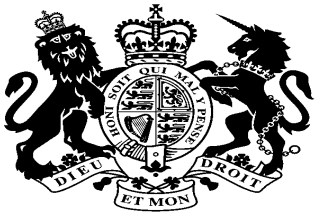

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15081/2017
HU/15091/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2019	**On 7 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ZAHID HASAN RONI
[N B]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms H Masood (counsel instructed by Law Dale Solicitors)
For the Respondent: Mr S Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. These are the appeals of Zahid Hasan Roni and [NB], citizens of Bangladesh born 4 August 1999 and 22 November 2005, against the decision of the First-tier Tribunal (Judge Brewer) of 26 November 2018 to dismiss their appeals, themselves brought against the Respondent's decision of 13 October 2017 to refuse their

applications to join their mother in the UK on the basis that she had sole responsibility for their upbringing.

2. The applications, made on 7 July 2017, were to join their mother [GB], born 7 July 1971.

3. The First-tier Tribunal noted that the Sponsor had difficulties in giving oral evidence, and struggled to remember her childrens' ages or her own date of birth; she failed at times to answer even the simplest questions and could not recall when she obtained British citizenship. The Tribunal accepted that her evidence was nevertheless credible, and that any discrepancies or vagueness was simply down to her being clearly upset and confused.

4. The First-tier Tribunal set out the evidence that it accepted. The Sponsor married her husband in Bangladesh in 1987, and they had five children, four daughters and one son. Three daughters (aged 27, 28 and 29) were married, two living with their families in Bangladesh, one with her family in the UK.

5. The Appellants were (as at November 2018) aged 18 and 13. They had originally been raised by their parents together in Bangladesh, and since 2007 had lived with their father. When the Sponsor left Bangladesh they were aged 8 and 2. She spoke to them regularly over the telephone. They had extended family in Bangladesh by way of their mother's brother and sister, and their father's relatives. The Sponsor earned £23,000 in steady employment as a culinary recruiter. She regularly sent them money, via their father until Zahid reached the age of 17, at which point he was named as the recipient; this money was used for the whole family in Bangladesh, including food and school fees, and medical bills for the Sponsor's husband.

6. The Judge noted that the medical evidence relating to the father related only to a back problem; there was no evidence of mental capacity issues or that he could not walk, though he was recorded as having had problems walking in 2017.

7. In oral evidence the Sponsor stated that her husband "cannot walk or feed the children" though then back-tracked to say that he could cook by sitting on a chair, and spent most of the time lying down, using a stick to move around; the children went hungry as he had no assistance in raising them. He could not make decisions about their welfare. When her husband went to the doctor he was taken by Zahid.

8. The Sponsor had variously stated that she took all the decisions about her childrens' education including in relation to their education "by working"; she sometimes spoke to the school about school fees. She also said that her sister, their aunt, told them when to see a doctor.

9. The Judge reviewed the authorities on sole responsibility, including *Mundeba* and *TD Yemen*, noting that this was a case where the children continued to live with

their father, the question therefore being whether he had abdicated responsibility for them.

10. The Tribunal accepted that the Sponsor provided for the family generally in Bangladesh, including for her childrens' upkeep. It did not accept that she precisely specified on what the money should be spent; it was not plausible that she would detail the food to be bought. It was not established that the Sponsor had continuing control and direction over their upbringing including important decision making; her husband had stated that he discussed decisions about the Appellant's education, and her sister made decisions on medical issues. The documents from the schools were silent on any involvement by the Sponsor in her childrens' schooling.

11. At §38 the Tribunal stated "The evidence is that the father has never not been involved in the appellants' upbringing, and that this involvement does equate to shared responsibility; it is not simply the inevitable consequence of the sponsor being in the UK."

12. Reviewing the case outside the Rules via Article 8 ECHR, and having regard to the best interests of the child, it would be disruptive to remove Nila from school at a critical moment in her education, and there was no evidence that Zahid wished to study in the UK. There was no evidence that their best interests would be served other than by the present arrangements continuing, and the Sponsor was free to visit them; indeed they could visit her in the UK. There was no evidence that they had any problems with their education or that they had not had a normal upbringing. Overall the immigration decision was not disproportionate with the private and family life with which it interfered.

13. Grounds of appeal contended the First-tier Tribunal had materially erred in law because

    (a) The appropriate test was not simply whether the Sponsor had continuing control and direction over the childrens' upbringing: the test was modified in a "two-parent" case and thus the Judge had been wrong to unduly concentrate on the mother's role in decision making;

    (b) It attached undue weight to the evidence that the Sponsor's sister was involved in medical decision making;

    (c) There was no clear evidential basis for the conclusion §38 that the father "had never not been involved" in their upbringing.

14. Permission to appeal was granted by the First-tier Tribunal on 4 January 2019 on the basis that the grounds were arguable.

15. Ms Masood argued that the critical question in a "two-parent" case was not whether the Sponsor exercised control and direction from the United Kingdom but whether the parent abroad had effectively abrogated responsibility for their child's care. This wrongful focus inevitably led to the Tribunal becoming distracted in its subsequent evaluation of the evidence.

16. Mr Melvin relied on the Rule 24 response which had highlighted that the Judge had referred to the lack of evidence that the mother took the important or key decisions in the Appellants' lives, and that the school documents did not mention any involvement by the Sponsor.

Decision and reasons

17. The admission of the Appellants is governed by immigration rule 297, which so far as relevant to the issues in dispute provides:

> "**297**. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
> **(i)** is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
> …
> **(e)** one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement 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 or being admitted on the same occasion for settlement 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;"

Children and Sole Responsibility

18. As is explained in judgments such as that of Buxton LJ in *Cenir* [2003] EWCA Civ 572: "The general guidance is to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent … the importance of the parent with responsibility, albeit at a distance, having what can be identified as direction over or control of important decisions in the child's life."

19. *TD Yemen* [2006] UKAIT 00049 made a very thorough survey of the legal principles relevant to the assessment of sole responsibility:

> "13. A central part of the notion of "sole responsibility" for a child's upbringing is the UK-based parent's continuing interest and involvement in the child's life, including making or being consulted about and approving important decisions about the child's upbringing. …

30. The Court of Appeal [in *Nmaju* [2001] INLR 26] saw "sole responsibility" as a practical (rather than exclusively legal) exercise of "control" by the UK-based parent over the child's upbringing and whether what is done by the carer is done "under the direction" of that parent.

…

27. What is apparent from both the judgments 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.

…

34. These cases are largely concerned with the issue of "sole responsibility" arising between a UK-parent and relatives who are looking after the child in the country of origin. In many of the cases, the other parent has disappeared from the child's life totally or plays so little part as to have, in effect, abdicated any responsibility for its upbringing. What emerges is a concept of "authority" or "control" over a child's upbringing which derives from the natural social and legal role of an individual as a parent. Whilst others may, by force of circumstances, look after a child, it may be that they are doing so only on behalf of the child's parent. The struggle in the case law is to identify when the parent's responsibility has been relinquished in part or whole to another such that it should be said that there is shared rather than sole responsibility. By contrast, where both parents are active in the child's life, the involvement of the parent in the country of origin is significant – perhaps crucial - in assessing whether the parent in the UK has "sole responsibility" for the child.

…

44. In most of the cases, the parent based in the child's own country – usually the father – has abdicated any responsibility for his child by disappearing or taking no part in the child's upbringing. There is only one parent involved in the child's life. If one started from principle, it might be thought that the issue of "responsibility" for a child and whether or not that amounts to "sole responsibility" is exclusively an issue between parents. The issue of sole responsibility should not, therefore, arise. However, that is not the position taken in the cases, including those in the Court of Appeal. We accept that the question of "sole responsibility" is not so restricted and it remains an issue even where there is only one parent but, for practical reasons, the child is looked after by others (see, *Ramos*, above, per Dillon LJ at p 151). The issue is then whether, as between the relative/carers and the UK-based parent, the latter has "sole responsibility" for the child.

45. To understand the proper approach to the issue of "sole responsibility", we begin with the situation where a child has both parents involved in its life. The starting point must be that both parents share responsibility for their child's upbringing. This would be the position if the parents and child lived in the same country and we can see no reason in principle why it

> should be different if one parent has moved to the United Kingdom. 46. In order to conclude that the UK-based parent had "sole responsibility" for the child, it would be necessary to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK-based parent and was otherwise totally uninvolved in the child's upbringing. The possibility clearly cannot be ruled out: *Alagon* provides an example of this exceptional situation and turns upon an acceptance by the judge of the wholly unusual situation that the father was "doing nothing for the child beyond the bare fact of living with her on reasonably good terms". (at p 345).
> …
> 52. Questions of "sole responsibility" under the immigration rules should be approached as follows:
> …
>
> > 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."

20. Notwithstanding the elegant concision with which Ms Masood made her central submission, I do not consider that the grounds of appeal are here made out.

21. Ms Masood was quite correct to identify that the case law shows that where two parents have been involved in a child's upbringing, it is necessary to evaluate whether the one abroad has relinquished responsibility. However, as the authorities also show, the critical question will remain whether the UK-resident parent can establish responsibility for the child's upbringing via their "*decision-making, control and obligation towards the child*" (*TD Yemen*). Doubtless the fact of abdication of responsibility would make it easier to establish sole responsibility by the UK-based parent. However, either parent may be found to have relinquished some degree of responsibility to another person such that there is *shared* rather than *sole* responsibility; here of course there is the Sponsor's sister's role to consider, too.

22. Where a child has two parents involved in its life, the starting point must be that they share responsibility for their child's upbringing, and only exceptional factors will rebut this presumption. The father has consistently been involved in his daughter's life. It was in this context that the Appellant's task on appeal arose: that being "*to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK-based parent and was otherwise totally uninvolved in the child's upbringing*" (*TD (Yemen)* §45).

23. The First-tier Tribunal was plainly alive to the critical question on the appeal, which was that whether the Sponsor had sole responsibility was a question of fact to which geographical separation was of only limited relevance. It is understandable that the Judge concluded that the evidence before it was not capable of demonstrating sole responsibility.

24. For example, a letter from the Appellants' father Bashir Ali stated "My wife is in the UK. Due to financial difficulties she had to go to the UK to earn money. I was not in any position to provide support our family in Bangladesh. My wife is the decision maker in the family. I always consult with her for the upbringing, education and medical needs of the children. It is very difficult for me to look after them. I am very ill. I had an operation and it getting worse day to day." There are rather vague assertions in the Sponsor's own witness statement as to having had responsibility for schooling and health.

25. It is very difficult to see how material of this unspecific nature could demonstrate that the father had abrogated responsibility for his children. On the chronology here, he had apparently jointly raised the Appellants with their mother from their births in 1999 and 2005 until her departure in 2007. Given that the medical evidence is put forward to demonstrate a history by which the father has become increasingly less able to cope physically, the question arises as to the timing of the asserted abrogation of responsibility, and thus the moment at which the parents stopped sharing overall responsibility. And this arises in the context of the Sponsor's sister (their aunt) having been present to help with issues such as healthcare. The proposition apparently underlying this case is that at some point, the father has relinquished all responsibility for assisting in the direction of the childrens' well-being; but this does not necessarily flow from the mere fact that he has become less physically able to care for them. Their aunt has apparently consistently been available to help with the physical side of things.

26. The First-tier Tribunal noted evidence that the Sponsor's husband had stated that he discussed decisions regarding the child's education with her: it was entitled to find that this represented a *shared*, rather than a *sole* responsibility. Indeed, the husband's statement in his letter that he *consulted* with his wife provides a reasonable evidence base for this conclusion. Equally, the First-tier Tribunal was entitled to find that responsibility for the Appellants' care was shared between the Sponsor and her sister given that the latter had control over medical decision making.

27. As to the other grounds, the weight to be given to the evidence as to the sister's involvement was a matter for the Judge assessing the evidence as a whole. I do not consider that any aspect of the case was left out of consideration when this finding was made. Doubtless the phrase impugned in the grounds of appeal, ie the finding that the father "had never not been involved" in their upbringing, was one whose syntax invited a challenge as to its cogency. But when one steps back and reviews the evidence as a whole, it seems to me that the Judge was there pointing to the very consideration I have outlined above at greater length. By drawing attention to the father's ostensible ongoing involvement in the childrens' lives, the First-tier Tribunal was highlighting the fact that the case on the timing of any shift in responsibility between the parents was simply too vague for the appeal to succeed.

28. I accordingly conclude that there was no material error of law in the decision appealed, which stands.

Decision:

There is no material error of law in the decision of the First-tier Tribunal.
The appeal is dismissed.

Signed: Date: 28 February 2019

Deputy Upper Tribunal Judge Symes