



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/15200/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 19 March 2021

On 29 March 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

ANGELIC MAM FATOU MENDY

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr H Sadiq of Adam Solicitors

For the Respondent: Mr A McVeety, 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. The appellant, who is a national of Gambia with date of birth given as 22.11.01, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 14.10.20 (Judge Shergill), dismissing on all grounds her appeal against the decision of the Secretary of State, dated 19.8.19, to refuse her application for entry clearance as a child of Paul Mendy, a parent settled in the UK, and family life with the parent's partner Anna Johnson Thompson, pursuant to Appendix FM of the Immigration Rules and outside the Rules pursuant to article 8 ECHR.
2. The issue in the appeal is one of sole responsibility, pursuant to TD (Yemen) [2006] UKAIT 00049. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 20.11.20, on the basis that it was arguable that the judge reached findings not based on evidence, namely that because the appellant's aunt (the sister of the sponsor) was involved with the appellant's upbringing for some 17 years, shared responsibility had to be assumed, ousting the sponsor's claim to sole responsibility. The judge granting permission noted, "It is argued that not a single example that emerged during cross-examination or the examination of the court as to how the sponsor's sister was involved in respect of the appellant that could be described as important or determining direction at all. It is argued that the judge's approach that the sponsor's sister must have had shared responsibility over direction and control is based on virtually no evidence other than perhaps a view taken as to what the words guidance or consultation may mean." The judge granting permission also considered that "It is arguable that since the (appellant's) mother has abandoned the responsibility of the (appellant) the role played by the father has been significant enough to ensure he has sole responsibility."
3. There is no Rule 24 reply to the grounds.
4. 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.
5. The judge cited and purported to apply TD with regard to the issue of continuing control and direction. In that case, the Upper 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 over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".
6. Contrary to the position taken by the respondent in the refusal decision, at [2] of the decision the First-tier Tribunal Judge accepted that the sponsor is the appellant's biological father. At [7], no issue was taken with the credibility of the sponsor and his

partner (P), the judge accepting that he had provided financial support for some time, including payment of school fees. At [8] the judge accepted that he had maintained contact with the appellant, that P had twice visited the appellant in Gambia, and that their son wants his half-sister to join them in the UK. At [10] the judge accepted that the appellant's mother had abdicated any responsibility for the child and was totally uninvolved in the child's upbringing.

7. However, the judge appears to have taken the view that the evidence did not "displace" the aunt's involvement in the appellant's care. At [9] the judge stated that whilst the sponsor claimed that he checked on the appellant's educational progress and general well-being through conversations with the teachers on the phone, "It is implausible that the aunt would not be consulted as the first port of call given she is local, and that decisions may need to be taken by her acting *in loco parentis*. The fact that she has been a de facto parent since the appellant was 2 years old, some 17 years to date of hearing, is a significant part of the factual matrix. She is not someone who has merely stepped into the void, or taken care of the appellant for a limited time. She has been the only substantive parental influence the appellant has had on a daily basis in my assessment." The judge concluded that from an objective assessment the sponsor's claimed role does not equate to sole responsibility.
8. At [11] the judge stated that although the sponsor paid the school fees and the vicar referred to the aunt as the appellant's 'guardian' did not displace the parental role of the aunt and "does not alter my view about the 'guardian aunt' having de facto parental responsibility." At [12], the judge's assessment was that having looked after the appellant since she was 2 years of age, "the aunt is likely to have had a predominant role in parenting." Reference is made to the aunt's letter, in which she states that the appellant had been "under my custody and guidance", even though she stated that this was "in consultation with" the sponsor. The judge concluded, "She is likely to have been doing more than merely the day-to-day decision making, and it is more likely than not she has had to make important decisions about the appellant's upbringing during the passage of 16 years (to majority) when the sponsor was busy sorting his own life out thousands of miles away."
9. Specifically purporting to apply the 'continuing control and direction' test of TD, at [13] of the decision the judge concluded, "I am not satisfied on the balance of probabilities that looking at the totality of the evidence and the period of time the aunt was acting *in loco parentis* that the sponsor was 'making all the important decisions in the child's life.' Some of those important decisions during that 16-year period were likely to have been taken by the aunt."
10. In the light of the above, it can be seen that the judge's assessment and conclusions about the role of the aunt arise from assumptions based almost entirely on the long period of residence with the appellant and not evidence. I am satisfied that given the acceptance of the sponsor's credibility and the several positive findings summarised above, there was no real evidence upon which a conclusion could be reached that the aunt was acting *in loco parentis* to the displacement of the sponsor's claim of sole

responsibility so that there was shared responsibility. It is possible for a relative or other to have delegated day-to-day responsibility without the sponsor abdicating sole responsibility or the continuing care and control referred to in TD. There was no actual evidence that the aunt made any of the important decisions in the child's life without consultation with the sponsor, only the judge's assumption (if not speculation) that because she was 'local', she must have made such decisions. In effect, the judge approached the issue of sole responsibility on the apparent basis that the starting point was that the aunt was in loco parentis and that it was for the sponsor to displace that assumption and prove to the contrary. This is not a correct approach or interpretation of the guidance in TD. In the premises, the decision of the First-tier Tribunal cannot stand and must be set aside to be remade.

11. On the positive findings of the First-tier Tribunal and absence of evidence to the contrary, I am satisfied that the only conclusion that can be drawn is that the sponsoring father did retain continuing care and control and, therefore, sole responsibility. In the circumstances, the appeal should be allowed.
12. In the circumstances and for the reasons set out above, I find material error of law in the decision of the First-tier Tribunal so that it must be set aside to be remade by allowing the appeal.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

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

I remake the decision in the appeal by allowing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 19 March 2021