



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05874/2015
HU/05875/2015

THE IMMIGRATION ACTS

Heard at Liverpool
On 16th March 2018

Decision & Reasons Promulgated
On 17th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MISS AS

(2) MISS AN

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER (ISLAMABAD)

Respondent

Representation:

For the Appellants: Miss G Patel (Counsel)

For the Respondent: Mr A McVeety (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge O'Neill, promulgated on 25th May 2017, following a hearing at Bradford on 11th May 2017. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are two sibling sisters. The first Appellant was born on 12th May 1997 and was 17 at the date of the application. The second Appellant was born on 29th June

1999 and was 15 at the date of the application. Both are citizens of Pakistan. Both applied to join their father, Mr TA in the UK as the dependent children. The applications were refused by the Secretary of State on the basis that he did not have sole responsibility for their upbringing in a decision dated 27th July 2015.

The Appellants' Claim

3. The basis of the Appellants' claim is that they are the daughters of Mr TA, and his second wife, NA, whom he married in the UK. She had previously been married and had children of her own, and indeed grandchildren living in the UK. The Appellants, daughters of Mr TA, lived in their paternal grandmother's house, together with their older brother, U, who was born on 16th June 1996, and their younger brother, M, born on 24th November 2004, as well as a younger sister, A, born on 25th December 2002. The Appellants' natural mother was a lady by the name of RM, but who died on 2nd October 2009. Their father, TA, had five children, including the Appellants, and three other siblings, their father, TA, had come to the UK in March 2013 as the spouse of a person settled in the UK, with leave to remain until 2018, but had subsequently married NA. Since coming to the UK in March 2013 he had not returned to Pakistan and had not visited his children. However, "he has three brothers and five sisters living in Pakistan and he sends money through them to support his family" (see paragraph 6(k)). Both TA, and his second wife, NA, are committed to supporting the Appellant children, they have the means to accommodate them, and to support them, and they can do so without recourse to public funds (see paragraph 6(t)).

The Judge's Findings

4. The judge went on to hold that the Appellants' father, Mr TA, could not be said to have had sole responsibility for the children's upbringing. He concluded that, "although Mr TA has provided for their financial support and housing the primary carer has been the children's grandmother" (paragraph 26).
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge failed to give appropriate regard to the sole responsibility test as set out in the leading case of **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**, and especially at paragraph 52, which makes it clear that "day-to-day responsibility for decision making, for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child" which the judge appears to have overlooked. Moreover, proper regard was not given to the case of **MM (Lebanon) [2017] UKSC 10**, which makes it clear that,

"The duty imposed by Section 55 of the 2009 Act stands on its own feet as a satisfactory requirement apart from the HRA or the Convention. It applies to the performance of any of the Secretary of State's functions including the making of the Rules. While the detailed guidance may be given by instructions, it should

be clear from the Rules themselves that the statutory duty has been properly taken into account. We would grant a declaration that in this respect both the Rules and instructions are unlawful (see paragraph 16 of the Grounds of Appeal dated June 2017)".

It is, in fact the case that the judge in this appeal has drawn no reference whatsoever to either the case of **TD (Yemen)** or to the case of **MM (Lebanon)**.

7. On 15th December 2017 permission to appeal was granted on the basis that the judge arguably did not consider the best interests of the Appellant children. The judge did not embark upon a discrete consideration as to where the best interests of the Appellants lay. It was also arguably incumbent upon the judge to do so in the light of the Supreme Court decision in **MM (Lebanon)**.

Submissions

8. At the hearing before me on 16th March 2018, Miss Patel, appearing on behalf of the Appellants, submitted that the main issue here was the judge's approach to "sole responsibility" which was flawed. She drew attention to Mr TA's witness statement, dated 9th May 2017 (at pages 5 to 8 of the hearing bundle before Judge O'Neill). He makes it clear that his mother is "about 89 years old. She has disabilities due to stroke. My mother lives with my children. She was their main carer. She is now unable to look after them due to her disabilities" (paragraph 6). He goes on to explain that he has a "very close family bond with the rest of my brothers and sisters" but that they "do not live in the same village" (paragraph 7).
9. He also states that since his arrival in the UK in 2013,

"My children had been living at my house, they were not looked after by my brothers and sisters. My mother was the only person who cared and looked after them. I have been supporting them all both financially and emotionally. I speak to them on a daily basis" (paragraph 8).
10. He further explains that his children "are wholly financially and emotionally dependent on me and my wife" (paragraph 9). Importantly, he goes on to say that, after his first wife had passed away, he lived with his children in Pakistan and that, "I had sole responsibilities towards them but my arrival in this country has left them with no one who can or would be willing to provide with daily care" (paragraph 10). His brothers and sisters are unable to take an active part in the upbringing of his children and as a result "they live in a very isolated life with my elderly mother" and he is of the view that, "I believe they are vulnerable and open to live a life without education. I am greatly concerned about the future of my children" (paragraph 11).
11. He goes on to say that,

"My children are experiencing problems on a daily basis when they go to school which is about fifteen minutes' drive. They have problems on meeting their daily

needs, i.e. cooking, cleaning and education. Their social, emotional and economic wellbeing's at risk" (paragraph 12).

He goes on to say that he himself has not been able to visit them but he remains in touch with them over the telephone (paragraph 14).

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2009) such that the decision should be set aside. My reasons are as follows.
13. First, the legal application of the role of sole responsibility is now fully set out in the well-known determination of the Tribunal in **TD (Paragraph 297(i)(e) ("sole responsibility")) Yemen [2006] UKAIT 00049**, where the Tribunal 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 of the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in the child's upbringing, it was the exception that one of them will have 'sole responsibility'".
14. In this case it is plain that both parents are not involved in the child's upbringing. The sponsoring father in the UK alone is. It is also clear that he has continuing control and direction of his children's upbringing and the position now is that the Appellant children, having grown up, and are adolescent, require additional guidance, which the ailing grandmother in Pakistan is unable to provide on the evidence, such that it is the sponsoring father in the UK who takes steps to make sure that his two Appellant children are on the straight and narrow, and are provided with all necessary direction and guidance.
15. The Appellants only have to make out their case on a balance of probabilities. This is not least because it is long established case law (see **Emmanuel [1972] Imm AR 69**), that the literal interpretation of "sole responsibility" would defeat all things, because responsibility can never be "sole" in circumstances where a child abroad is bound always to be looked after by somebody else, and in this case the grandmother. It is in this respect, that the judge below has erred in law in assuming that just because the children were left in Pakistan that the sponsoring father in the UK never could have sole responsibility for them. The suggestion that two other children were being left behind makes the claim untenable is also flawed, because the ailing grandmother has made it clear that she would like not to be left alone without the remaining grandchildren, and the youngest ones are easiest to maintain and look after, which is not an improbable scenario to comprehend.

16. Moreover, in **Nmaju**, the Court of Appeal stated that the parents' legal responsibility for the child under the appropriate legal system would be a relevant consideration in deciding sole responsibility. In fact Pill LJ in **NA (Bangladesh and Others) [2007] EWCA Civ 128** said that,

“On the basis of the evidence, it was arguable that the Sponsor had the sole responsibility for the Appellant within the meaning of the Rules. The words ‘sole responsibility’ have been the subject of many cases in the courts and these are summarised at Macdonald 6th edition, paragraphs 11.90. Reference is made to **Sloley v. ECO, Jamaica [1973] Imm AR 54**. Where responsibility has not been delegated to a grandmother or other relative who is looking after the child, but has been abdicated, the parent in the United Kingdom will not be treated as having sole responsibility”.

In that case, sole responsibility in that parent was found to exist, the Tribunal considering as relevant the source and degree of *financial support for the child and whether there was cogent evidence of genuine interest in and affection for the child by the sponsoring parent in the United Kingdom*. In **Cenir v ECO [2003] EWCA Civ 472**, the court stressed the importance of the parent with responsibility, albeit at a distance, having *direction over or control of important decisions in the child's life*.

17. So indeed, is the case on the facts here. The sponsoring parent in the UK has not abdicated responsibility. Far from it. If anything, his interests over the years have been increasing considerably. He did not abandon his children. He made proper arrangements for the child to be brought up under the day-to-day care of his own mother. He has expressed genuine interest in his children. He has provided cogent evidence of that interest and shows affection for the Appellant children. Importantly, he has provided evidence of having direction over and control of important decisions in the children's life. Additionally, the proper maintenance of his Appellant children has always been at the behest of the sponsoring father in the UK, without whose financial support, the Appellant children would not have been able to continue living for as long as they have been living in the day-to-day care of the grandmother, as there is no evidence that she is working. In fact, the evidence is precisely that monies are being sent by the sponsoring father from the UK to enable the care of the Appellant children to take place. Added to this, is the latest evidence, of the inability of the grandmother, and particularly given her medical problems, to provide continuing care for the Appellant children who are now of an adolescent age, and require much more detailed management, such as from their father.
18. In **Mundeba [2013] UKUT**, it was explained that the focus of Section 55 cases is on the circumstances of a child in the light of his or her age, social background, development history. It requires an inquiry into whether there is
- (a) evidence of neglect or abuse;
 - (b) there are unmet needs that should be catered for; and
 - (c) whether there are stable arrangements for the child's physical care.

The assessment involves consideration as to whether the combination of circumstances is sufficiently serious and compelling to require the admission of these Appellant children into the UK.

19. Although I have already allowed the appeal, taking these very circumstances into account, I make the following observations as well.
20. If one applies Lord Bingham's tabulation in **Razgar** (at paragraph 17), the following emerges. First it is plain that the continued exclusion of the Appellant children is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellant children's right to respect for their family life. This family life is qualitatively different with the one that the Appellant children are enjoying in their country of origin, where their carer is not able very much longer, and not least given her age, to provide them with the kind of care that they would need as teenagers. On the other hand, the Appellant children will have the care and support of their own father and stepmother in this country, both of whom are keen and able to look after the Appellant children.
21. Second, the interference here does have consequences of such gravity as to potentially engage the operation of Article 8 (bearing in mind that this is a low threshold). Third, the interference here is not in accordance with the law, if the appeal is allowed under paragraph 297, which it is, since the sponsoring father has been able to show that he has been exercising "sole responsibility". Fourth, the interference is not necessary in a democratic society because it is not necessary for the economic wellbeing of the country or for the protection of the rights and freedoms of others. There is no hint whatsoever of any wrongdoing or illegality by any of the parties concerned. In fact all of the evidence is that the sponsoring father has legal custody and Lord Justice Pill has made it clear in the Court of Appeal decision quoted above that this is a more significant factor in determining how the balance of considerations falls in the determination of "sole responsibility" as a legal test. Fifth, all in all the decision here is not proportionate to the legitimate public end that is sought to be achieved.
22. It is well established that the material question engaging the proportionality of an administrative decision that threatens to break a family is whether it is reasonable to expect the Appellant to remain separately from his natural parent, which in this case means the natural father, who is now the person with legitimate legal status in the UK and is settled, and has got legal custody of both the Appellant children as well. On the facts of this case, it is not reasonable.
23. Finally, as far as "sole responsibility" is concerned, there is the inability of the grandmother in Pakistan to look after the Appellant children. The evidence cannot be plausibly contradicted and has not been contradicted. The starting point of the evidence is always the narrative presented by the Appellants, unless it can be properly rejected. There can never be absolute "sole responsibility". It is a relative matter. In the circumstances where there is no natural mother to look after the Appellant children, and the grandmother is not any longer fully able to provide and look after these two Appellant children, but at the same time the sponsoring father in the UK has to all intents and practical purposes, been providing care and support for the

Appellant children from the UK, he has sole responsibility. It is clear that he has singularly been involved in the welfare of these two Appellant children from the beginning.

24. On the totality of the evidence therefore, the Appellants have discharged the burden of proof and the reasons given by the Respondent do not justify the refusal. Therefore, this appeal is allowed.

Remaking the Decision

25. Accordingly, I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for these reasons.
26. In coming to these conclusions I have had regard to the following evidence. There is the skeleton argument of Miss Patel before me (at pages 2 to 4) which makes it clear that the sponsoring father alone has had sole responsibility for the direction and control of these Appellant children. There is the hearing bundle of 9th May 2017 of 156 pages. There is a witness statement which makes it clear (at paragraph 6) that the mother is unable to look after the Appellant children because she now has diabetes. It is made clear (at paragraph 8) that the sponsoring father speaks to the Appellant children on a daily basis. It is plain from this that he does so so as to be able to have direction and control over them. It is further the case that (at paragraph 9) that the children are wholly dependent financially on the sponsoring father and the children's stepmother (at paragraph 9). The sponsoring father has lived with his children in Pakistan after his wife died (see paragraph 10) and had sole responsibility for them there until he came to the UK. The sponsoring father makes it clear (at paragraph 11) that he is concerned that his children's life without education, would jeopardise their future prospects and expressly states that, "I am greatly concerned about the future of my children".

Notice of Decision

27. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
28. An anonymity direction is made.
29. This appeal is allowed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of

their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated

Deputy Upper Tribunal Judge Juss

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

Signed

Dated

Deputy Upper Tribunal Judge Juss

14th May 2018