



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

Appeal Number: OA/04061/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 December 2015**

**Determination
Promulgated
On 8 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

**KAMERON HARRIS DECENA
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation; the Sponsor in person
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is an appeal against the decision of Judge of the First-tier Tribunal Hussain dated 7 July 2015 in which the judge dismissed the Appellant's appeal against the Respondent's decision of 8 January 2014 to refuse the Appellant entry clearance.

- 2 The background to the matter is this. The Appellant was born in the Philippines on 11 October 1996. His mother is Maria Theresa Kinch ('the Sponsor'). The Appellant has one full sister, Kamille Harris Decena, born in 1994. Their father is Mr Harris Decena. The Appellant and Kamille have two half sisters, Kimberly and Katrina Tolosa, born in 1983, from a previous marriage of the Sponsor, prior to her relationship with Mr Decena.
- 3 The Sponsor's relationship with Mr Decena broke down in around 2005. In or around 2010, the Sponsor married Mr Kinch, a British national, and on 30 August 2010, the Sponsor was issued entry clearance to enter the UK as his spouse. The Sponsor has had the benefit of indefinite leave to remain in the United Kingdom since 25 February 2013.
- 4 In 2012, an application was made for entry clearance for Kamille to enter the UK under the immigration rules on the grounds that the Sponsor had sole responsibility for her upbringing. That application was refused, and an appeal was brought by Kamille against such refusal. The appeal proceeded on the papers and was heard on 15 March 2013 by Judge of the First-tier Tribunal Herlihy. On 23 March 2013, Judge Herlihy dismissed that appeal. There was subsequently an appeal to the Upper Tribunal in relation to that decision, which resulted in a hearing, and the Upper Tribunal apparently upholding the Judge's decision. I have not had sight of that Upper Tribunal decision.
- 5 On or around 15 October 2013, the Appellant made an application for entry clearance under paragraph 297 of the immigration rules to join the Sponsor in the United Kingdom, on the grounds that the Sponsor had sole responsibility for his upbringing.
- 6 It is appropriate to set out the relevant parts of paragraph 297 HC395 at this point:

"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: the

- (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

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal."

7 In a decision dated 8 January 2014, the Respondent refused the application for reasons, in summary, as follows:

(i) An application for entry clearance made by the Appellant's sister Kamille had been refused on 26 June 2012 on the ground that the Entry Clearance Officer was not satisfied that the Appellant's mother had sole responsibility for the Appellant's sister, and the subsequent appeal had been dismissed.

(ii) Following an interview with the Appellant and Sponsor on 8 January 2014, the Entry Clearance Officer asserted that the Appellant continued to see his father who had also written a letter in relation to the application. The Entry Clearance Officer stated: "I do not accept the emotional or parental contact will be severed entirely with your father if you do travel to the UK. For him to have been asked to give consent to you to travel to the UK would indicate that he has some parental responsibility for you."

(iii) There was no indication that the Appellant's father did not have any contact with the Appellant.

(iv) There was little to show that the Appellant's mother had sole responsibility for the Appellant's upbringing since she decided to leave the Philippines in 2010.

(v) There was no evidence of the Sponsor's financial support of the Appellant.

(vi) The Entry Clearance Officer was satisfied that the Appellant was not living in serious and compelling family or other circumstances which made the Appellant's exclusion from the United Kingdom undesirable.

(vii) There was no indication that the major decisions concerning the Appellant's schooling and welfare were being made by the Sponsor.

8 The Appellant appealed against that decision, the matter coming before Judge Hussain at the Birmingham Tribunal on 2 July 2015. The Appellant was not represented at that hearing, but the Sponsor attended and gave evidence in support of the appeal.

9 At paragraph 9 the judge referred to the previous decision of the First-tier Tribunal in relation to Kamille and stated that the circumstances then were not materially different to the application made today. The judge noted that that decision was appealed to the Upper Tribunal and was heard on 28 October 2013 when the Sponsor "attended to give oral evidence and to make submissions". At paragraph 10, the judge suggested that the time difference between the two cases was not sufficient to have caused a material change to the circumstances claimed by the Sponsor. At paragraph 11, the judge directed himself by stating that under the case of Devaseelan [2002] UKAIT 00702, the findings of the First and Upper Tribunals form the starting point of the present appeal. At paragraph 12, The judge also directed himself that Devaseelan was also authority for the proposition that if the issues and evidence in the first and second appeals are materially the same, the second tribunal should treat the issues as settled by the first decision rather than allowing the matter to be re-litigated.

10 At paragraph 13, the judge held that the issues concerning sole responsibility for Kamille were no different to those concerning the present Appellant and the same finding can be applied to the Appellant's case. He held that for the avoidance of doubt, he was satisfied on the findings of the First and the Upper Tribunal that the Sponsor did not have sole responsibility for the Appellant. At paragraph 14, the judge held that he gave little weight to the Sponsor's evidence as her credibility was damaged by reason of the fact (set out at paragraph 9) that it appeared to be recorded in her interview with the Entry Clearance Officer on 8 January 2014, that she had asserted that the Upper Tribunal had

previously accepted that she had had sole responsibility for Kamille, whereas it had not.

- 11 At paragraph 15, the judge held that the Appellant's father had on two occasions (in the applications for entry clearance for Kamille, and later for the present Appellant) been prepared to provide affidavits in support of the applications, thus confirming that he has not completely washed his hands of responsibility for his children.
- 12 In paragraph 16-24, the judge dismissed the appeal in the alternative under Article 8 ECHR.
- 13 Grounds of appeal appeared to have been drafted by the Sponsor. In granting permission to appeal to the Upper Tribunal, Designated Judge of the First-tier Tribunal Garratt stated as follows in relation to those grounds:

"The grounds appear to have been drafted by the Sponsor on behalf of the Appellant and, in the main, take issue with the conclusions of the judge rather than pointing to any specific arguable errors of law. However, in the second paragraph of the grounds, it is suggested that the judge was wrong to apply the Devaseelan guidelines without considering the evidence submitted in this specific appeal which are related to a different child the Sponsor. This point is arguable. It is evident, from the decision, the judge relied heavily upon the decision made in the entry clearance appeal by the Appellant's sister which was sent out on 8 January 2014. This was done without any evident consideration of evidence produced in support of this appeal which might have shown that the position in relation to the sole responsibility issue was not the same to this Appellant as opposed to his sister. In paragraph 14 of the decision the judge appears to dismiss the Sponsor's evidence for the sole reason that she had accepted that she had made an inaccurate statement in an ECO interview during the course of the present application. Further, it is also arguable, having regard to the decision of the Upper Tribunal in *Mubu and Others (Immigration Appeals - res judicata)* [2012] UKUT 00398 (IAC) that the judge was wrong to apply the Devaseelan guidelines to a decision relating to a third-party."

Judge Garratt granted permission generally.

- 14 In a Rule 24 response dated 21 October 2015, the Respondent argued that the judge had been entitled to conclude that, if the factual basis that was the same as that relied upon in the appeal of Kamille and that further the Sponsor had deliberately sought to mislead the ECO as to material events in respect of Kamille, that these were points that he was entitled to take judicial notice of reaching his decision. However, the Respondent accepted that the reference to Devaseelan was mistaken

and amounted to an error in law. However, this was said not to be material, as the findings at paragraph 13 and 14 were more than adequate to support the judge's decision, and that no material error of law had been disclosed.

- 15 Before me, the Appellant was not represent but the Sponsor appeared in person, and the Respondent was represented by Mr Avery. I explained the procedure to the Sponsor and invited her to provide any argument she felt appropriate on behalf of her son the Appellant in relation to the appeal. She described the whereabouts of her four children, which, although not relevant to the primary task in this error of law hearing, I noted. (Kimberly was 32 and lived in Manila; Katrina had now moved to Canada; Kamille, now 21 (who has behavioural problems) lived in the family home, with the Appellant, now aged 19.)
- 16 I invited Mr Tarlow to address me. He relied on the Respondent's Rule 24 response, and accepted that the authority of Devaseelan did not apply because the Appellants in the first and second proceedings were different. However, any error was not material.
- 17 During a reply from the Sponsor, she produced a copy of the First tier decision of Judge Herlihy which I considered.
- 18 At the end of the hearing, I indicated that I found that there were material errors of law in the judge's decision, and indicated that I intended to set aside the decision, and to remit the matter for rehearing before the First tier Tribunal. I now provide my reasons for so finding.

Discussion

- 19 I will not reiterate the whole of the guidelines provided in the case of Devaseelan, but it is sufficient for present purposes to suggest that *where such guidelines apply*, the first such guideline provides that the first determination should always be the starting-point for the findings to be made by a second decision maker. The present judge clearly held that the Devaseelan guidelines applied, and held that there was no so sufficient basis to come to a different conclusion than that made by the First tier and Upper Tribunals considering Kamille's appeal, which was that the Sponsor did not have sole responsibility for her. The present judge held, by extension, that the Sponsor did not have sole responsibility for the present Appellant either.
- 20 I find that the question of whether the Devaseelan principles had any application to the present appeal is not as straightforward as the Respondent appears to indicate in her concession, which was that they did not apply.
- 21 The headnote of Mubu and others (immigration appeals - res judicata) Zimbabwe [2012] UKUT 398 (IAC) provides as follows:

“The principle of res judicata does not operate in immigration appeals.

The guidelines set out in Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1 are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties. This is so whether the finding in the earlier determination was in favour, or against, the Secretary of State.”

- 22 In that appeal, the appellants had argued that where an issue of fact had been decided in their favour in earlier proceedings before the Tribunal to which they had been a party, that issue was to be treated as res judicata. That proposition was rejected by the Tribunal in Mubu. I find that the second paragraph of the head note, seemingly giving guidance as to the status of an earlier judicial determination in an appeal against an earlier decision ‘involving the same parties’, is not intended to indicate that the Devaseelan principles apply only to subsequent proceedings if the parties are the same as in the first proceedings before the Tribunal.
- 23 This is clear from AA and AH v SSHD [2007] EWCA Civ 1040, in which the Court of Appeal (by majority, Hooper LJ dissenting) held that the Devaseelan guidelines may also apply to appeals where, notwithstanding that there were different parties, there was a material overlap of evidence; see Carnwath LJ, paras 64-68 generally. As to how the Devaseelan guidelines might be applied in practice in such cases, see Carnwath LJ at 69-70:

“69 While I do not think it is open to us to depart from Ocampo I would suggest two qualifications, which seem to me consistent with it. First, Auld LJ said that the guidelines are relevant to "cases like the present" where the parties are not the same but "there is a material overlap of evidence". The term "material" in my view requires some elaboration. It recognises I think that exceptions to the ordinary principle that factual decisions do not set precedents (see above) should be closely defined. To extend the principle to cases where there is no more than an "overlap of evidence" would be too wide, and could introduce undesirable uncertainty. In all the cases in which the principle has been applied so far, including Ocampo, the claims have not merely involved overlapping evidence, but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events. I would respectfully read Auld LJ's reference to "cases such as the present" as limiting the principle to such cases.

70 Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether

the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct party to the first decision, whereas the claimant was not. It is one thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal's comments, in Devaseelan, on what might be "good reasons" for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the "increasing tendency" to blame representatives for unfavourable decisions by Adjudicators, commenting:

"An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence..."

I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the Devaseelan principles in such cases (for example, the hypothetical series of cases involving the same family, cited in TK), the second tribunal may be more readily persuaded that there is "good reason" to revisit the earlier decision."

The present case

- 24 In the light of that authority, which I note was not discussed by the Judge in the present decision, I find that it was necessary for the judge to identify with some care:
- (i) what evidence was relied upon by the first Appellant (Kamille) in her appeal, and how the issues in that appeal were determined by judge Herlihy; and
 - (ii) what evidence was being relied upon by the present Appellant (Kameron) in his appeal.
- 25 Neither Kamille nor the present Appellant were heard by the First tier Tribunal (naturally, they being outside the United Kingdom). The common factor in the two appeals is clearly the evidence given by the Sponsor.
- 26 It is to be noted that the Sponsor did not give oral evidence before Judge Herlihy, that appeal being considered on the papers. The present judge observed as follows on that issue:

"It could be argued that the Sponsor did not attend to give evidence to the first Tribunal whereas she has done so on this

occasion. However, the Sponsor concedes that when the matter went to the Upper Tribunal she did attend, not only to give oral evidence but also to make submissions as she has done today.”

- 27 However, it is not clear what evidence, if any (as opposed to submissions) the Sponsor actually gave to the Upper Tribunal, at the error of law hearing of 29 October 2013.
- 28 In any event, I find that the relevant distinction to recognise is the manner in which the First tier hearings proceeded, not whether the Sponsor attended at the Upper Tribunal hearing of 28 October 2013. No oral evidence was heard by Judge Herlihy, whereas oral evidence was heard by the present judge. As impliedly suggested by Judge Garratt in granting permission to appeal, if the judge has deemed the whole of the Sponsor’s oral evidence to be unreliable on the sole the basis that it was thought that in her interview with the Respondent on 8 January 2014 she mis-stated (whether purposely, or accidentally) the Upper Tribunal’s findings, this was clearly an inadequate basis on which her evidence could be rejected. I find that the Judge erred in law in failing to have proper regard to the Sponsor’s oral evidence.
- 29 Further, applying AA and AH, I find that the Judge erred in failing to consider whether there may be a ‘good reason’ not to apply the Devaseelan principles and to revisit the earlier decision, on the basis, for instance, that the Appellant, a minor child, was not a party to his sister’s appeal, did not give evidence in it, and that the only live witness in his appeal, did not give live evidence in his sister’s appeal.
- 30 Further, I note that there were other differences in the evidence before Judge Herlihy and the present Judge. Whereas Judge Herlihy refers at para 5.5 to a Philippine bank account and finds that it was not clear where the money appearing in that account had been coming from, the present Appellant had included in his bundle his mother’s UK bank accounts, which showed very many transfers to ‘Philippine Nationa...’ (sic) which the Sponsor asserts are transfers that she makes to her bank in the Philippines which her children access there.
- 31 The Appellant and Sponsor were also interviewed in relation to the present application; something which does not, at least from the face of Judge Herlihy’s decision, appear to have happened in relation to Kamille’s application. Other evidence before the present judge appeared to indicate that the Appellant’s father does not even live on the same island in the Philippines as the Appellant (see the assertion to that effect at question 106 of the application form; the father’s own affidavit, and the interview with the Sponsor, question 47). This evidence does not appear to have been taken properly into account, whether for the purposes of determining whether the evidential basis of the present application differed sufficiently from his sister’s appeal to depart from the Devaseelan guidelines, or at all.

- 32 Ultimately, I am able to agree with the concession made by the Respondent in this case in its Rule 24 Response, that the Devaseelan guidelines should not have been applied in this case, although for the rather more detailed reasons that I have set out at paragraphs 26 to 31 above.
- 33 Further, I find that, even without the matter being raised in the Appellant's grounds of appeal, that it is a Robinson obvious error of law for the Judge to have failed to direct himself in law appropriately in accordance with TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 as follows:

"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".

And see also the guidance at paragraph 52 of that decision

"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".

- 34 Any decision as to what roles the Sponsor, the Appellant's father, and his older sisters may have had in the Appellant's upbringing, must be made bearing that guidance in firmly mind, in particular the question raised at para 52(x): 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. In making a finding that the Appellant's father had 'not completely washed his hands of responsibility for his children' by dint of his act of writing two letters (which, somewhat ironically, were to the effect that he washed his hands of any responsibility towards this children) suggests that the Judge failed to have the guidance in TD Yemen in mind.

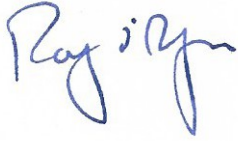
Decision

- 35 I therefore find that the First tier decision involved the making of material errors of law.
- 36 I set aside the decision of the First tier. No findings of fact are retained from the decision.
- 37 I find that the degree of fact-finding that will be required for the present appeal to be remade is of a degree that the matter is suitable for remittal to the First tier Tribunal, for determination in accordance with the legal issues set out in this decision.
- 38 Given the complexity and history of this appeal, the Sponsor is encouraged to give serious consideration to obtaining legal representation for the remitted hearing.

39 The Upper Tribunal regrets the time taken to produce the present decision.

Signed:

Date: 6.7.16

A handwritten signature in blue ink, appearing to read 'P. O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O’Ryan