



IAC-CH-SA-V1

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

Appeal Number: OA/13098/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 19<sup>th</sup> April 2016**

**Decision &  
Promulgated**

**On 9<sup>th</sup> May 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

**MR MARK JOHN BAGUNU MACARUBBO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms S Jegarajah, Counsel

For the Respondent: No Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of the Philippine born on 16<sup>th</sup> April 1998 and 16 years 2 months at the date of his application for entry clearance to join his sponsoring mother in the United Kingdom. The respondent refused the

application on 17 September 2014, on the basis that he failed to establish that his mother had sole responsibility for him.

2. The Appellant appealed on 15<sup>th</sup> October 2014, the grounds set out in a covering letter from the Sponsor were limited to asserting:
  - (a) “that mother is the sole person who is responsible for upbringing son.”
3. Judge Khawar, following a hearing on 11<sup>th</sup> June 2015, in a decision promulgated on 1<sup>st</sup> September 2015 dismissed the appeal.
4. Permission was granted on renewal to the Upper Tribunal by Judge Goldstein on 15<sup>th</sup> February 2016 in the following terms:
  1. *The renewed grounds continue to rely upon the original grounds submitted in support of the first application for permission to appeal.*
  2. *Without wishing to unduly raise the appellant’s hopes, I am persuaded that the grounds raise arguable issues as to whether the First-tier Tribunal Judge was entitled in law to reach the conclusions that he did for the reasons given that in the circumstances raise an arguable concern as to the adequacy of his reasoning.*
  3. *In particular, Grounds One and Two raise arguable issues, not least in relation to the veracity, reliability and weight that the Judge placed upon the Order of the Regional Trial Court of the Philippines dated 24 April 2015, awarding sole custody of the appellant to the sponsor.*
  4. *In such circumstances I am persuaded that permission to appeal should be granted in respect of all of the grounds.”*
5. At the hearing before me Ms Jegarajah relied on the grounds of the application for permission, and the skeleton argument dated 11<sup>th</sup> June 2015 that she had prepared for the hearing at the First-tier Tribunal. In short the issue of sole responsibility had been determined by a decision of the family court in the Philippines who had declared the mother to be the sole guardian of three minor children including the Appellant, and granting her sole custody over them. The judgment was binding on the First-tier Tribunal. It was not open to the judge to reach a different conclusion, placing emphasis on difficulties in the evidence.
6. Ms Jegarajah set out in the grounds that should the Appellant’s father seek to assume full custody of the Appellant he would be breaching the Philippine family court order. In oral submissions the issue was extended further with the assertion that any exercise by the father of parental responsibility, even if shared with the Appellant, would similarly breach the order.
7. With regard to the difficulties in the evidence identified by the judge the inconsistency between the application, where it is said that the Appellant’s father will be seeking to make an application, along with another child, to

join the Sponsor, and the Appellant once he is in the United Kingdom, was given too much weight. The judge failing to take account of the Sponsor's witness statement evidence that the child completed the application without her knowledge and authority, and erroneously thought that by including his father and portraying themselves as a family the application would stand a better chance of success.

8. Further the judge has failed to take account of the Sponsor's evidence that in fact the father left the family home in approximately November 2006, as discovered by the Appellant's mother when she went to visit in mid-November 2006, as per her witness statement at [9], also in her affidavit prepared for the Regional Trial Court in the Philippines [12], [13], [14], and [15].

*“12. Q: You stated in your petition that you work as an Overseas Contract Worker. Where do your children stays everytime you go abroad?”*

*A: For the first time I went to work as an Overseas Contract Worker sometime in April 2006 my husband took care of my children and they stayed in our house located at Villart St., District I, Cauayan City, Isabela.*

*13. Q: Then what happened?*

*A: Six (6) months thereafter that was sometime in November 2006 I went home for a short vacation and much to my surprised my husband was not at home. I learned that at the time I went abroad he also left our conjugal dwelling leaving behind my children to the care of my mother who was very old.*

*14. Q: Did your husband return when you went home for a vacation?*

*A: No, sir. From the time he left in 2006 he did not come home anymore. He abandoned his children.*

*15. Q: When you said he did not come home anymore and abandoned his children. Do you mean totally abandoned?*

*A: Yes, sir. I learned that he cohabited with another woman, as a matter of fact he executed an Affidavit stating among other things that he is living with the said woman, sir.”*

9. The grounds complain that the Philippines judge accepted the Appellant's account, so that the facts asserted have been established in a court of law, and are finding on the judge in the United Kingdom absent good reason.
10. Any difficulties arising as a result of the father's telephone interview with the Respondent Entry Clearance Officer in which he asserts shared responsibility was irrelevant given the transfer of sole custody to the Sponsor as per the court order of 29<sup>th</sup> April 2015, and as above, because “any attempt by the Appellant father to renew contact would be in breach of the order.” Ms Jegarajah reminded me of the case that she had submitted to the First-tier Tribunal a judgment dated 9<sup>th</sup> September 2013

in the matter of A (Children) (AP) [2013] UKSC 60 to the point the habitual residence of a child determined the court which has jurisdiction in respect of family law. Ms Jegarajah also handed up Re Z (Recognition of Foreign Judgments) [2016] EWHC 784 (SAM) a judgment considering the exercise of the court's powers under the inherent jurisdiction to recognise and enforce orders concerning the medical treatment of children made by the court of another member state of the European Union.

11. Ms Jegarajah submitted that the judge had failed to properly assess the best interests of the Appellant which were self evidently to be reunited with his mother given that he had been abandoned by his father some time between April and November 2006, the grandmother, who had been caring for him, being 87 years old and no longer capable of looking after three children full time, even with the help of the nanny. The Appellant's mother had been here since 2006, was financially stable, settled with a partner since 2010 who helped her with her business in the United Kingdom, and she and her partner were now both British citizens. The Appellant's mother's life was plainly established as being in the United Kingdom. The judge could and should have looked beyond the sole responsibility provisions to the compelling family or other circumstances provisions and allowed the appeal under those provisions if not satisfied on the sole responsibility point. Whilst there was no specific ground of appeal or submission to that effect the skeleton encompassed issues relevant to the best interests and welfare of the child so that it was plainly before the judge.
12. Ms Jegarajah did not accept that out of country cases required consideration as at the date of decision , but submitted that even if that was right the judge should have made an assessment as at the date of hearing given the that the case concerned the best interests of the child.
13. Mr Jarvis for the Respondent relied on the Respondent's Rule 24 Notice to the point that the grounds amount to a disagreement on the facts. Judge Khawar found that the evidence presented by the Sponsor was not a true reflection of the situation. Family court orders, even when made in the UK, are not binding on an immigration judge, where different matters are weighed. Given the findings the alternative of compelling family or other circumstances, which was not argued and cannot give rise to an error, would not have assisted in any event.

### **My Consideration and Findings**

14. I reminded the representatives at the hearing the leading case of TD. (paragraph 297(i)(e): "Sole Responsibility") [2006] UKAIT 00049 remains the guiding case in the discussion of sole responsibility. The case guides that the issue of sole responsibility is fixed to the date of decision. In this case 17<sup>th</sup> September 2014.
15. The Sponsor's petition to the Philippine court was lodged on 8<sup>th</sup> October 2014 as revealed by an application to admit the same, dated 7<sup>th</sup> April

2015. The application to admit, and the amended petition, the sponsor's subsequent judicial affidavit, and the order of the court were all before the First-tier Tribunal, as was her husband's affidavit in those proceedings, dated 9<sup>th</sup> October 2014. All of that evidence post dates the date of decision.

16. At its highest it encompasses evidence as to the position prior to the order which falls to be weighed in the round with all the other evidence.
17. I find that the Appellant has not established any error of law in the First-tier Tribunal's approach to the judgment of the trial court in the Philippines. Judge Khawar has explained why the court order, obtained by a petition filed after the Respondent's refusal, based on the representation of a factual matrix asserted by the Appellant's mother in an amended petition in April 2015, was inconsistent with the evidence before the Entry Clearance Officer as set out both in the application and the interview with the Appellant's father, and referred to above. Judge Khawar has explained why he has rejected the Sponsor's explanations for the evidence which was undermining of the assertion of her sole responsibility. The Philippine court decision is not a resolution of a factual dispute between the Appellant's mother and father, the judge noting that the mother's evidence that her husband had attended court was contrary to the face of the court order. Judge Khawar carefully read the father's affidavit as shown by his noting of the limits of that evidence.
18. Even if, as the particularisation of the grounds before me indicate, a transfer of sole responsibility/custody occurred in April 2015, and for the reasons I set out above the evidence is not without difficulties, it remains that as at the date of decision there was ample evidence of joint responsibility so that Judge Khawar's conclusion is sustainable on the evidence, and reveals no perversity.
19. Ms Jegarajah made a belated attempt in submissions to widen the ambit of the grounds of appeal to include a challenge to the judge's decision on the basis that even if the Appellant could not establish sole responsibility lay with his Sponsor the evidence showed that there were family or other compelling circumstances under a different limb of the Rule. I find no merit in that submission. Firstly Ms Jegarajah's broad submission that references to the best interests of the child were sufficient to particularise a ground of appeal in relation to the separate sub-paragraph of the Rule, so that it required distinct articulation in Judge Khawar's decision, runs contrary to the duty to deal with a case as it is argued. In any event the satisfaction of the rule must be as at the date of decision, and for all the reasons provided by Judge Khawar, it is clear on his findings that the requirements of the alternative sub paragraph had not been met so that if the ground had been raised, which it had not, it was bound to fail.
20. The credibility findings in respect of the Sponsor were plainly open to the judge on the evidence and reveal no perversity. The burden of proof is on the Appellant. The judge found that he had not discharged it as at the

date of decision including taking into account the later obtained Court order.

21. Ms Jegarajah efforts to persuade me that Judge Khawar should have made an assessment as at the date of hearing were made without an appreciation that in an out of country appeal the relevant date for assessment is the date of decision in respect of the Rules and in respect of Article 8 ECHR. Ms Jegarajah asserted that this was flagrantly in breach of the UK's international obligations because it failed to provide a consideration of the best interests of the child at the later date of the hearing. The suggestion that I should adjourn and list the matter for a panel to consider the point because it was important, fails to recognise that it has already been decided. There was no cogent argument as to why I should depart from the well-established principle.

### **Notice of Decision**

22. The Appellant's appeal is dismissed and the decision of the First-tier Tribunal dismissing the Appellant's appeal stands.
23. No anonymity direction was requested and I see no reason to make one at this stage.

Signed

Date

Deputy Upper Tribunal Judge Davidge