IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16691/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2014	**On 14 November 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE DEANS

Between

KEVIN STEVEN QUINDE COLCHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Thoree, Thoree and Co Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a determination promulgated on 22 May 2014 by the First-tier Tribunal (Judge Prior) dismissing the appellant's appeal against a decision made by the Secretary of State to refuse him entry clearance to the United Kingdom in order to join and settle with his mother and his stepfather. Permission to appeal was refused by the First-tier Tribunal (Judge Levin) but after the filing of "Grounds for Reconsideration" it was granted by the Upper Tribunal (Judge Kekic).

2. At the time when the application was made the appellant was 14 years old. He had lived all his life in Ecuador. He is an Ecuadorean national. His application was based upon his mother's marriage to her husband, who is a person present and settled in the United Kingdom. His mother has discretionary leave to remain.

3. There is a tragic history, in that the appellant was conceived as a result of the rape of his mother when she was only 12 years old. As a result of that he never knew his biological father, and his father had no part to play in his upbringing. The Tribunal accepted the evidence in that regard and made fact-findings about it in the determination (paragraph 8).

4. The sole issue that forms the basis of the appeal before us today is whether there was an error of law that influenced the decision of the First-tier Tribunal that the appellant's mother did not have sole responsibility for his upbringing and care. That was a matter which it was necessary for him to prove on the balance of probabilities. As recorded in paragraph 14 of the determination it was common ground between the parties that this was the only issue in the appeal.

5. The leading authority on the meaning of "sole responsibility" is the case of **TD (Yemen) [2006] UKAIT 00049**. It is clear that this authority was considered by the First-tier Tribunal; specific reference is made to it in paragraph 17 of the determination.

6. At this stage it is pertinent for us to refer to some of the passages in **TD (Yemen)** which have a bearing on the issue we have to decide in this appeal, namely whether or not the determination that the mother did not have sole responsibility was tainted by the First-tier Tribunal adopting too high a test or standard.

7. The test is set out in paragraph 27 of **TD (Yemen)** as follows:

> "What is apparent ... is the need to establish "responsibility" for the child's upbringing in the sense of decision making, control and obligation towards the child which must lie exclusively with the parent. Financial support, even exclusive financial support, will not necessarily mean that the person providing it has "sole responsibility" for the child. It is a factor but no more than that."

8. Further on in the decision in paragraphs 50 and 51 the Asylum and Immigration Tribunal said this:

> "The touchstone of "sole responsibility" is the continuing control and direction by the parent in the UK in respect of the "important decisions" about the child's upbringing. The fact that day-to-day decision-making for a child - such as "getting the child to school safely and on time, or putting the child to bed, or seeing what it has for breakfast, or that it cleans its teeth, or has enough clothing, and so forth" (**Ramos,** per Dillon LJ at p.151) rests with the carers abroad

> is not conclusive of the issue of ”sole responsibility”. However if the UK based parent has allowed the carer abroad to make some “important decisions” in the child’s upbringing then it may readily be said that the responsibility for the child has become “shared”.
>
> In reaching a decision on what is a fact-rich issue it is important to take account of evidence of any contact between the parent and the carer in respect of important decisions to be taken about the child and its upbringing. The availability of modern communications technology may reduce the impact of distance alone on a UK parent’s ability to be consulted (and therefore decide) about the child’s upbringing in another country. The length, and cause, of the separation of a parent and child and the reasons for its continuation may shed some light on the role played by the carer abroad. Likewise it may be helpful to look at the financial support provided by the parent and, in particular, its absence may be very telling.”

9. In approaching the question of sole responsibility, which as the AIT stressed is a “fact-rich” issue, the Tribunal first considered the question of where the appellant had been living. It then turned to the case of **TD (Yemen)** from which we have already quoted the salient passages, and said that it was satisfied from the documentary evidence (to which it referred) that there were remittances by the mother to the child which amounted to some financial support of the appellant. The Tribunal also made this positive finding: “testimony identified to my satisfaction recipients whose identities were questioned by the respondent and the Entry Clearance Manager” (paragraph 17). Those recipients were the partner of the appellant's grandmother and the great- step-aunt of the appellant, who were his carers.

10. The Tribunal next went on to find that there was no documentary evidence relating to the appellant's education and educational progress, apart from two untranslated documents (paragraph 18).

11. Paragraph 19 is important. The Tribunal there considered the evidence given by the stepfather and the mother in respect of the contact that they had with the appellant in Ecuador, and their alleged responsibility for the appellant's education. There was a finding that the mother’s evidence in relation to why there were no pre-2013 visits was “unsatisfactory”. The Tribunal referred to the mother being asked why she had no school reports or evidence of school fees being paid as evidence of her interest in the appellant's education, and noted that she provided no answer to those questions. The paragraph continues as follows:

> “The sponsor, in testimony, claimed to take all major decisions about the appellant's education and schooling, yet there was no evidence of any kind that suggested to me that the sponsor monitored, or kept in touch with, the appellant's educational progress.”

12. Read in context, what the Tribunal was saying there was that although the mother had claimed that she took major decisions about the appellant's education and schooling, it was not satisfied with that bare assertion, in the absence of any other evidence to support or corroborate it. If what the mother claimed was correct, the Tribunal would have expected some evidence that she was paying regard to how her son was getting on at school, for example, but there was none.

13. The Tribunal then referred in paragraph 20 to the only specific example produced in evidence of the mother ostensibly taking a major decision in relation to the appellant's life, and pointed out that that evidence post-dated the decision of the Secretary of State, and was self-serving.

14. One then comes to the paragraph which is at the heart of this appeal, paragraph 21:

> "The statements of the sponsor, the stepfather and the appellant's grandmother all spoke of the sponsor being consulted in relation to important decisions affecting the appellant. I am bound to observe that the verb consult usually conveys the meaning of consultation with third parties but a decision not to be taken by those third parties. At most I interpret that evidence as indicating joint decision-making rather than sole decision-making on the part of the sponsor."

15. On behalf of the appellant Mr Thoree submitted that the Tribunal elevated the word "consult" to a meaning that it does not bear in the Oxford English Dictionary. The word "consult" means to seek information or advice from somebody. It does not necessarily convey any information about who makes the decision at the end of the consultation. Consultation is simply taking their views into account. We agree that this is what the word "consult" means. However, the second sentence of paragraph 21 goes no further than to make the perfectly fair point that when the word "consult" is used in everyday speech, it usually indicates that the person being consulted does not take the decision; rather, the person doing the consulting does. Evidence of consultation is not evidence that the mother was the sole decision-maker.

16. On the basis of the alleged error in paragraph 21 Mr Thoree submitted that the Tribunal was applying too high a standard in assessing whether the sponsor had sole responsibility for the appellant's upbringing. The carers would not be consulting the mother if they could make the relevant decisions without reference to her. He also contended that there was too much weight placed by the judge on the absence of evidence in relation to school records and consultation in relation to the appellant's education.

17. In our judgment, on a proper reading, there is no error, and what was said in paragraph 21 is no foundation for the submission that the Tribunal applied a higher test than the balance of probabilities. The Tribunal was entitled to regard the evidence of "consultation" as falling short of what was required. The relevant test for "sole responsibility" does not turn on

whether the parent is consulted by the carers (in the sense of seeking his or her views and taking them into account) but on who makes the important decisions. That was exactly what the Tribunal was saying. If one looks in particular at the passages at paragraphs 50 and 51 of **TD (Yemen)** quoted above, it is clear that the touchstone of sole responsibility is the continuing control and direction by the parent in the UK in respect of the important decisions about the child's upbringing. That is what the First-tier Tribunal found was lacking on the evidence adduced before it (including, in particular, the evidence in respect of his education).

18. It seems obvious to us that the point that the First-tier Tribunal was making in paragraph 21, albeit perhaps not as clearly as it might have done, was that the evidence of consultation did not establish that the important decisions that were being taken about the child and about the child's upbringing were being made by the sponsor, or (taking that evidence at its highest) by the sponsor alone. It is not enough to take into account the wishes of the mother, and it is not enough to make those important decisions jointly with her. The evidence suggested that those who had the responsibility for caring for the child abroad were taking important decisions that went above and beyond such minor matters as getting him to school safely or making sure that he cleaned his teeth or making sure that he was properly fed. Therefore all that there was left was some evidence of financial support, which **TD (Yemen)** makes clear will not suffice, in and of itself, to make out "sole responsibility". We are not persuaded that the Tribunal placed too great a reliance on the absence of school records. This was one of the many factual pieces of information that was weighed in the balance in reaching a highly fact-sensitive decision.

19. On behalf of the Secretary of State, Mr Whitwell submitted that some of the considerations that came into play when finding that sole responsibility was not made out, also tied in to the question of what was in the child's best interests and thus there was no failure by the Tribunal to have regard to the best interests of the child as alleged in paragraph 13 of the "grounds for reconsideration". Mr Whitwell pointed out that at the time of the decision by the Secretary of State the appellant was a teenager who was living in a family unit in Ecuador, which was the only country he has ever known since his birth, and therefore there was no real reason for supposing that his best interests lay in relocation from that country to the United Kingdom. There is a great deal of force in those submissions. However, the decision that was made by the Tribunal really turned on the question of sole responsibility, which it was common ground was the only live issue before it. Thus the question of where the best interests of the child lay, though relevant, was not material to the determination.

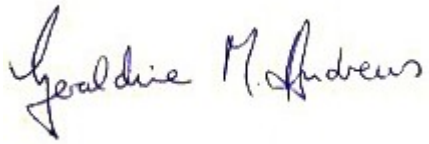
20. In our judgment, when paragraph 21 of the determination is read as a whole and put in context, it is clear that far from applying too high a standard, the Tribunal was actually applying its mind very clearly to the decision in **TD (Yemen)** and asking itself the correct question, namely,

does the mother make the important decisions about this child, or is it a matter for the people who are looking after him in Ecuador? The Tribunal was not satisfied that it was the mother alone. That was a finding that it was entitled to reach on the evidence before it. There was no error of law, let alone a material error of law, in the determination on this or any other ground stated in the grounds of appeal.

Notice of Decision

21. For the reasons stated we find that there was no material error of law on any of the grounds stated. This appeal is therefore dismissed.

No anonymity direction is made.

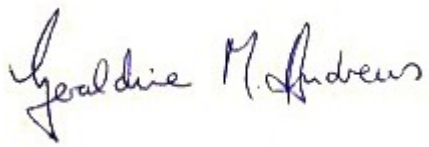


Signed Date 13 November 2014

Mrs Justice Andrews

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.



Signed Date: 13 November 2014

Mrs Justice Andrews