



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

Appeal Numbers: OA/19229/2013
OA/19230/2013

THE IMMIGRATION ACTS

Heard at Field House

On 6th February 2015

**Decision & Reasons
Promulgated**

On 17th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR M G E (A MINOR - FIRST APPELLANT)
MISS S G E (A MINOR - SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Richardson, Counsel

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Jamaica born respectively on 12th June 1998 and 27th May 2003. Application had been made by both Appellants for indefinite leave to enter the United Kingdom as a child of a parent present and settled in the United Kingdom and their application was originally considered by the Entry Clearance Officer pursuant to paragraph 297 of the Immigration Rules. That application was considered by the Entry Clearance Officer on 28th August 2013 and it was refused on the grounds that the Appellants did not meet paragraph 297, in particular:-

- (i) that the Entry Clearance Officer was not satisfied that the parent that the Appellants were seeking to join has had sole responsibility for their upbringing (paragraph 297(i)(e)), and
 - (ii) that the Entry Clearance Officer was not satisfied that there are serious and compelling family or other considerations which make the Appellants' exclusion undesirable (paragraph 297(i)(f)).
2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Davey sitting at Taylor House on 7th October 2014. In a determination promulgated on 17th October 2014 the Appellants' appeals were allowed under the Immigration Rules.
3. On 21st October 2014 the Secretary of State lodged Grounds of Appeal contending that the judge had failed to apply the correct test as enunciated in *TD (Yemen) [2006] UKAIT 00049*.
4. On 11th December 2014 First-tier Tribunal Judge Cruthers granted permission to appeal. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the proceedings, albeit that this is an appeal by the Secretary of State, the Secretary of State is referred to herein as the Respondent and Mr and Miss E as the Appellants. The Appellants appear by their instructed Counsel Mr Richardson. Mr Richardson has served a handwritten Rule 24 response on the Tribunal at the commencement of the proceedings. That Rule 24 response merely states

"The Appellant submits, that in the event that the Upper Tribunal identifies an error of law in the determination of Judge of the First-tier Tribunal Davey, that the appeal ought to nevertheless be allowed under

- (i) 279(i)(f) of the Immigration Rules and or
- (ii) Article 8 ECHR".

Mr Shilliday does not object to that Rule 24 response being admitted in evidence.

The Issue

5. The issue in this matter is quite succinctly described in Judge Davey's determination. The sole issue is whether or not the father of the Appellants, their Sponsor, had sole responsibility and that sole responsibility has to be understood in the sense of the case law in *TD (Yemen) [2006] UKAIT 49*.

The Case Law

6. In *TD (Yemen)* it was held:-

“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’”.

The Evidence

7. It is accepted by both Mr Shilliday and Mr Richardson that the evidence is as set out in paragraph 6 of the First-tier Tribunal Judge’s explanation as explained and expanded in paragraphs 7 to 11 thereof.

Submissions

8. Mr Shilliday submits that the phrase used by the First-tier Tribunal Judge at paragraph 21 of his determination that the Sponsor’s ex-wife, the mother of the Appellants, takes some interest in the children’s upbringing is, he contends, fatal to a contention that the Sponsor has sole responsibility for the children’s upbringing as required by paragraph 297(i)(e). He submits that at the date of decision the Sponsor did not have sole responsibility and that the judge’s decision was speculative on what would happen in the future and that is not the way the claim should be looked at under the Rules. That apart he relies on the Grounds of Appeal.
9. Mr Richardson points out that it was made very clear before the First-tier Tribunal Judge that the Appellants’ mother was intending to move to Canada from Jamaica to work and study and that that technical desertion/abandonment of the children meant that responsibility for them had to be passed to their UK based Sponsor. He acknowledges that the parents had gone about the matter in a proper way and that legal custody of the children and responsibility for them transferred to the Sponsor by an order of the court in Jamaica on 16th December 2012. He acknowledges that for the best interests of the children whilst the immigration procedures were taking their course, their mother has delayed her move but any living with the mother is only taking place until circumstances are such that she can leave. He emphasises however that all major decisions are made by the UK based father.
10. He submits that the parents have looked at the matter in considerable depth and the parents have sought what is in the best interests of their children and have decided that the children should come to the UK and

that the only person who would look after the children would be their father. He points out that the basis of paragraph 297 of the Immigration Rules is for the benefit of children and it cannot be right that sole responsibility cannot pass until a need materialises and therefore the judge is entitled to make the findings that he did and that the decision contains no material errors of law. He asked me to dismiss the appeal.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

13. The whole thrust of the Secretary of State's appeal is the judge has erred in his assessment of what constitutes sole responsibility. Sole responsibility is a factual matter to be decided on all the evidence. That is noted in the head note of *TD (Yemen)* and was also noted by Immigration Judge Davey. It is not necessary to recite again within this determination the factual matrix of this matter. That is well set out within the First-tier Judge's determination and the facts are accepted and agreed. I remind myself that it is the role of the Upper Tribunal to correct errors that have arisen in a decision of the First-tier Tribunal. It is not per se the role of the Upper Tribunal to rehear the evidence and to try and come to different findings on that evidence. In this matter the First-tier Tribunal Judge has at paragraph 4 taken on board fully the basis upon which sole responsibility can exist as a matter of law. He has then gone on to analyse the facts, considered the children's schooling at paragraph 15, considered issues which, whilst he acknowledges postdate decision, consist of communications at paragraph 16 and makes findings that the Sponsor has

not only continued with the financial responsibility that he had previously maintained but has taken over sole responsibility for major decisions as set out at paragraph 18.

14. The First-tier Tribunal Judge has therefore carried out a very full and detailed analysis before reaching his findings and I totally disagree with the submission made by Mr Shilliday that merely because the children's mother shows some interest in the children's upbringing is fatal to a claim under Section 297. That clearly is not what either the Immigration Rules or *TD (Yemen)* states or contemplates.
15. It is important to note that the First-tier Tribunal Judge allowed the appeal "under the Immigration Rules". That was a perfectly proper approach and he did not need to specify which sub-Rule of paragraph 297 he allowed them under. Argument raised by the Secretary of State relating to sole responsibility, bearing in mind the physical presence of the Appellants' mother, might, if considered on its own, have led to a different determination under Section 297(i)(e). However the First-tier Tribunal Judge looked at the matter under paragraph 297 and made findings to the effect that this was one of those exceptional cases that should succeed. Whether it effectively succeeded under Section 297(i)(e) or 297(i)(f) is irrelevant. Each case is fact specific. In such circumstances the arguments made by the Secretary of State amount to no more than disagreement and argument and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge discloses no material error of law and is maintained.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

The First-tier Tribunal Judge made an anonymity order. No application is made to vary that order and the order is continued.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris