



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

Appeal Number: OA/00665/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 13 August 2014**

**Determination
Promulgated
On 21 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

**M K
(ANONYMITY ORDER MADE)**

and

ENTRY CLEARANCE OFFICER - BEIRUT, LEBANON

Appellant

Respondent

Representation:

For the Appellant: Ms P Heidar, Solicitor, of AA Immigration Lawyers
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Lebanon. She is now 15 years old, but was 13 at the date of decision. She applied for entry clearance to settle in the UK with her father (the sponsor), who is now a British citizen. The sponsor obtained permanent residence in the UK in 2010, and was naturalised as a British citizen in 2012. The appellant's application was refused on 26 November 2012, with a review on 27 February 2013, and her appeal was

subsequently dismissed by First-tier Tribunal Judge Flynn, in a determination promulgated on 23 December 2013.

2. Permission to appeal was initially refused by First-tier Tribunal Judge Foudy, on 1 April 2014, but was then granted, on renewed grounds prepared by new representatives, by Upper Tribunal Judge Goldstein, on 12 June 2014. In granting permission the Upper Tribunal Judge observed that there were arguable issues as to whether the judge was entitled in law to reach the conclusions that she did for the reasons given.
3. A Rule 24 response for the respondent was provided, defending the judge's determination, on the basis that valid reasons had been given as to why the judge found the sponsor not to have sole responsibility for the appellant.
4. In a discussion of the issues at the start of the hearing before me it was agreed that the ability of the sponsor to maintain and accommodate the appellant was not at issue. Maintenance had been raised in the refusal, but this had subsequently been conceded. The only issue before the judge had therefore been that of sole responsibility. There was some discussion of the alternative consideration of paragraph 297(i)(f), concerned with "serious and compelling family or other considerations". In cases of this sort, if sole responsibility is not accepted, it is normal for this to be given consideration as an alternative. In this refusal this had not occurred, and it was confirmed at the hearing before me that this point had not been raised in the original grounds of appeal, and neither was it raised at the hearing before the judge.
5. The sponsor attended the hearing, accompanied by his partner.
6. The challenges to the determination were under three headings. The first concerned failure to consider relevant evidence; the second failure to consider the issue of sole responsibility correctly in law; and the third factual errors in the Article 8 proportionality assessment. On the first ground Ms Heidar submitted that the best interests of the child should have been front and centre in the case. The voice of the child should have been heard. There were handwritten and typed statements giving the appellant's views, and these had not been referred to, and did not appear to have been taken into account by the judge. The letters from the appellant's grandmother and uncle in Lebanon also did not appear to have been considered. In considering a power of attorney the judge had misunderstood the meaning and relevance of the document. It was an authority from the sponsor permitting his Lebanese relatives to obtain a passport for his daughter.
7. On the second ground Ms Heidar referred to the recent developments of the law in relation to consideration of the best interests of the child. The judge's findings at paragraph 35, in which she found that the sponsor was generally credible and that he had delegated authority for the care of his

daughter to his relatives should have led to a finding of sole responsibility. Reference was made to the case of **Mundeba (section 55 and paragraph 297(i)(f)) [2013] UKUT 88**. Although this case was concerned not with sole responsibility but with the alternative in paragraph 297(i)(f) (serious and compelling family or other considerations) the observations about the best interests of the child, and that the starting point in considering those best interests would be that a child should usually be with both or at least one of their natural parents, was relevant.

8. On the third ground Ms Heidar accepted that she was placing less emphasis on her challenge to the Article 8 aspect, because she accepted that the outcome turned on paragraph 297 there was, however, a significant factual error in that paragraph 54 referred to the sponsor living alone, whereas paragraph 10 of the determination referred to his relationship with his partner.
9. Mr Walker, for the respondent, pointed to paragraphs 10, 36, and 43, in which the judge had referred to the documentary and oral evidence, and indicated that she had considered all of the evidence in the round. There was no requirement for the judge to have listed every item of evidence and the findings on joint responsibility had been open to the judge on the evidence that she had heard and the documentary evidence that she had considered. The apparent error in the discrepancy between paragraphs 10 and 54 was not as clear as made out, because it had been the sponsor's evidence that he lived alone, despite having a partner.

Error of Law

10. Having risen to give further consideration to the submissions by both sides I indicated, at the hearing, that I found the second ground to be made out, and that the determination did disclose a material error of law in not addressing the correct legal framework in reaching the decision on sole responsibility. I also indicated that I did not find either of the other two grounds to have been made out.
11. My reasons in relation to the second ground, which I indicated in summary at the hearing, are as follows. The judge referred to the leading authority on sole responsibility, the case of **TD (Yemen)**, and quoted part of the legal summary paragraph of that determination, within paragraph 33 of her determination. In addition the judge quoted passages from Macdonald's Immigration Law and Practice, within paragraph 34. Difficulty may have arisen because key elements of the guidance in **TD (Yemen)** were omitted from the section quoted in paragraph 33. In particular the concluding parts of the guidance were omitted, since the quotation finished at sub-paragraph (vi). The remaining sub-paragraphs are those in bold below:

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”.*

12. There are other crucial matters in the sub-paragraphs which precede the start of those quoted in paragraph 33 of the determination, which are as those at i. and ii. above.

13. The judge’s finding that the sponsor did not have sole responsibility for his daughter, but rather that responsibility was shared with the appellant’s grandmother and uncle, was based on a number of matters. These were that a power of attorney gave a wide discretion to the appellant’s uncle; that the sponsor had said that decisions about schooling had been taken jointly with his relatives; that there was nothing preventing the appellant

continuing to live with her relatives; and that the sponsor had not applied for the appellant to either visit or settle with him earlier. In an analysis of these reasons, at paragraphs 36 to 42 two key points emerge that appear to me to take the challenge outside one that is restricted to the factual realm, and into the area where it can be said that the correct legal framework has not been applied.

14. The first point is that the reference to joint decision-making about education in paragraph 39 does not appear to be inconsistent with sole responsibility. The summary in **TD (Yemen)** at (vii) and (viii) makes this clear. There may be day-to-day responsibility or decision-making about the child's welfare which will be shared with relatives, but that does not prevent the parent in the UK having sole responsibility within the meaning of the Rules. The second sentence of paragraph 39 of the determination ("he said that decisions about her schooling were taken jointly with his family") is treated by the judge as an indication of shared responsibility, but if the guidance in **TD (Yemen)** had been applied in full this would have been regarded as a matter falling under sub-paragraph (vii), rather than one that was determinative. It is possible that the partial quotation at paragraph 33 of the determination, which omitted the final three sub-paragraphs of the guidance in **TD (Yemen)** may have contributed to not focusing on the final test.
15. On an analysis of paragraphs 36 to 42 it is difficult to avoid the conclusion that the central point to be considered, the test referred to in sub-paragraph (ix) of **TD (Yemen)**, namely the test of "continuing controlling direction of the child's upbringing including making all the important decisions in the child's life" was not directly considered by the judge.
16. Another point of concern about the legal framework within which the sole responsibility finding was made concerns the legal point that sole responsibility may have been exercised for a relatively short period before the entry clearance application. As is noted at sub-paragraph (ii) in **TD (Yemen)** sole responsibility may have been for a short duration only. The judge's reasoning between paragraphs 36 and 42 clearly places weight on the overall period of time that the sponsor has been away from the appellant, and there is no consideration by the judge of whether the sponsor may have been able to demonstrate sole responsibility in the period leading up to the application, even if he had not been in a position to do so in earlier years.
17. Although I have decided that the first ground was not made out, since I accept the submissions on this point by Mr Walker, in essence that the judge was not obliged to list and refer to every item of evidence, nevertheless there is one aspect of the argument under this ground that is also relevant to the second ground. This is that the best interests of the child, as discussed in the **Mundeba** case, are of relevance to the sole responsibility decision. It is the case that the judge considered the best interests of the child in her consideration of Article 8, but the difficulty is

that those best interests do not appear to have featured in the sole responsibility issue, which was, in reality, the heart of the appeal. The impact of the initial decision and the determination was to prevent a child from living with her natural parent, against the wishes of both the child and the parent, and in a context where it was accepted that the other parent had abandoned responsibility. The starting point, taking into account what are referred to in the IDIs quoted at paragraph 27 of the **Mundeba** decision, would be the internationally accepted principle that a child should first and foremost be cared for by a natural parent or parents. In assessing paragraph 297(i)(e), therefore, as well as 297(i)(f) which was considered in the **Mundeba** case, it would therefore be correct to say that the starting point of any consideration would be that the best interests of this appellant would be to be with her father. Given the structure of the Immigration Rules, and the sole responsibility rule, this may of course be outweighed in positions where the sponsoring parent in the UK had shared responsibility, but it is striking in the determination that the best interests of the child, and her wishes, and the principle that a child should be with a natural parent, are not referred to at all in the reasoning process on the sole responsibility issue.

18. For all of these reasons I therefore find that the finding on sole responsibility, through not having been approached through the correct legal framework set out in **TD (Yemen)**, involved an error on a point of law that was material to the outcome. That aspect of the decision therefore falls to be set aside.

Re-making the Decision

19. I invited submissions from both parties as to the appropriate disposal of the appeal given my error of law decision. Having considered those submissions I indicated that I intended to re-make the decision on the basis of the documentary evidence in the two appellant's bundles, and the respondent's bundle. Having checked with Mr Walker that he had all of the relevant documentary evidence I invited submissions, on the basis that the findings in the judge's determination at paragraph 35 could be preserved, and it was only the reasoning and findings between paragraphs 36 and 43 that were to be set aside.
20. Mr Walker indicated that he had no further submissions to make. Ms Heidar, for the appellant, made very brief submissions referring to the positive findings in paragraph 35 of the determination, and submitting that the starting point had to be that it was in the best interests of the child to be with her natural parent.
21. As I indicated at the hearing I have decided to re-make the decision by allowing the appeal under paragraph 297, on the basis that the sponsor did have sole responsibility within the meaning of the Rules at the date of decision. As noted above it was agreed that this was the only point at issue. It was also agreed by Ms Heidar that, in the event of the appellant

succeeding under paragraph 297 it was not necessary for me to consider Article 8.

22. The judge's findings at paragraph 35 were as follows.

"I listened carefully to the evidence of the sponsor and I find him to be generally credible. I accept that he has remained in contact with the appellant throughout his absence. I accept that he asked his mother and brother to bring up his daughter and that they agreed to do so with his delegated authority. I also accept that the appellant's mother abandoned her daughter and there is no contact between them. I further accept that the sponsor has been in contact with the appellant and has sent money for her support."

23. I have considered the handwritten statement by the appellant of 9 February 2013, and the typed statement of 22 November 2013. I note, in those statements, the appellant's clear view that her father is the most important person in her life, and that she has been dreaming of the day when she would be able to live with him in the UK. She also refers to her decision to move and to live with her father in the UK because "he is the only person I have". She refers to the process of losing contact with her mother after her mother moved away and decided to continue her life "with another person". I have also taken into account the sponsor's statement, and the summary of the evidence in the judge's determination, which led to the findings at paragraph 35 above. I note that the sponsor visited the appellant in 2005, 2012, and 2013.

24. I have also taken account of the documentary evidence from the appellant's grandmother and uncle. This is supportive of the appellant's wish to move to the UK to live with her father, and is also supportive of the appellant's father's claim to have maintained continuing controlling direction of her upbringing, as well as taking full financial responsibility for her education and upkeep. I have also taken note of the letter from the appellant's mother giving her consent to the appellant moving to the UK to live with her father.

25. I have considered the power of attorney. I note that this explicitly refers to the process of obtaining a passport for the appellant. Although the sponsor has indicated that he intends to travel with the appellant, should she obtain entry clearance, nevertheless it appears that it was necessary to obtain a passport for the purposes of the application. My view of this document is that it is a legal document essentially limited to the purpose of obtaining a passport for the appellant, and cannot be interpreted more widely. It appears to me that the reference to travel in the power of attorney is related to the passport issue, rather than suggesting that the sponsor does not have continuing control and direction of the appellant's upbringing.

26. I accept the submission that the starting point for any consideration of the best interests of the appellant are that she should be with her natural parent or parents. In her particular case, given the finding that her mother has abandoned responsibility, this only leaves the sponsor, her father. In considering the sole responsibility issue it is therefore relevant that it is in her best interests to be with the only parent who continues to exercise responsibility, and her wishes are also of relevance.
27. The documentary evidence does not appear to me to show that there are any difficulties with the appellant's grandmother and uncle continuing to care for her in Lebanon, but the structure of paragraph 297 is such that a parent who has had sole responsibility does not, as an additional point, have to establish anything of this sort. It would only be if sole responsibility had not been shown, and consideration moved to paragraph 297(i)(f), that this would become a relevant issue.
28. For these reasons, on considering the documentary evidence, and using the findings at paragraph 35 of the determination as a starting point, I have come to the conclusion that the sponsor has had sole responsibility for the appellant's upbringing. This is a situation that appears to me to fall within the test of the appellant's father maintaining responsibility for the control and direction of the appellant's upbringing, despite there being day-to-day responsibility and decision-making shared with the appellant's uncle and grandmother, as envisaged in sub-paragraph (vii) of **TD (Yemen)**.
29. Having reached this decision in relation to paragraph 297 I am not considering Article 8.
30. In the interests of preserving the anonymity of the appellant, who is a minor, I am making an anonymity order.
31. Despite having allowed the appeal, on re-making it, I am not making a fee award. No application was made at the hearing for such an award. It was not clear whether all of the evidence relied on in the appeal bundle was presented with the application. For an award to be made it would be necessary to show that sufficient evidence was presented with the application for it to have been successful. This has not been established in this case.

Decision

32. The determination discloses a material error of law in relation to the sole responsibility test under paragraph 297. That aspect of the determination is set aside.
33. In re-making the decision the appeal is allowed under the Immigration Rules.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, as follows.

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.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date

Deputy Upper Tribunal Judge Gibb