



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11824/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 9th August 2018

Decision & Reasons Promulgated
On 14th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MASTER M A S
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr Thornhill (solicitor), Thornhills Solicitors

For the Respondent: Mrs Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ransley, promulgated on 12th October 2017, following a hearing at Manchester on 3rd October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan and was born on 8th May 2008. He appealed against the decision of the Respondent dated 11th April 2016, refusing his application for entry clearance under paragraph 297 of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he has been looked after, as far as paragraph 297 of HC 395 is concerned, by his father, in the United Kingdom, and through him his grandfather, namely Mr [P H], such that it is the case that his sponsoring father has "sole responsibility" for his upbringing, and that in any event, there are serious and compelling reasons why his exclusion would be undesirable from the United Kingdom.

The Background to this Appeal

4. It is a feature of this appeal that it had been the subject of previous proceedings before Judge Herwald, who had promulgated his decision on 14th August 2014, dismissing the Appellant's appeal (appeal number OA/17934/2013). This meant that the starting point, as was agreed by the parties before Judge Ransley on 3rd October 2017, was the rule in Devaseelan. The nature of the Appellant's claim is that his father, [S H], had married Mrs [S N] and they had then, after living together in the UK from 2nd October 2008 until 31st December 2009, returned back to Pakistan, by which time the Appellant had been born to them, and there the sponsoring father had divorced the mother. Up until that time the child had been under the sole care of the mother. Judge Herwald found that there was hardly any evidence thereafter, when the sponsoring father had returned back from Pakistan to the UK, to show that he had been in touch with the child after the mother and child returned back to Pakistan. There was one relatively brief visit in 2010 and the only other visit by the Sponsor to Pakistan was at the time of his Islamic divorce in June 2013. On that occasion the Sponsor stayed barely a month in Pakistan (see paragraph 20).
5. Judge Herwald had gone on to say that he did not attach credibility to the Sponsor's claim that the child's mother, who had spent the last five years of her life caring for her son as a primary carer, would now suddenly give up all interest in the child and all parental rights over the child (paragraph 21). Judge Herwald also attached little weight to the divorce deeds that were placed before him, which he regarded to be self-serving. He was not satisfied that the wife had abandoned the child. He believed that there were emotional ties between the mother and the child. The deed of divorce had particularly provided for contact between the mother and the son but the Sponsor in his oral evidence attempted to play this down. He claimed that the son had been left in the care of his own parents in Pakistan (paragraph 22). Judge Herwald also found that the documents stating that the father had custody of the child only came into effect in the five week period before the Appellant's visa application was submitted and this strongly suggested that the child was still in close contact with his mother, as provided for clearly in the deed of divorce (paragraph 24).

6. Against this background, Judge Ransley had heard the appeal. A new feature to this appeal before Judge Ransley was a letter dated 14th September 2017 from a Mr Muhammad Azem Qureshi, an Advocate of the High Court in Peshawar, to the effect that the guardianship certificate was written on “stamp paper” and it was issued by the Family Court in Peshawar, in favour of the sponsoring father of the Appellant.
7. The Presenting Officer said to Judge Ransley that no reliance could be placed upon this document because this High Court Advocate had misspelt the name of the Appellant, which would not be credible from the Advocate of a High Court because of the poorly worded nature of the letter (paragraphs 29 to 30).
8. The Presenting Officer also said that the credibility issues related to the document entitled “Application under Section 25 Guardian and Ward Act 1990 for the Custody of Minor Son” dated 19th February 2015 (AB pages 20 to 21) could not be treated as reliable because it states that the mother was contesting custody. This statement contradicted the Sponsor’s oral evidence that the mother had always wanted the father to have custody of the child.
9. At this stage, when this was put by Judge Ransley to the sponsoring father at the hearing, he stated that he had been advised by lawyers in the UK that he should apply for legal custody in a Family Court in Pakistan, alleging that the custody was being contested by the mother, and this would then make his place look more credible.
10. Mr Thornhill, who appeared also on that occasion, quickly disclaimed any responsibility to have done so as far as his firm was concerned. The judge observed that there is no “objective evidence” to show that the Family Court would not consider an application for legal custody unless one of the parents contested the custody (see paragraph 33).
11. That aside, the judge was of the firm view that the Sponsor’s evidence in his witness statement that his application for custody was “unopposed” by the child’s mother was inconsistent with the Family Court document, which states that the application was made because the child’s mother was not willing to hand over custody of the child to the Sponsor.
12. The judge then went on to consider also the position of the child’s grandparents, namely the father of the sponsoring father. She held that the evidence indicated that the grandparents had also played a very significant role in the Appellant’s upbringing, in Peshawar, where they were living and purported to look after the Appellant as well (paragraph 39).
13. This was repeated by the judge (paragraph 44) and it was observed that “the grandparents have relocated back to Pakistan solely for the purpose of caring for the Appellant” (paragraph 44).
14. However, on the crucial question about why, be this as it may on the evidence produced on behalf of the Appellant, the Appellant’s natural mother, Mrs [N], should

cease to look after her son, the judge was clear that the grandfather “gave an evasive answer”.

15. At first, he said that Mrs [N]’s parents do not want his family to have any contact with her because they wanted their daughter to get remarried. Then he said that she did not want the child. Then it was also said that she wanted to complete her own education (paragraph 54). The judge explained how there were close family ties in terms of extended family network between the parties involved (paragraph 55).
16. Ultimately, however, the judge was clear in her view that it was simply not credible that Mrs [N], who had been the Appellant’s full-time mother from his birth until the age of 5, would suddenly decide not to want to look after him at all. She said it was not credible that she “would have no feelings for the child at all” (paragraph 56).
17. She went on to conclude also that any suggestion that Mrs [N] had no contact with the Appellant at all after her divorce in 2013 was inconsistent with the talaq divorce deed. This states that it is a term of the divorce that the mother should continue to have contact with the child and that the father would not have stopped such contact (paragraph 57).
18. Accordingly, looking at the evidence as a whole, the judge was of the view that the evidence of both the Sponsor and the grandfather was not credible. She was categorical in her statement that “they did not tell the truth when they said that the mother Mrs [N] had made no attempt at all to have contact with the child after the parents’ divorce in June 2013” (paragraph 58).
19. Finally, the judge went on to consider whether there were “serious and compelling family or other considerations which made the Appellant’s exclusion from the UK undesirable (see paragraphs 61 to 67).
20. The judge was clear that although evidence had been provided that the sponsoring father had made provision for the Appellant’s medical treatment in Pakistan, especially during the time when they took him to a clinic when the Appellant was suffering from malaria, nevertheless, the fact remained that the mother, Mrs [N], had not abdicated parental responsibility (paragraph 66).
21. The same applied for the fact that the sponsoring father had gone to the trouble of arranging education for the Appellant at North Hill School in Pakistan.
22. As for the suggestion that there was medical evidence to the effect that the child was suffering from depression, this had been contested by the Presenting Officer, who said that it was very rare for a child of 8 to be diagnosed with depression.
23. The judge had accepted this but ultimately, the claim failed because it could not be shown, against the background of existing evidence that had been so affirmed by a judge before, that Mrs [N] had abdicated parental responsibility for the Appellant child as had been alleged by the father and the grandfather (paragraph 66).

The Grant of Permission

24. On 9th April 2018 permission to appeal was granted.
25. Thereafter, on 2nd May 2018, a Rule 24 response was entered by the Respondent Secretary of State.

Submissions

26. At the hearing before me on 9th August 2018, Mr Thornhill relied upon his well-drafted grounds of application. He submitted that there was an arguable case and that I should make a finding of an error of law and remit the matter back to the First-tier Tribunal.
27. First, the judge had taken the view that the guardianship proceedings were not to be believed because the sponsoring father had said that he had been wrongly advised by a lawyer in the UK to claim that custody was being contested. The judge had said that these documents were discredited. However, if that is the case it was not clear why the judge should then conclude that the mother had not abdicated parental responsibility.
28. Second, the judge had said that the mother had been a full-time primary carer of her son from the age of 5. However, there is no evidential basis for this. The witness statement of the sponsoring father had been that his ex-wife had been “invariably out of the house between further education or other social activities” and the judge had not given this any weight.
29. Third, the judge had found that the Appellant’s grandparents (namely the father of the Sponsor himself) had played a “very significant role in his upbringing” (see paragraphs 39 and 44). If this was so, then this satisfied the rule in **TD (Yemen) [2006] UKAIT 49** because this makes it clear that the sole responsibility test is satisfied if there is evidence to show that the Sponsor had allowed his parents “to make some important decisions in the child’s upbringing” (see paragraph 50 of **TD (Yemen)**). Similarly, the sponsoring father had selected the school himself, going to extensive lengths to do so (see paragraph 10 of his statement).
30. In the same way, there were school letters (from pages 98 to 99) showing the role that the sponsoring father had been playing in relation to the child’s education. There were even letters in relation to his education (see page 100) which confirms that the Sponsor regularly contacted the doctor in question to discuss his son’s medical problems. In all these respects the rule in **TD (Yemen)** was satisfied to the extent that it could be shown that the sponsoring father had sole responsibility for the child.
31. Fourth the judge had gone on to decide that the child did not suffer from depression, as diagnosed by a properly qualified medical doctor, a paediatrician, simply because the Presenting Officer had said that it was not likely for an 8 year old child to be diagnosed with medication. This was not something that was open to a judge to so conclude in the face of medical evidence. The reality was that the child was living with

aged grandparents alone and it was likely that this would have an impact on his mental health. As against this, if he was allowed to come to the UK he would have regular contact with very many uncles here, aunts and cousins who are resident in the Manchester area (see paragraph 11 of the Sponsor's statement).

32. For her part, Mrs Pettersen relied upon the Rule 24 response. She submitted that the judge had explained why the documents produced, in the form of custody proceedings, could not be relied upon because the Sponsor had himself given evidence to say that he had wrongly been advised by a lawyer in the UK to say that he should pursue the case as if custody of his child was being contested. The reality was, as the judge came to conclude, that the mother had always had access to the child and this was the condition of the divorce itself. Second, one must not overlook the fact that the Talaq (divorce proceedings) had as a condition in 2013 stipulated that the mother should continue to have contact with the child and that the father could not obstruct such a contact. In these circumstances the Family Court of Peshawar's decision of 9th March 2015 giving the mother legal rights could not be deemed to be credible. If there had been a contrivance on the part of the sponsoring father the judge was right to point it out.
33. Finally, the fact that the paternal grandparents exercise some support and control in the upbringing did not mean that the judge could ignore the actual situation on the ground which was that there was no sole responsibility exercised by them or the sponsoring father in the light of the fact that the mother had always had responsibility for the child as well.
34. In reply, Mr Thornhill submitted that the judge did not make any findings at all whether the talaq could be relied upon. Second, the fact that the grandparents were doing what they were for the child did not mean that the sponsoring father did not have "full responsibility" for him because they were acting as his agents.

No Error of Law

35. I am satisfied that the making of the decision by the judge did not involve the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
36. First, much of what has been argued before Judge Ransley had already been put before Judge Herwald on a previous occasion, and the judge had found that the sponsoring father was not a reliable witness. She had found that there was hardly any evidence to show that the Sponsor had been in touch with the child after the mother and child returned to Pakistan. She had found that the Sponsor's claim that the child's mother, who had spent the last five years of her life caring for her son as a primary carer, would not suddenly give up all interest in the child. She had also found that the deed of divorce had particularly provided for contact between the mother and the son.
37. Indeed (lest it be forgotten), the documents stating that the father had custody of the child only came into effect in the five week period before the Appellant's visa application was submitted. As Judge Ransley pointed out, "this strongly suggested

that the child was still in close contact with his mother, as provided for clearly in the deed of divorce” (paragraph 24).

38. Second, the evidence in the form of the contested custody proceedings was rightly rejected by Judge Ransley in the light of the sponsoring father’s own evidence that he had been wrongly advised by a UK lawyer to apply for legal custody in the Family Court in Pakistan.
39. Therefore, as far as these particular proceedings were concerned, the judge, having heard the latest evidence before her, was firmly of the view that the Sponsor’s evidence in his witness statement that his application for custody was “unopposed” by the child’s mother is inconsistent with the Family Court document, which states that the application was made because the child’s mother was not willing to hand over custody of the child to the Sponsor”.
40. The two fundamental reasons why this particular application must fail before this Upper Tribunal are as follows. First, even if the evidence presented by the Appellant before Judge Ransley is to be given the credence that the sponsoring father would have the court attach to it, the plain fact is that one cannot get away from the position that the mother of the Appellant, Mrs [N], had during the first five years of his life looked after the child as a full-time mother, and that the divorce decree, in the form of a Talaq, had in terms made it a condition in 2013 that the mother should continue to have contact with the child and that the father should not obstruct such a contact.
41. In these circumstances, even if one takes the view that the expression “sole responsibility” cannot ever be understood in a literal sense, the fact remains that the sponsoring father, either on his own or through his own parents, the grandparents of the child, cannot be said to have “sole responsibility” for this child. In a very real sense the responsibility for the child has always been shared at the very least.
42. Second, the same must apply in relation to the question of whether there are serious and compelling family or other considerations which make the Appellant’s exclusion from the UK undesirable for the purpose of paragraph 297(1)(f). This is because even though the evidence shows that the diagnosis of the operation had been undertaken by a medically qualified doctor, the fact remains that the mother has not abdicated all parental responsibility for him, as was alleged by the father and the grandfather (see paragraph 66 of the determination). This is to say nothing of the fact that the judge was entitled to accept that it was most unusual for a child aged 8 to be diagnosed with depression. That is a finding of fact that the judge was entitled to make, even if it was in the face of a medical letter from the doctor.
43. The other matters that are raised, namely the fact that the schooling of the child is being done through the authorisation of the sponsoring father at North Hill School, the judge was entitled to come to the view that even if the sponsoring father does telephone the school the school reports do not go to the sponsoring father (paragraph 64). None of the matters that are described in the evidence and concluded upon (at paragraphs 62 to 65) suggest in any way that the situation presented is one where there are “serious

and compelling family or other considerations which make the Appellant's exclusion from the UK undesirable".

Decision

There is no material error of law in the original judge's decision. The determination shall stand.

An anonymity order is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Juss

12th September 2018