child and involved in its upbringing. (Paragraph 48). Where one parent had disappeared from the child's life and so relinquished or abdicated his or her responsibility for the child the starting point must be that it is the remaining active parent who has sole responsibility for the child. (Paragraph 49). At paragraph 52 the Upper Tribunal summarised the approach to the question of sole responsibility which was a practical obligation not a theoretical one. Who in fact was exercising responsibility for the child? "If it is said that one of the parents was not involved in the child's upbringing one of the indicators for that would be that the other has "abandoned or abdicated his responsibility. In such cases it may well be justified that that parent no longer has responsibility for the child".
16. **TD (Yemen)** was further considered by the Court of Appeal in the case of **Buydov**. At paragraph 18 the Court of Appeal noted that in a two parent case the usual starting point would be that both parents had responsibility for the upbringing of the child. At paragraph 22 the Court of Appeal stated that it would usually be relevant to enquire whether one parent had wholly abdicated responsibility because if they had it was much more likely that the other parent would have sole responsibility "but the converse does not necessarily follow". In **Buydov** the Tribunal below had found that the parent not with the day-to-day care and control discussed the child with the child's mother and maintained a genuine and active interest in the child's education.

Findings

17. Applying the ratio of those two cases to the facts in the instant case before me, the extent of the Appellant's mother's involvement in the upbringing of the Appellant is to have occasional contact with the Appellant at the address of the paternal aunt and some consultation for example over the decision to apply for entry clearance. The Sponsor's evidence was that in consulting the Appellant's mother he was motivated by his acknowledgement that the Appellant's mother was the child's mother and that position needed to be respected. It was not that she was consulted because that was the pattern of behaviour between the parents (as by contrast it had been in the case of **Buydov**). Whilst therefore it cannot be shown that the Appellant's mother has abandoned the Appellant because she still figures in the Appellant's life, it is fair to say that on the evidence produced she has abdicated responsibility for care of the Appellant.
18. That was the matter which was not conclusively dealt with at first instance in this appeal but which having heard the further evidence in this case I am now satisfied about. It is supportive of the Appellant's case that in previous proceedings (which do not appear to have been appealed) the Sponsor was found to be a credible witness and it was found that the Appellant's mother did not have responsibility for the Appellant's older brother [T]. That is persuasive but not conclusive since each case must be

looked at on its own facts as the Upper Tribunal in **TD** made clear. On the facts in this case, I am satisfied that it is more likely than not that the Appellant's mother has abdicated her responsibility for the care of the Appellant and that day-to-day care is exercised by the Appellant's aunt under the direction of the Sponsor. The Sponsor can be said to have sole responsibility for the Appellant within the definition of paragraph 297 of the Immigration Rules. That being so the Appellant's appeal against the decision of the Respondent falls to be allowed. The DNA evidence shows conclusively that the Sponsor is indeed the father of the Appellant and I am satisfied for the reasons given that he has sole responsibility for the Appellant.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have re-made the decision by allowing the Appellant's appeal against the Respondent's decision to refuse leave to enter.

Appellant's appeal allowed.

~~I make no anonymity order as there is no public policy reason for so doing~~

Signed this 14th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft

**TO THE RESPONDENT
FEE AWARD**

The Judge at first instance declined to make a fee award as it had been necessary for the Appellant to submit documents in support of the appeal for it to succeed, documents that were not before the Respondent. Although I have re-made the decision and allowed the appeal, I see no reason to go behind the decision at first instance and I too decline to make a fee award in this case.

Signed this 14th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft



IAC-AH-DP-V1

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

Appeal Number: OA/06468/2014

THE IMMIGRATION ACTS

**Heard at Taylor House
On 22nd October 2015**

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BS

Respondent

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer

For the Respondent: Ms Bassiri-Desfouli of Counsel

REASONS FOR FINDING AN ERROR OF LAW

1. The Respondent is a citizen of the Gambia born on 7th September 2006. She appealed against the decision of the Appellant dated 30th April 2014 to refuse to grant indefinite leave to enter the United Kingdom as the child of her father [FS], a citizen of Gambia with indefinite leave to remain in the United Kingdom ("the Sponsor") pursuant to paragraph 297 of the Immigration Rules. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Callow sitting at Taylor House on 31st March 2015. The Respondent appeals with leave against that decision.

2. The issue in the case was whether the Sponsor could show that he had had sole responsibility for the Respondent. The Appellant in refusing the application had doubted the relationship between the Sponsor and the Respondent and had doubted whether it was the case that the Respondent's mother played no role in the Respondent's upbringing.
3. The Judge set out the Respondent's case at paragraph 3 of his determination and at paragraph 11 said that those facts had been established on a balance of probabilities. The Sponsor was the father of the Respondent and he was solely responsible for her despite the proximity of her mother and the fact that the Respondent lived with her aunt. The Sponsor made all of the important decisions in the Respondent's life and continued to be responsible for her wellbeing.
4. The Appellant appealed against the Judge's decision arguing that he had failed to give adequate reasons for his findings on material matters. There was no evidence that the Respondent's mother had abdicated her responsibilities for the Respondent but only that she had given up her residence due to overcrowding. Nor was there any evidence that she had no involvement in the Respondent's life. That she had left the Respondent in the care of an aunt due to overcrowding itself suggested that the Respondent's mother had some involvement. There was no evidence of sole responsibility held by the Sponsor. In granting permission to appeal the First-tier found there was an arguable error of law as the Judge had made findings in circumstances where it was unclear as to the evidence on which those findings had been made. In particular whether the child's mother had any ongoing responsibility for the child was not addressed.
5. At the error of law hearing before me it was argued by the Appellant that there was very little evidence as to just what the set up was in the Gambia for the care of the Respondent.
6. On behalf of the Respondent Counsel argued that the grounds seeking permission to appeal had raised matters which had not been in the original refusal letter from the Entry Clearance Officer for example whether affidavits from family members should not have been considered by the Judge. The Respondent's siblings had been granted leave to enter the United Kingdom following an earlier appeal hearing in another case at which the credibility of the relationship was accepted. The Judge had accepted the Sponsor's explanation as to the delay in producing the Respondent's birth certificate. In response the Presenting Officer stated that the Judge needed to make clear why he had found in the Respondent's favour, one could not see that the Judge had looked at all the requirements. The earlier determination referred to (in relation to the Respondent's claimed siblings) had not been produced.

Findings

7. The Judge correctly directed himself that the relevant authority in this case was that of **TD (Yemen) [2006] UKAIT 00049**. Deciding who was the

person who had responsibility for a child's upbringing and whether that responsibility was sole was a factual matter to be decided upon all the evidence. The difficulty was that the Judge did not properly consider the second part of **TD (Yemen)** that in the case of a parent still alive whether that parent has abandoned the child. In adopting his summary of the Appellant's case at paragraph 3 the Judge's finding on this point was confined to what he had said at paragraph 3(ii) that the Respondent's mother had surrendered day-to-day care of her "to the aunt subject to the sole responsibility of the Sponsor". Whilst the Judge summarised the aunt's affidavit that the children that is to say the Respondent and the Respondent's claimed siblings were left in the aunt's care and that all important decisions were taken by the UK based Sponsor, the Judge did not state in terms that the Respondent's mother had abandoned the Respondent. Making an arrangement with her ex-husband's relative to have day-to-day care of the Respondent was not sufficient to be able to draw an inference that the mother had abandoned the child. There was therefore a gap in the Judge's reasoning which was pointed out in the grant of permission.

8. At the conclusion of the hearing I indicated that I found an error of law and that the matter would have to be reheard at a later date in the Upper Tribunal. It was not necessary for the case to be remitted back to the First-tier Tribunal as there had already been a substantial consideration of evidence in this case. Given the error pointed out above for the Respondent to be able to succeed in her appeal against the Entry Clearance Officer's decision, she would have to show more evidence than has been produced thus far. I therefore gave directions as follows:
 - (1) Leave to the Appellant to adduce DNA evidence to be filed at court and served on the Respondent Entry Clearance Officer at least fourteen days before the next hearing.
 - (2) Leave to the Sponsor to file and serve an updated statement if so advised.
 - (3) The case be listed for rehearing at the first available date time estimate 2 hours.

Signed this 12th day of November 2015

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Deputy Upper Tribunal Judge Woodcraft