IAC-FH-AR-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08072/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2016	**On 25 April 2016**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ENTRY CLEARANCE OFFICER - BANGKOK

Appellant

and

[O C]
~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Ms M Rhind, IR Immigration Law LLP

DECISION AND REASONS

1. It will be convenient to refer to [OC] as the appellant, as she was before the First-tier Judge, and to refer to the Entry Clearance Officer as the respondent, accordingly.

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2. The appellant appealed to the First-tier Judge against the respondent's decision of 10 June 2014 refusing to grant her indefinite leave to enter the United Kingdom as the child of a parent settled in the United Kingdom. The Entry Clearance Officer was not satisfied that the sponsor, the appellant's mother, had sole responsibility for her upbringing or that there were serious or compelling reasons making her exclusion undesirable.

3. The appellant was born on [ ] 2002. Her parents were divorced in June 2006 and custodial rights in respect of the appellant were granted solely to her mother and the father was required to pay 3,000 Baht per month by way of maintenance. This payment was to be made to the appellant's mother, hereafter referred to as the sponsor. Subsequent to the divorce the appellant and the sponsor lived with the sponsor's parents, Mr and Mrs [S]. The sponsor met her new husband, Mr [K], in 2006. In 2009 she moved to the United Kingdom and married him here. The appellant remained in Thailand with the sponsor's parents. In December 2013 the sponsor was granted indefinite leave to remain in the United Kingdom. The evidence was that since moving to the United Kingdom the appellant has visited the sponsor here on one occasion and the sponsor has visited Thailand at least once a year, usually with Mr [K], and stays with the appellant and with the grandparents.

4. The judge set out at paragraphs 12 and 14 of the determination the evidence derived from interviews by the Entry Clearance Officer with first Mr [C], the appellant's father, and second Mrs [S], her maternal grandmother. When asked who chose which school the appellant attends, both said that Mrs [S] does, she also consents to the applicant joining school excursions. They both agreed that the appellant has contact with her father. Her father said that she saw him two to three times a year and the grandmother said that it was twice a year. He said the last time they met was in Bangkok when she came to apply for a visa and the grandmother said the same. He said that the appellant contacts him once a week and the grandmother said it was every two to three days. He also said that they speak on the phone and via Facebook. The grandmother also when asked whether she consulted her daughter about the appellant joining a school excursion said no the mother consents me. They both agreed that the father contributes financially. He said that it was 3,000 Baht every month by transfer to the grandmother’s account and she said that it was 1,500 Baht every month to her account.

5. Mr [C] subsequently, in a statement dated 11 September 2014, sought to clarify some of the responses upon which the Entry Clearance Officer relied in coming to his conclusion. For example he said that he assumed that the grandmother made the decisions because the appellant lived with her but that he himself did not look after or support the child himself, so he had no involvement in how she was raised or in making decisions about her. As regards his financial contribution, he said that in the early days after he and his wife separated he did help support their daughter financially but in the last few years he had not been able to send money to

her. With regard to frequency of visits, he said that in the past three years he had not been to visit the child at her grandparents' home.

6. There was also a purported clarification by the grandmother of some of the responses on which the Entry Clearance Officer relied. She said that she had been confused at the telephone interview. She said that it was the sponsor who had wanted the appellant to attend the particular school and she carried out those wishes and ensured the child did attend.

7. With regard to contact between mother and child, she said that there was phone contact between them every Sunday but that on other days they corresponded by electronic means that she did not understand. She believed that her response to the question how often the child saw her father was incorrectly recorded and that he had not visited the child for two years although prior to that he had visited regularly as had been recorded. Again with regard to how often they met and spoke on the phone and how often they were in contact, she said she had been referring to the pattern of contact for about two years ago and said that since then the appellant's father had been less attentive but he did contact her at least once a month. As regards his financial contributions, she said that he had not paid anything for two years although he used to pay money and said that she should not have said that he gave her money every month.

8. At paragraph 22 the judge said that insofar as responses recorded by the Entry Clearance Officer and the telephone interview appeared to contradict that assessment of her grandparents and her grandparent’s life, he was content that that was in part explained by misunderstanding or confusion on the grandmother’s part in that interview. He considered that in any event it was quite possible to read her responses as indicating that she did have day-to-day responsibility for the child but that that did not exclude the true situation which he found to be the case that the mother has responsibility in terms of paragraph 297(i)(e).

9. The judge attached weight to a statement of the sponsor dated August 2014 disagreeing with the Entry Clearance Officer’s decision. He referred to the fact that she had always planned that the appellant would eventually move to the United Kingdom to be with her and her husband but she always wanted her to know how to speak and write in Thai so she was able to learn these things while in Thailand before joining her mother. She said that it was she, the sponsor, who decided which school the child would go to and that she was still paying for her school fees. She referred to the fact that she had also decided that the appellant should take English language lessons so she had been paying for her to take English classes outside school. She said that her parents look after her daughter well but now that she, the mother, is the one responsible for her and they would not be able to look after her so well if she did not provide them with the money to pay for everything that the appellant needs. She said that the appellant does talk to her biological father using Facebook and he sees

her once a year when he stays with her at her parents' home for about two nights. He is not paying the 3,000 Baht every month, he gave money but not regularly as he did not have the money to give her and he had not given any money for her this year at all. The judge noted that that statement was made before the sponsor was aware of what had been recorded in the sponsor's ex-husband's and her mother's telephone interviews and that this was important because it was not written to contradict evidence of which she was aware but was intended as a narrative of what she understood the position at the time to be. As regards the father's evidence, the judge said that he had not abandoned or abdicated his responsibility in respect of his daughter, although he was paying at least at one time his maintenance requirements and at one time visited her regularly and contacted her by phone and other electronic means. The judge said that everyone who gave an account in person by way of a statement including the father himself agreed that over the years his commitment in terms of both contact and financial contributions had diminished. The judge said that insofar as the impression from the interview was at odds with the evidence of the sponsor and her husband, Mr [K] and the subsequent "clarification" statements from the grandmother and the father, he preferred the later evidence and in that regard he paid particular regard to the sponsor's statement.

10. The judge went on to conclude that the mother had sole responsibility for the appellant's upbringing and in the alternative that the appellant would satisfy the requirements of paragraph 297(i)(f). He took into account the decision in Mundeba [2013] UKUT 00088 (IAC), that the appellant's best interests were served by living with a parent and that could only be her mother as her father was unable to care for her. He went on to say that clearly continuity of residence was important, but it would be difficult to see how that could outweigh the child's best interests in living with a parent, particularly when everybody who had been involved in her upbringing and she herself believed that was best for her and were prepared to arrange and agree to it. That was the case even if there were no concerns about her welfare in Thailand. It was not that she was losing contact with her culture or family roots. Her mother had ensured that she stayed in Thailand long enough to establish her cultural identity and she would no doubt visit her grandparents and could maintain contact with her by electronic means. Hence the appeal was allowed.

11. The Secretary of State challenged the judge's decision on the basis that the interview of the father and the grandmother essentially gave the same replies with regard to the father's financial support of the appellant and the frequency of his visits to her. It was argued that the subsequent "clarification" statement of the sponsor to which the judge referred was merely a self-serving document, and the judge's decision that he preferred the evidence in that statement lacked adequate reasons and failed to explain how there could be misunderstanding in the grandmother's interview when the answers were consistent with those of the appellant's father. Permission was granted on all grounds.

12. In his submissions Mr Jarvis relied on the grounds and argued that the judge had a duty to resolve material matters in dispute between the parties and make specific findings about the matters in dispute. The answers in the interview with the father and the grandmother corroborated each other and showed that they both played a materially significant role in the child's life. This was in contrast with the later statements which the judge addressed. He believed the sponsor's evidence that things had changed. The core issue however was the two matters which materially corroborated each other and it was not enough to say the judge preferred the sponsor's evidence. It was not a rationality challenge, but the disputes had to be resolved lawfully and it was unclear why the corroboration did not materially affect the sponsor's evidence.

13. As regards allowing the appeal under subparagraph (f), inexorably that finding was unlawful as the judge would have to deal with the fact that it followed from a failure to show sole responsibility which was a different factual scenario in that the appellant would have been shown to have been cared for by the family in contrast to the findings that were made. This had not been addressed in paragraph 32. In that alternative scenario, the father's interests would have to be taken into account and they were just as significant as the refusal of entry clearance to the child. The paragraph missed the point and it was therefore unlawful in respect of that matter also in light of the errors referred to earlier by Mr Jarvis.

14. In her submissions Ms Rhind referred to paragraph 24 of the determination. The judge had said that he preferred the sponsor's evidence where it was at odds with earlier evidence. He gave clear reasons as to why that was the case. The sponsor's evidence predated the receipt of the Entry Clearance Officer's interview transcript so she did not know what was in it. The last three sentences of paragraphs 24 were of particular relevance. The judge had accepted there were misunderstandings, at least on the part of the grandmother in response to the ECO's questions. The contended consistency was not there as could be seen from the fact that the father and grandmother gave different figures as to the amount being contributed financially. That was important because the Entry Clearance Officer claimed that their evidence was entirely consistent. At paragraph 22 the judge referred to a misunderstanding or confusion in part and reference was made to the clarifying statement by the grandmother. Also she had said there were errors by the Entry Clearance Officer or the interpreter. It was open to the judge to find that the grandparents' explanation was consistent. Also the judge had put the sponsor's statement and clarifying statements in the context of all the evidence. He made clear at paragraph 4 of the determination what evidence was before him. There were no challenges to any of the other evidence including the evidence of other family members, which also preceded the ECO's transcripts. The judge had given reasons for preferring the sponsor's evidence and it was clear that he had

had the benefit of other evidence and found the explanations plausible and the sponsor to be credible.

15. The judge had seen and heard evidence about the father’s inability to care for the appellant and there was also evidence as regards the day-to-day care and the sponsor's evidence and the findings in respect of sole responsibility. The grant of permission seemed to add to the ECO’s grounds in referring to a misdirection in regard to the appropriate test. It was not a test of exceptionality but a question of who had continuing control over the child’s upbringing, and reference was made to paragraph 19 in Buydov [2012] EWCA Civ 1739 in respect of this. This was a case referred to by the judge who granted permission. It was a question of continuing control by the parent.

16. If the Tribunal disagreed it was open to the judge in the alternative to find as he did at paragraph 32 with regard to subparagraph (f). There was no need in that paragraph to find that the sponsor had sole responsibility. The guidelines in Mundeba had been properly followed. The father was unable to care for the child due to his financial circumstances. Her best interests had been considered, and it had been intended all along that she should live with her mother and everyone including her father agreed. The grandparents were ageing and had less ability to care and her cultural roots had developed. There was no error of law in the decision.

17. By way of reply, Mr Jarvis said that there was no disagreement with the legal tests set out but there was with the approach to the evidence and he argued that the evidential findings were not safe. If sole responsibility were not made out then the consequences of that had to be factored in, for example whether the father would be unable to care for the appellant, and that had not been done. If there were a proper alternative finding the grandparents would have been found to have shared care with the mother and that was a different relationship from the usual grandparent/ child relationship. It highlighted what had not been done.

18. The Entry Clearance Officer had not said the evidence of the father and grandmother in interview was identical, but both had described the same arrangements of monthly payments and the payments were transferred and the level of contact and the role of the grandparents, so it was clearly corroborated and there was no real direction towards that important feature of the evidence by the judge.

19. It was arguably irrational to decide as the judge had done at paragraph 24 on the basis of the latest statement by the sponsor as it had always been the purpose of the application for her to claim sole responsibility and it would be surprising if she did not say she had such responsibility and it was difficult to understand why the judge should give such weight to it. It should be contrasted with what was said in the interviews and the ultimate findings at the end of paragraph 24 with regard to visits and money in contrast to the interviews.

20. I reserved my determination.

21. The judge set out correctly the relevant legal tests in this case both as they are stated in the relevant Immigration Rules and also with regard to the guidance in particular from TD [2006] UKIAT 00049. With regard to the "sole responsibility" test, paragraph 52 of TD is of particular relevance. There among other things it is emphasised that the question of who has responsibility for a child's upbringing and whether that is sole is a factual matter to be decided on all the evidence and the term "responsibility" is a practical one which requires in each case looking at the question of who in fact is exercising responsibility for the child. It may be undertaken by individuals other than a child's parents and may be shared between different individuals but even if there is only one parent involved in the child's upbringing that parent may not have sole responsibility. 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 but that does not prevent parents having sole responsibility within the meaning of the Rules. 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 and if not responsibility is shared and therefore not sole.

22. An important question in this case is whether the judge was entitled to prefer the subsequent explanations given in respect of the evidence of the father and the grandmother, and in particular to attach the weight that he did to the "clarification" statement of the sponsor. There were similar explanations from the father and the grandmother also. The judge said at paragraph 22 that with regard to what was said by the grandmother at interview, it was quite possible to read her responses as indicating that she had day-to-day responsibility for the appellant but that did not exclude the sponsor having responsibility in terms of the Rule. However it is clear from the grandmother's interviews that she said she chose the school the applicant attended. She attended the parent/teacher meetings, signed the applicant's school report every term and consented to the applicant joining school excursions. That goes a long way towards indicating that she has more than day-to-day responsibility. That was supported in the answers given by the father at interview. In light of the responses given by the father and the grandmother on that matter and also the extent of contact that the father had with the child and the regular payments and the way in which they were made, albeit there is the discrepancy in the amount, I consider that that evidence was such as to show that the sponsor had not established sole responsibility. I should say in passing that I agree with Mr Jarvis that the Entry Clearance Officer did not say that the two interviews contained identical responses. But they are essentially similar if not identical on most key points.

23. The question then is whether the judge was entitled in light of the resiling from those interview answers by the father and the grandmother together with the statement from the sponsor, to conclude that in fact she does have sole responsibility.

24. In my view the judge's reasoning in this regard is inadequate. Bearing in mind the coincidence between the two interviews, I do not consider that the judge was entitled to include that this could be explained in part by misunderstandings or confusions on the grandmother's part. That does not, as the grounds point out, explain the very similar answers given by the father. There is no clear addressing of the reasons for preferring the subsequent explanation for his answers by the father in contrast to what he said at interview. Although no doubt it was appropriate to take into account the clarification statement from the sponsor, that in my view was given excessive weight such as to make the reasoning unlawful. It may well be that she was unaware of what had been recorded in the interviews, but she was clearly aware of the fact that the application had been refused, and, as Mr Jarvis argued, it is hardly surprising that she would give the evidence that she did in that statement given that the basis of the claim all along was that she had sole responsibility.

25. In sum, I do not consider that the judge properly addressed and properly reasoned his conclusions on the differences between the position as set out in the interviews and the statements from the father and the grandmother resiling from that and the statement of the sponsor. The determination in this regard is inadequately reasoned and therefore unlawful.

26. As regards the findings in respect of paragraph 297(i)(f), again I agree with Mr Jarvis that it was not possible simply to deal with the matter in the abstract as in effect the judge did there. Such findings had to be made on the basis that the appeal had not succeeded under subparagraph (e), and as a consequence that there would have been a finding that the sponsor does not have sole responsibility which has clear implications for the role that therefore would have had to have been found to have been played by the father and the grandparents in the appellant's life rather than simply emphasising as that paragraph does the best interests of the child. Accordingly I do not consider that the determination is saved by paragraph 32.

Notice of Decision

27. In conclusion, I consider that the extent to which the decision has to be revisited is such that it is most properly to be dealt with by a full rehearing before the First-tier Tribunal and that is to take place at Taylor House before a judge other than Judge Rayner. There will be a time estimate of two hours. A Thai interpreter is to be booked.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen