



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/17375/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 21 May 2021

On 03 June 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NANGYALAY AMIRI

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Mr A Badar of Counsel, instructed by Abbott Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. To avoid confusion, for the purpose of this decision I have referred below to the parties as they were before the First-tier Tribunal.
2. The appellant is an Afghan national resident in Pakistan with date of birth given as 4.9.03.
3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 3.11.20 (Judge Phull), allowing on human rights grounds the appellant's appeal against the respondent's decision of 9.10.19 to refuse her application made on 19.7.19 for entry clearance to the UK as the dependent child of her father and sponsor in the UK, Gulamir Amiri, pursuant to paragraph 297 of the Immigration Rules.
4. The application was refused because the respondent was not satisfied as to the relationship between the appellant and the sponsor, or satisfied that the sponsor has had sole responsibility for the appellant's care and upbringing. The first issue was resolved by DNA testing, leaving the single issue at the First-tier Tribunal appeal as that of sole responsibility.
5. Judge Phull concluded that the sponsor had a genuine and subsisting parent-child relationship with the appellant and that "the circumstances are that the appellant remains dependent on (her) father for all (his) needs. I find on balance that the sponsor exercises the necessary control and direction over the appellant's upbringing". As the judge concluded that the requirements of the Immigration Rules were met, she concluded at [37] of the decision that the refusal of entry clearance was disproportionate to the article 8 ECHR rights of the appellant and the sponsor.
6. The grounds submit that the judge misapplied the Rules and made a material misdirection in applying TD (Paragraph 297 (i)(e)): Yemen [2006] UKAIT 00049. It is submitted that on the facts as found by the judge the only conclusion can be that there is shared and not sole responsibility.
7. Permission to appeal was granted by the First-tier Tribunal (Judge Kelly) on 29.12.20, who considered "It is arguable that it was not reasonably open to the Tribunal to conclude that the appellant's father had had sole responsibility for his upbringing given the evidence of his mother's involvement in the same. Permission to appeal is accordingly granted."
8. The Upper Tribunal has received the appellant's poorly-drafted Rule 24 reply, dated 12.1.21, which perpetuates the error of referring to the appellant as male when she is female. It is submitted that not only is the sponsor financially

responsible for the appellant “but he is the only person who is performing important caring role in the appellant’s life and upbringing.” It is submitted that the First-tier Tribunal Judge applied the correct legal test regarding paragraph 297 and Article 8 ECHR and that the grounds are “nothing more than a lengthy semantic argument without merit if the (First-tier Tribunal) decision is considered in its entirety.”

9. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. However, for the reasons set out below, I found an error of law in the decision of the First-tier Tribunal requiring it to be set aside and remade. Both Mr Badar and Mr Tan invited me to remake the decision on the findings of fact made by the First-tier Tribunal.
10. At the hearing before me, Mr Tan relied on TD, particularly paragraphs [45] to [47] and [52(iv)], which for convenience I have set out below, adding emphasis as appropriate:

“[45] To understand the proper approach to the issue of “sole responsibility”, we begin with the situation where a child has both parents involved in its life. The starting point must be that both parents share responsibility for their child’s upbringing. This would be the position if the parents and child lived in the same country and we can see no reason in principle why it should be different if one parent has moved to the United Kingdom.

[46] 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. The possibility clearly cannot be ruled out: Alagon provides an example of this exceptional situation and turns upon an acceptance by the judge of the wholly unusual situation that the father was “doing nothing for the child beyond the bare fact of living with her on reasonably good terms”. (at p 345)

[47] Our conclusion on the likely decision that responsibility is shared where a child has both parents involved in its life is, in our view, consistent with the policy relating to the admission of children for settlement underlying paragraph 297. In full, paragraph 297(i) provides as follows:

“297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

- (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:*
 - (a) both parents are present and settled in the United Kingdom; or*

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and..."

"[52] Questions of "sole responsibility" under the immigration rules should be approached as follows:

- i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
- ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.
- iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.
- iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.
- v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.
- vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.
- vii. In the circumstances likely to arise, day-to-day responsibility (or 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.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

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

11. Mr Tan submitted that this was a case of both parents being involved and therefore the judge should have taken shared responsibility as the starting point. Neither had it been demonstrated that the mother had abdicated any responsibility for the child, the judge accepting repeatedly that she provided day-to-day care for the appellant. It is important to also note that the appellant had never lived with the sponsor, who has been in the UK since 2001 and that since 2009 the appellant has lived with her siblings and mother in Pakistan. In short, it is submitted that the judge made a material misdirection and took the wrong approach.
12. For his part, Mr Badar submitted that it is clear from [21] of the decision that the judge was alive to the respondent's case that this was a case of shared responsibility. He also relied on the *Edwards v Bairstow* principle as applied at [17] of the Upper Tribunal's decision *Dasgupta* [2016] UKUT 00028 (IAC), that in error of law appeals the standard of "the true and only reasonable conclusion" open, so that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal. However, it was also accepted that a finding of fact can be set aside if the decision-maker acts without any evidence or upon a view of the facts which could not reasonably be entertained.
13. I am satisfied that as this is a case of both parents being involved in the appellant's care, the First-tier Tribunal Judge erred in law in failing to take shared responsibility as the starting point. Neither does the judge make any finding 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," nor could this be deduced from the other findings and evidence available to the First-tier Tribunal. Whilst the father sponsor in the UK appears to have considerable involvement in the appellant's life, as set out between [24] and [28] of the impugned decision, even to the point that he accepted at [28] that he made all the decisions for the appellant "be they major or minor," that is not equivalent to the exclusion of the mother's continuing responsibility as a parent. I am satisfied that the judge misdirected herself by focusing on the sponsor's role

without consideration as to whether the mother had abdicated all responsibility, for whatever reason.

14. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal so that it must be set aside.
15. In remaking the decision, I adopt the findings of fact and take share responsibility as the starting point. These are clear from the First-tier Tribunal decision and need not be repeated here. I accept the extensive involvement and support of the sponsor in the appellant's life at the present time, including the evidence of financial support and contact with her.
16. However, as the Upper Tribunal held in TD, where both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility. For the reasons set out above, I do not accept that it has been demonstrated that the mother has abdicated all responsibility for the appellant and is merely acting at the direction of the sponsor so that she is otherwise totally uninvolved in the appellant's life. That is not an accurate characterisation of the facts as they appear to be and as found by the First-tier Tribunal. It is she who provides the day-to-day care, despite her own difficulties as set out in the decision of the First-tier Tribunal. The very fact that the mother has given permission for the appellant to join the sponsor is also indicative of the fact that she retains responsibility.
17. In the premises, I do not accept and do not find that the mother has abdicated all responsibility for the appellant. She has not disappeared from the appellant's life, far from it. I am satisfied that in practice the mother retains continuing care and control of the appellant, even if she has allowed decisions to be made by the absent father. Further, I find that there are no exceptional features that justify departing from the starting position of shared responsibility. In summary, I am satisfied that for the reasons set out above and on the findings of fact from the First-tier Tribunal that this is clearly a case of shared responsibility. It follows that the appellant has failed to demonstrate that the sponsor has had sole responsibility for her upbringing. It follows that this appeal must fail.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The decision in the appeal is remade by dismissing the appellant's appeal.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 21 May 2021