



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005724
First-tier Tribunal No: HU/50642/2022
Case No: UI-2022-005725
First-tier Tribunal No: HU/50643/2022
IA/01562/2022 & IA/00931/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 April 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

RHEYMEN CANTALEJO
DANIELA CANTALEJO
(NO ANONYMITY ORDERS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hodson of Counsel, instructed by Queen's Park Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 13 March 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 24 August 2022, in which the Appellants' appeal against the decisions to refuse their applications for entry clearance under paragraph 297 of the Immigration Rules dated 26 January 2022 were dismissed.
3. The Appellants are national of the Philippines, born on 15 November 2002 and 14 June 2005, who most recently made applications under paragraph 297 of the Immigration Rules to join their father in the United Kingdom on the basis that he had sole responsibility for them. This followed earlier applications on 2 July 2019 which were refused by the Respondent in decisions dated 30 October 2019 and

appeals against those refusals were dismissed in a decision of First-tier Tribunal Judge Freer promulgated on 23 February 2021.

4. The Respondent refused the latest applications in materially identical decisions dated 26 January 2022 on the basis that first, the Appellants did not have valid TB certificates (those submitted had already expired) and secondly, it was not accepted that the Appellants' father had sole responsibility for the Appellants nor were there any compelling or compassionate factors warranting a grant of leave to remain. The Respondent relied upon the previous Tribunal determination in which the Appellants' father was not found to be credible, nor did he have sole responsibility at that point.
5. Judge Hawden-Beal dismissed the appeals in a decision promulgated on 24 August 2022 on all grounds. In summary, the starting point in the appeals was the previous Tribunal decision, further to which there was limited further evidence comprising of an affidavit from the Appellants' mother and letters from the local Church and community. As to the latter, the letters detailed only the Appellants' address and not who had responsibility for them and little weight was attached to the Church letter which referred to the Appellants' father as a primary contact when there is no reason why such a contact out of the country would be required. There were also school ID cards which showed, for the First Appellant only, the Appellants' father as emergency contact (with his old address in the Philippines). The Judge noted that there was no further evidence from the school such as reports or anything about contact or finances and no medical evidence; the sort of which would be expected in a case like this focusing on whether a person has sole responsibility.
6. In relation to the affidavit from the Appellants' mother, it was noted that the contents were contradictory to the Appellants' claim that they had lived with her from birth until at least 2018. When considering whether the signature was genuine, reference was made to the Appellants' mother's voting card, which the Judge went on to note contained the same address as given by the Appellants in their statements, in the community and Church letters, as well as school identity forms; but different to the address given on the visa application forms said to be their grandmother's address. It was considered whether this was just an old address, but noted that this was the same address as the Appellants' TB certificates dated June 2022 and there was no evidence of any money transfers to the Appellants' address or to the Appellants' grandmother. As a result of considering this evidence, the Judge found that the Appellants were living together with their mother at a particular address, 120 Purok 2.
7. Overall, the Judge was not satisfied that any of the new evidence went behind the earlier findings of Judge Freer and in fact went further to show that the Appellants were not living with their grandmother but were still living with their mother who was still making the decisions in their lives as she had done since their father came to the United Kingdom in 2006. As such, the Appellants' father did not have sole responsibility. The appeal was then dismissed on human rights grounds given that the requirements of the Immigration Rules were not met and the refusal would mean the continuation of the Appellants lives as they had always known them, such that the refusals were not a disproportionate interference with their right to respect for family life.

The appeal

8. The Appellants appeal on two grounds. First, that the First-tier Tribunal materially erred in law in making a material error of fact as to where the Appellants were living and with whom, the finding that they lived with their mother was contrary to the evidence before the First-tier Tribunal and also was a matter of procedural fairness given that this point was not relied upon by the Respondent and not raised at all during the hearing either for evidence to be given or submissions made. Secondly, that the First-tier Tribunal materially erred in law, essentially in consequence of the first ground of appeal, in finding that the Appellants' father did not have sole responsibility for them.
9. At the oral hearing, Mr Hodson relied on the grounds of appeal and indicated that there was a difficulty in the nature of the evidence before the Tribunal, which was confusing and showed a number of different addresses for the Appellants, their mother, their grandmother and potentially their aunt as well. In respect of the second ground of appeal, it was submitted that this essentially stood or fell with the first ground, in that if there is an error of law as to the finding that the Appellants lived with their mother, it is difficult to see how the overall findings on sole responsibility could not be infected or affected, the finding was fundamental to the overall reasoning. It was submitted that the Appellants living with their mother was used by the Judge as a 'slam-dunk' point, although the contrary was also accepted that if the Appellants were living with their mother, it would be difficult to show that their father had sole responsibility.
10. In relation to the first ground of appeal, it was noted that the finding that the Appellants were living with their mother was not based on the earlier decision of Judge Freer who made no findings at all on where the mother lived, such that the *Devaseelan principles* were not relevant here. In that decision, the Judge accepted that Appellants' father's evidence that the Appellants' mother and grandmother were making at least some decisions for the Appellants and that the mother lived in the same country.
11. In the present case, it was submitted that the Judge came up with an entirely new theory of the case based on inconsistent documents as to the addresses, which it was accepted included a number of different addresses for everyone involved in the Philippines. The Respondent's position in the refusal letters, review and at the hearing before the First-tier Tribunal was that the Appellants' mother lived in the same city in the Philippines and as the previous primary carer, the arrangements with her involvement while they lived with their grandmother could continue. It was submitted that there was then post-hearing investigation by the Judge which was used as determinative of the issue in the appeals and in the absence of the issue being raised at the hearing; such that it is impossible to know if there is an explanation of the contradictory evidence. It was accepted that there was no rule 15(2A) application to rely on such evidence before the Upper Tribunal. It was also suggested that the accuracy and consistency of documentary evidence from the Philippines should not be assumed.
12. On behalf of the Respondent, Mr Melvin relied on his skeleton argument and submitted that the grounds of appeal were unmeritorious. The Judge was entitled to make the findings that he did on the evidence before him which involved numerous different addresses for those in the Philippines. The applications were made on the basis that the Appellants lived with their grandmother at 109 Purok, but there was wider evidence showing they lived at 120 Purok 2. The differences were an obvious point for the Judge to take and it was not necessary to refer to

every piece of evidence. In particular, although not expressly referred to in the decision, there were travel certificates for both Appellants which stated that they lived with their mother at the same address. Against the backdrop of the previous appeals being dismissed and the Appellants' father not being found to be credible, the burden was on the Appellants to show that their father had sole responsibility for them. It was accepted previously that their mother remained involved, which is contrary to the affidavit relied upon in the current appeals that stated she had never had responsibility for the Appellants. Mr Melvin submitted that although the issue of who the Appellants were living with was not raised by the Respondent, the Judge was tasked with considering all of the evidence before the Tribunal and on that basis, the only conclusion could be that the Appellants were not residing with their grandmother as claimed.

13. Overall it was submitted that there was no material error of law in the First-tier Tribunal's decision. The contradictory addresses was an obvious point and the onus was on the Appellants/their father to show that he had sole responsibility and this had not been done. The previous appeal noted the kind of evidence that was missing and those concerns were not addressed in the previous appeal which was only a matter of months before the latest applications. In any event, the finding on the Appellants' address and who they were living with was not therefore material to the outcome of the appeal.

Findings and reasons

14. The first ground of appeal is divided into two parts, the first that there was a material error of fact and the second that there was procedural unfairness; both related to the issue of where the Appellants lived and with whom. As to the first part, the Appellants have not been able to establish any mistake of fact in the finding that the Appellants were residing with their mother in the Philippines given that there was no clear or consistent evidence before the First-tier Tribunal that they were not. At its highest, the Appellants could only show that there were other possible findings on the evidence but Mr Hodson could offer nothing more than that the evidence of addresses was confusing and showed multiple addresses for each of the relevant people in the Philippines. It is notable that there was no application under Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence on behalf of the Appellants as to the issue or to offer any explanation of the multiple different addresses which may have been helpful for the Appellants to establish the claimed mistake of fact. In the absence of anything further, it remains the case that there was differing evidence before the First-tier Tribunal as to where the Appellants, their mother and grandmother lived in the Philippines and that one reasonable and rational conclusion that could be reached on that evidence, was that the Appellants were living at the same address as their mother - for the reasons given in the First-tier Tribunal decision but also by reference to the latest dated documents in the bundle containing address information, the travel certificates issued in respect of both Appellants on 20 October 2021 which record the Appellants as having the same address as their mother. In these circumstances, the Appellants have not established any mistake of fact in the finding that the Appellants were living with their mother. The first part of this ground of appeal is no more than disagreement with the finding.
15. In relation to procedural fairness, there is no real dispute that the issue of differing addresses was not aired at the hearing, either by Judge, by the Respondent or with questions put to the Sponsor; and it was not dealt with in

submissions from either party. There is nothing in the decision to suggest that this issue featured at all at the hearing. In such circumstances, where the issue concerns a finding that is material to the outcome of the appeal, the usual course would be that there would be a further hearing to allow a party to respond and findings made on the issue. It would only be in rare and very clear cases that an issue of procedural fairness would not require this, however I find that these appeals are such cases. The reasons for this are, in essence, the same as the reasons that I do not find any material error of law on the second ground of appeal. It simply could not have made any difference in the appeals.

16. In these appeals, there was a previous and very recent First-tier Tribunal decision of Judge Freer promulgated on 23 February 2021, which in accordance with the principles in *Devaseelan* was the starting point for the First-tier Tribunal in the present appeals. In that decision it was found that the Sponsor did not have sole responsibility for the Appellants and the Sponsor was not found to be credible. The task of Judge Hawden-Beal was then to consider further evidence in accordance with the principles in *Devaseelan*. There is no challenge to the weight attached to this evidence by the Judge or the findings in the following paragraphs:

“42. Since that determination is my starting point, I have to consider what has changed since then to persuade me to go behind the finding that the sponsor did not have sole responsibility for the appellants. I have a letter from the community council at pdf 142 which states that the appellants live at 120 Purok 2 and when he is in the Philippines, the sponsor is also registered at that address. The letter goes on to say that their guardian is the paternal grandmother. The community council do not have the appellants mother registered within their area. There is no documentary evidence to demonstrate that the grandmother is their legal guardian. This letter does not confirm that the sponsor has sole responsibility for the appellants. It merely tells me where the appellants live and that is it.

43. The letter from the church at pdf 143 states that the appellants attend that church as does the sponsor when he visits, again which he has only done once since 2006. The church states that the sponsor is the main contact for the appellants. I am not quite sure why the church needs the sponsor’s contact details when he is almost 7000 miles away, but their grandmother is actually in the same town. I place little weight upon this document.

44. I have considered the appellants school identity cards at pdf pages 147-8. These are for the school year 2019-20. The second appellant has the sponsor as his emergency contact and the first appellant has her grandmother. But both contacts are noted to be at the appellants home address of 120 Purok 2. The second appellant’s college contact is again the sponsor at their home address. The first appellant does not appear to have a college identity card, but she has produced a letter from her college, confirming that she is a student there.

45. None of these identity cards or letters tell me that the sponsor has sole responsibility and indeed for the first appellant, the sponsor was not her emergency contact. There is nothing from the school or either of the colleges to say that the sponsor is the person to whom they

would refer if needed. There is nothing from the school from 2019-20 to say that the sponsor has been in contact with it to check on the appellants progress or that he visited it in 2019; there is no evidence to say that the school has his contact details in their records; that he paid for anything required by the appellants whilst they were there or that he gave permission for any extra-curricular activities and there is no evidence of any school reports for the appellants whilst at school or to whom they were sent. There is a dearth of evidence from the school, just as there was before Judge Freer in 2021.

46. There is also a lack of evidence from any doctor with whom they may be registered, saying when they first went to the practice, who went with them, who was the person noted as the emergency contact, especially when they were younger.

47. Finally, I turn to the affidavit purportedly from the mother. I take on board the respondent's comments in the refusal letter that by stating that she has not, does not and will not take responsibility for the appellants does contradict the evidence that they lived with her from their births until 2018. She therefore must have had responsibility for them for at least 13-15 years. The sponsor seemed to have difficulty answering the questions as to how this tribunal would know that the signature on the bottom of the affidavit was indeed the appellant's mother's signature. ...

53. It was made clear to the sponsor in Judge Freer's determination what evidence would be expected in an application such as this, but he has submitted none of that evidence. There is nothing from the schools or colleges to say he has been in touch, he has visited, he has reports sent to him, there is nothing and the same for the doctor.

...

56. The only evidence I have that the sponsor has had the control of the direction of the appellants lives so far is the oral evidence of the sponsor himself.

57. I am satisfied that none of the new evidence submitted with these applications has persuaded me to go behind the findings of Judge Freer. ..."

17. The extracts from the decision above omit the findings in relation to the Appellant's address and their mother's address/who they are living with. Although Mr Hodsom submitted that the finding that the Appellants were living with their mother could not be separated out from the reasoning as it was used as a 'slam-dunk' point to dismiss the appeal; in fact, the assessment of the new evidence since the last appeal, which comes first in the reasoning, easily stands alone as a comprehensive and well reasoned decision as to why the previous finding that the Sponsor did not have sole responsibility stands. It is only after that reasoning in paragraph 57 that the Judge in this appeal goes further and concludes that the new evidence shows that the Appellants were not living with their grandmother, but that the mother continues to make decisions for them as she has since the Sponsor came to the United Kingdom in 2006.

18. The burden of proof in these appeals is on the Appellants, to show on the key issue that the Sponsor has sole responsibility for them. Even if the finding on who the Appellants were living with was wrong (which for the reasons above has not been established as an error of fact) and even if all the reasoning as to addresses and the Appellants living with their mother is removed; it is still very clearly the case that the new evidence relied upon by the Appellants falls very far short of establishing that the Sponsor has sole responsibility. For these reasons, despite the procedural fairness point that the differing addresses were not put to the Sponsor or the parties at the hearing; there was simply no sufficient evidence before the First-tier Tribunal upon which any reasonable and rational Judge could have concluded that the Sponsor had sole responsibility - there was the same dearth of evidence that there was before the first Tribunal. There is no stand alone challenge to the Article 8 findings beyond the issue of sole responsibility and there is therefore no material error of law on either ground of appeal. On the evidence before the First-tier Tribunal, the appeals were bound to fail.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeals is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28th March 2023