Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01666/2013
OA/01667/2013

THE IMMIGRATION ACTS

Heard at Newport **Determination Promulgated**

On 15 May 2014 **On 4 June 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KO
SO
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellants: The Sponsor
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or

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Court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellants are citizens of Thailand who were born on 7 February 2001 and 9 April 1998 respectively. They are sisters. On 24 September 2012, the appellants applied for entry clearance to settle in the UK with their mother "JB" who is present and settled in the UK where she is married to a British citizen, "AB". On 15 November 2012, the Entry Clearance Officer refused each of the appellants' applications under para 297 of the Immigration Rules (HC 395 as amended). The Entry Clearance Officer was not satisfied that the sponsor had "sole responsibility" for the appellants' upbringing (para 297(e)). On 2 July 2013, the Entry Clearance Manager confirmed the ECO's decision and also concluded that there were no "serious and compelling family or other considerations" which made the exclusion of the appellants undesirable (see para 297(f)).

The Appeals

3. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 12 November 2013, Judge Moore dismissed each of the appellants' appeals. First, he was not satisfied that the sponsor had "sole responsibility" for the appellants' upbringing and secondly he was not satisfied that there were any serious or compelling family or other considerations which made exclusion of the appellants undesirable. Consequently the requirements of paragraph 297 were not met.

4. The appellants sought permission to appeal to the Upper Tribunal. On 4 March 2014, the First-tier Tribunal (Judge Landes) granted each appellant permission to appeal on two grounds. First, that the Judge had arguably failed to take into account all the evidence concerning the appellants' circumstances in Thailand in concluding that there were no "serious or compelling family or other considerations". Secondly, it was arguable that the Judge had misdirected himself in reaching his adverse finding on "sole responsibility" in that, having accepted the evidence of the sponsor's husband, "AB" that she made all the major decisions in their lives, he relied on the fact that the day-to-day care of the appellants was with their grandparents in Thailand.

5. Thus, the appeals came before me.

6. The sponsor did not attend the hearing as, I was told by her husband "AB", she was in Thailand. The sponsor's husband attended on her behalf. The respondent was represented by Mr Richards.

The Submissions

7. Mr Richards invited me to find that the Judge had not erred in law in finding that the appellants had failed to establish that there were “serious and compelling family or other considerations” under para 297(f). Mr Richards recognised that there was evidence before the Judge of troubling events but these had occurred after the ECO’s decision and could not be taken into account.

8. However, Mr Richards indicated that he had misgivings about the Judge’s finding in relation to “sole responsibility”. Mr Richards submitted that the Judge may well have failed to apply the guidance set out in the AIT’s decision of TD (Paragraph 297(i)(c): Sole Responsibility) Yemen [2006] UKAIT 00049. Mr Richards acknowledged that the grant of permission identified a difficulty in the Judge’s reasoning, namely his acceptance of AB’s evidence that the sponsor made all the major decisions whilst, nevertheless, relying on the fact that the appellants’ grandparents (with whom they lived in Thailand) made day-to-day decisions about the appellants. Mr Richards acknowledged that it was inevitable that the carer or carers overseas had day-to-day responsibility for an individual and that, in the light of TD, that was not necessarily inconsistent with a sponsor in the UK having “sole responsibility”.

9. Mr Richards indicated that if I was satisfied that there was an error of law in the Judge’s finding on “sole responsibility”, I should remake the decision in the light of all the evidence including that of the sponsor’s husband, AB whose evidence the Judge had accepted. Mr Richards did not seek to put forward a positive case that the evidence did not establish that the sponsor had “sole responsibility” for the appellants.

10. At the conclusion of Mr Richards’ submissions, I indicated that I was satisfied that the Judge’s decision under the Immigration Rules could not stand and I would remake the decision and was satisfied on the evidence that the sponsor had “sole responsibility” for the appellants.

11. My reasons for those decisions I now set out.

Discussion

12. The relevant Immigration rule is para 297 of HC 395 (as amended) which, so far as relevant to these appeals, provides as follows:

> “297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent…present and settled…in the United Kingdom are that he:
>
> (i) is seeking to enter to… join a parent…in one of the following circumstances:
>
> ….
>
> (e) one parent is present and settled in the United Kingdom… 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…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;…"

13. It is not suggested in these appeals that the appellants do not meet the remaining requirements in paragraph 297 of the Immigration Rules.

14. The proper approach to the issue of "sole responsibility" is set out in the AIT's decision in TD and is summarised at [52] of its determination as follows:

"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". "

15. As [52(ix)] makes clear, the test of whether a sponsor has "sole responsibility" for a child is whether or not that parent has "continuing control and direction" of the child's upbringing "including making all important decisions in the child's life". That is contrasted with the factual situation that, out of necessity because of geographical separation between a parent and child, another person or persons where the child lives may have day-to-day responsibility. That, however, is not inconsistent with a parent in this country having "sole responsibility" if he or she has continuing control and direction over a child's upbringing including making the important decisions.

16. Although Judge Moore cited the italicised headnote in TD at para 28 of his determination, it is clear to me that he misdirected himself in determining whether the sponsor had sole responsibility. At para 19 of his determination, Judge Moore accepted that AB was "an honest and credible witness who had a concern for both appellants". AB gave evidence that it was the sponsor who made all major decisions (see para 15 of the determination). AB's evidence is set out as follows:

> "She always determined which schools both appellants should go to despite the fact that she had been living in the UK since 2005. Whenever the mother was in Thailand she would always visit the school and teachers to be informed as to the academic progress of her two children. She would transfer monies for the school fees to her own brother–in-law in Thailand who would himself transfer it to the grandfather's bank account with whom the appellants lived. It was the grandfather who then paid the school fees as can be seen from the bank account details on page 33 of the appellant's bundle. [AB] further explained that it was always the mother of the appellants who made big decisions and not either of the grandparents particularly bearing in mind that both grandparents were now getting older and were unable to cope with two young grandchildren."

17. That evidence is clear and it was accepted by the Judge. It was evidence wholly consistent with the sponsor having "sole responsibility" for the appellant and that the grandparents (with whom the appellants lived in Thailand) only exercising day-to-day responsibility because the appellants lived with them. Yet, in a number of passages in his determination, Judge Moore refers to the grandparents as having day-to-day responsibility as part of his reasoning leading him to find that he is not satisfied that the sponsor has sole responsibility. So, for example, at para 20, having referred to the fact that the sponsor did not leave the UK in July 2013 for five weeks to travel to Thailand after being told that one of her daughters had gone missing, stated that:

> "This does not in my view reflect any lack of compassion or concern by the mother, but is a reflection of the reality that the mother has commitments in the United Kingdom, and that the grandparents in Thailand with whom the appellants live deal with the day-to-day responsibilities of taking care of both appellants."

18. Then again at para 24, referring to the fact that between 2003 and 2005 when the sponsor had worked away from home had visited her children at least twice a year, the Judge said:

> "Whilst no doubt such visits maintained physical contact between mother and child the day-to-day responsibilities appear to have been conducted by the grandparents."

19. Then again at para 26 dealing with a period between August 2008 and October 2011 when the sponsor did not visit the children in Thailand, Judge Moore said:

> "I am satisfied that during this period also that day-to-day control and direction of the two appellants was the responsibility of the grandparents and not the mother."

20. At para 29, Judge Moore did, however, say this:

> "…it is the grandparents and not the mother who is exercising sole responsibility. It is not just the fact that the mother has not lived with the two appellants permanently for over 10 years or just that the appellants lived with the grandparents in their home, rather, it is the fact that the grandparents are exercising the relevant control and direction over the appellants' upbringing including making, albeit to some extent in conjunction with the appellants' mother, important decisions in the children's lives. It is however the grandparents who exercise day-to-day control over the care of both appellants. It is the grandparents who very much "inform" the mother in the United Kingdom as to the welfare of the two appellants who live with her and her husband in their home. It is the grandfather who helps with homework, it is both grandparents who attend school meetings. It is the grandmother who cooks for the appellants. It is these grandparents with whom both appellants have lived all their lives, and in the absence of their mother for the last 10 years apart from those occasions when she visited Thailand."

21. Whilst the Judge does, of course, appear to address the test for "sole responsibility" in TD, as in other passages of his determination, he seeks to support his finding that the sponsor does not have sole responsibility for the appellants by identifying factual examples of day-to-day responsibility and function of the residential carers of the appellants, namely their grandparents. Even if a parent in the UK had sole responsibility, the activities and functions performed by the grandparents which the Judge sets out at the end of paragraph 29 would necessarily have to be performed by a carer in the country where the children lived. They are not, in themselves, inconsistent with the sponsor having sole responsibility for the appellants.

22. In my judgement, in reaching his adverse finding on "sole responsibility" Judge Moore erred in law both in failing properly to direct himself in accordance with TD and the proper meaning of "sole responsibility" and also in giving reasons which could not properly sustain his finding. For those reasons, his decision cannot stand and I set it aside.

Remaking the Decision

23. In support of the appellants' appeals, the sponsor and her husband AB submitted a substantial bundle of documents to the First-tier Tribunal. Those documents included a statement, a supporting letter from a

psychologist, copies of telephone interviews with the appellants', the sponsor and grandmother, photographic evidence, itemised telephone bills from Sky and Orange and supporting documents in relation to each appellant from their school in Thailand.

24. In addition, the sponsor's husband, AB submitted a detailed statement and submission of 12 pages. He also gave oral evidence which is recorded in Judge Moore's determination.

25. The burden of proof is upon the appellants to establish on a balance of probabilities that they met, at the date of decision, the requirements of para 297.

26. The background facts are as follows. The sponsor is 34 years of age and lived in a village in northern Thailand. She lived there with her parents and, initially, the appellants' father and both appellants. The appellants were 11 and 14 respectively at the date of decision. The appellants' father abandoned the sponsor and appellants and there is no evidence that he has had any contact or involvement in their lives since. Judge Moore did not suggest that he did. The appellants' father left when the oldest child was 6 which would have been around 2004. The sponsor continued living with her parents and the appellants in the same house following his departure. In 2003 the sponsor found work in her sister's salon and left home for approximately two years. During that time, she visited the two appellants at least twice a year.

27. In June 2004, the sponsor met AB (her future husband). Their relationship developed and in September 2005 the sponsor first visited the UK. That was on a holiday visa and she returned to Thailand in December 2005. In March 2006, the sponsor and AB married in Thailand and the sponsor returned to the UK where she remained until she was granted indefinite leave to remain in June 2010.

28. In his statement, AB sets out the sponsor's visits to Thailand thereafter. She visited between 17 March 2007 and 4 May 2007; 30 December 2007 and 13 January 2008 and between 20 July 2008 and 6 August 2008. During that first visit, AB also flew to Thailand between 26 April 2007 and 28 April 2007. He says that these visits were important for the appellants and in order to "check on their wellbeing at home and in school". AB says that the sponsor maintained contact with the appellants whilst in the UK initially by telephone but later as technology developed by using email, Facebook and Skyping. Included in the documentation, are telephone bills highlighting itemised calls to Thailand.

29. AB said that the sponsor and he next visited Thailand in October 2011. The gap in visits was due to the economic downturn in the UK between 2008 and 2010 when his business suffered badly. AB is a co-owner of a company and has responsibilities as contracts manager for it. AB says that the sponsor visited Thailand between 6 October and 8 December 2011; 24 May and 14 June 2012; and between 13 September 2012 and 11

December 2012. The evidence supports these regular visits, including the interview with the second appellant and the interview with the sponsor's mother. The latter states that the sponsor returns to Thailand twice a year and stays for two months. The sponsor's mother confirms that the sponsor contacts the appellants almost everyday and that she sends 10,000 Baht per month which is transferred to the bank account of the sponsor's father.

30. It is clear that the appellants have lived with their maternal grandparents since the sponsor left to work away in 2003 and, again, since she came to the UK in June 2006 having married AB. There are a considerable number of documents, in particular photographs showing continued contact and affection between the sponsor (and indeed AB) and the two appellants. Continued contact by telephone and other means is supported by the itemised telephone records, the evidence of the sponsor's mother and of the second appellant. And, of course, there is the evidence of AB who gave oral evidence before the Judge and who was accepted as an "honest and credible witness". His evidence was clear that the sponsor took all major decisions including where the children should attend school and financially supported them by transferring money. When the sponsor went to Thailand she visited the school and teachers to enquire about the academic progress of the appellants. The Judge accepted that the sponsor kept in regular telephone contact with the two appellants and also their grandparents.

31. I see nothing unusual in the cultural context in which the sponsor and appellants live that the sponsor should move away to support her family (her own parents and children) when her partner (the appellants' father) left home. She did so leaving the two appellants where they lived with their maternal grandparents who had day-to-day responsibility for them. The appellant visited twice a year. It may be, at this point, that the sponsor did not have "sole responsibility" for the appellants. At least, the evidence may not be sufficient to make a positive finding.

32. However, since the sponsor returned, married AB and has come to the UK, the evidence is, in my judgement, that she has exercised "sole responsibility" for the two appellants. The Judge was impressed by the oral evidence of AB and his detailed statement (and submissions) is equally impressive. His evidence is that the sponsor makes the major decisions in the appellants' lives. She keeps regular contact and visits Thailand for two months periods to visit the appellants and also to check on their progress at school. There is a gap in those visits between August 2008 and October 2011 but I accept AB's evidence that this was due to him (or as he put it in his oral evidence "down to me") because of the recession which made travelling to Thailand financially difficult. By 2011, his business had begun to pick up and again visits were made in October to December 2011 and then again between May and June 2012 and September and December 2012. In her telephone interview, the sponsor's mother said that it was the sponsor who had chosen the school which each appellant attended (see Question 47). Both the second

appellant and sponsor's mother confirmed that the sponsor contacts the appellants "almost every day". All of these matters, in my judgement, evidence the underlying fact that the sponsor has continuing control and direction over each of the appellants' upbringing. Whilst the appellants' grandparents have day-to-day responsibility for the appellants' welfare (as the appellants live with them), they do not share "responsibility" for the appellants' upbringing.

33. For these reasons, I am satisfied on a balance of probabilities that the requirement in para 297(e) of the Immigration Rules is satisfied and, further, as it is not suggested that the appellants do not meet the remaining requirements of paragraph 297, I am satisfied that each appellant meets the requirements of paragraph 297 and is entitled to entry clearance.

34. In reaching that decision, it is not necessary for me to consider whether the Judge erred in law when he was not satisfied that it had not been established that there were "serious and compelling family or other considerations" which made exclusion of the appellants undesirable. Suffice it to say, that the main basis upon which the appellants could arguably establish that related to matters which had arisen after the ECO's decisions on 15 November 2012. In particular, evidence given by AB that one of the appellants had gone missing for 36 hours and that there were concerns about a peeping tom. I understand from AB, though not in any detail, that there are continuing concerns in relation to the appellant's welfare and that is why the sponsor is currently in Thailand. Those matters could not assist to demonstrate "serious and compelling family or other considerations" even if I were to remake that decision as this is an entry clearance case and it is only the facts as at the date of decision which I can take into account. (see ss.85(5) and 85A(2) of the Nationality, Immigration and Asylum Act 2002). I need say no more as I am allowing the appeal under para 297 on the basis that the requirement in para 297(e) is met.

Decision

35. For these reasons, the First-tier Tribunal's decision to dismiss the appeal under the Immigration Rules, namely para 297 involved the making of an error of law. That decision cannot stand and I set it aside.

36. I remake the decision allowing the appeal under paragraph 297.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal under the Immigration Rules and I consider it appropriate to make a whole fee award.

Signed

A Grubb
Judge of the Upper Tribunal

Date: