Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/20013/2018
& HU/20015/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 November 2019	**On 11 December 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

S F
R F
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, instructed by Douglass Simon Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge S Moore, promulgated on 10 July 2019. The appellants are citizens of the Philippines who applied for entry clearance pursuant to paragraph 297 of the Immigration Rules to join their mother ("the sponsor") who is present and settled in the United Kingdom. Those applications were refused on the grounds that in respect of the first appellant and the second appellant it had not been demonstrated that their mother had shown sole responsibility for them, a requirement of

paragraph 297(i)(e) of the Immigration Rules. It is also stated that in the case of the first appellant she had not shown that she had not formed an independent family unit and so her application fell to be refused under, paragraph 297(iii).

2. It should be borne in mind that in this case the appellants' mother has two older children. The older of them was granted entry clearance subsequent to an appeal before the First-tier Tribunal which was heard by First-tier Tribunal Judge Metzer who made a number of findings regarding the circumstances of the family as it was in 2014 when he reached his decision. These are referred to in brief at paragraph 14 of the decision.

3. Judge Moore, however, gave only limited weight to these findings and having directed herself in light of TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 concluded that sole responsibility had not been shown. The judge also concluded that the first appellant had not shown that he fulfilled the requirements of paragraph 297(iii).

4. The grounds of permission are

(i) that the judge failed properly to attach sufficient weight to the findings in the previous determination;

(ii) failed properly to apply the sole responsibility test; and

(iii) misdirected herself as to the application of independent life and independent family unit.

5. Dealing with the first ground of appeal, it is agreed that the judge had not properly taken the decision of Judge Metzer into account and she had not properly directed himself in accordance with the decision of the Court of Appeal of Ocampo v Secretary of State [2006] EWCA Civ 76

6. The judge does appear to have referred himself to an earlier Tribunal decision, Chicaiza [2002] UKIAT 01200 but failed to note that this was a finding with regard to the circumstances of the family as a whole at an earlier date and whilst that would not of course have been determinative of the situation as at the date of hearing or the date of decision in these appeals, it is an important factor to be taken into account. That is because, as the case law demonstrates, the question of whether someone has sole responsibility can fluctuate over time. A parent may share responsibility, but, later, owing to the illness of the person with whom responsibility is shared, he or she takes over sole responsibility. It is a dynamic situation and that is something which the judge should have considered.

7. I turn to the second ground which is also made out. The judge had failed to properly to taken into the test of the change in circumstances whereby the appellants' grandmother was looking after them but was no longer was. There is then the involvement of the sponsor's sister and again this appears not properly to have been assessed through the lens of the proper application of the case law.

8. Further, I consider that the judge did not properly direct herself as to the meaning of "independent life" and took into account the fact that she had had a child as a sufficient basis for concluding that she had formed an independent family unit which did not take into account the particular facts of this case whereby the first appellant did not have full-time care of that child and indeed the child's father's family appears to have taken over responsibility for him.

9. In the circumstances I am satisfied the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. With the agreement of the parties, I then proceeded to remake the appeal, hearing evidence from the sponsor and then submissions from both representatives.

10. The sponsor adopted her witness statement and was cross-examined. She said that her children were close to their cousins with whom they live other they are younger, the eldest being 10 the youngest 3. She did not recall the length of the period during which her daughter had left the house to work but that she had rented a room in an area about three hours' drive away they had moved back in February 2017. She had learnt this when she spoke to her.

11. The sponsor said that her daughter sees her son about twice a week and appears to be happy with this. She accepted that their relationship had been strained in the past because she had not been there with them and had been close to the grandmother who had then passed away. She did not know why she had stopped work and that she had only found out about her daughter's child after the birth. She said that she had lived in the rented room whilst she was pregnant.

12. Miss Everett relied on the refusal letter and I accepted that it contained a number of errors and was in some respects not helpful.

13. Miss Everett submitted that there were significant difficulties with regards to the first appellant given the length of time she had been away from the family home at a distance of some three hours away where she had had a job, rented a room although it would appear that the relationship with the child's father had broken down. She submitted that in the circumstances the first appellant could not show that she had not created an independent life and that her appeal ought to be dismissed. She accepted, however, the second appellant was younger and this matter was more straightforward.

14. Mr Slatter submitted that even if it could be said that the first appellant had formed a separate family unit, that was no longer the case at the date of decision and that it was no longer the case that she formed a separate social unit.

15. Mr Slatter submitted also that although the first appellant was now 18, that was not a reason why in itself the decision was proportionate given

that the respondent's policy was, as shown by Rule 27, to admit appellants at this case.

The Law

16. Paragraph 297 of the Immigration Rules provide, so far as is relevant, 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, 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:
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> (a) both parents are present and settled in the United Kingdom; or
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> (b) both parents are being admitted on the same occasion for settlement; or
>
> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
>
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
>
> (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; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner and has not formed an independent family unit; and …'

17. I note from **TD (Paragraph 297(i)(e): "sole responsibility") Yemen** [2006] UKAIT 00049 at [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."

18. Within paragraph 297(iii) there are two elements to be considered: "leading an independent life"; and, "has not formed an independent family unit".

19. The issue of "leading an independent life" was considered in NM ("leading an independent life") Zimbabwe [2007] UKAIT 00051. As was observed by the Tribunal in that case at [11] it appeared there had been no previous consideration of that provision. Although the decision refers to paragraph 197(iii) that provision is identical to the current 297(iii). As the Tribunal observed at [12] the underlying purpose of the Rule is the continuation and maintenance of the family unit with the parents. Clearly that is somewhat difficult when combined with the issue of sole responsibility. At paragraph [14] the Tribunal said this:-

> "14. Mr Tranter submitted that it was a matter of assessing the nature of the choices made by the child. To an extent we agree. It is not enough that the child does make choices about his life, for example to take up employment. This, like other choices made by the child, may be factors to be taken into account but the crucial issue is always to ask whether the child has, through choice, separated from his parents' family to form his own social unit, whether alone, by marrying or as part of his own independent social unit. Consequently, a child who leaves his parents' home and sets up home alone can properly be said to be "leading an independent life". This is not the same as saying he must no longer be dependent upon his parents or is no longer part of their family. He clearly is the latter even if living alone and "independently" of them. The family ties remain even if the family unit headed by the parents has now split up. Likewise, even if living his own independent life he may be financially dependent (at least in part) on his parents, for example they may help him set up his separate home and, perhaps, even help him with his rent or mortgage for a period until he has found his feet financially. But, in our view such a person may still be seen as "leading an independent life". Financial or emotional dependence is not, in this context, the antithesis of "independence". Again, these are relevant factors to be taken into account but no more."

20. Some assistance as to what a "family unit" is can be derived from BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055. Albeit that that is in a different context it makes the point that what is a "family unit" is a question of fact. A number of factors will need to be taken into account and the reason for separation from the core family unit is a factor to be taken into account, as was held at [27] to [28]:

> "27. We regard the issue as to what is a "*family unit*" for the purposes of para 352D(iv) as a question of fact. In many cases it will be clear that a child was part of a family unit with an asylum seeker in his country of habitual residence. The child will have lived with the asylum seeker and perhaps another partner. Alternatively if there has been separation the reason for that separation may well be associated with the claim of persecution and a child might still remain part of the family unit from which the potential refugee had been temporarily separated. Here no such claim is made.
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> 28. If on the other hand the separation is the result of social choice by the parties and a separate family unit based upon the mother is created, it will be correspondingly harder to establish that a child is in reality a part of two different family units. This will be especially so if the child is young and the consequence will be separation from the mother rather than family unity as envisaged by the UNHCR handbook."

21. Two points need to be made in connection with how "has formed an independent family unit" and "leading an independent life" are phrased. As with of sole responsibility, both independent life and whether a family unit exists are dynamic and fluid. Whether a parent has sole responsibility may change over time due, for example, to the serious illness or incapacity of a carer or the other parent which may lead to the UK-based parent acquiring again sole responsibility which may have in the past been shared. What is relevant is the position at the date of application, or hearing. The use of "has" means that sole responsibility must rest with the UK based parent at time of decision, and "had" that this must have been so for some time. But it is not necessary for that to have been continuous.

22. Just as it is established law that family life does not stop immediately somebody turns 18 and as with any relationships, there is a spectrum within which they fall the same is true of whether the particular circumstances in which a person lives are such that that person becomes independent or has formed a separate family unit.

23. The issue of "sole responsibility" is common to both appeals.

24. I accept as the case law makes clear, that who has sole responsibility may change over time. That is of course less likely where both parents are involved with the upbringing but less so where there has been a degree of shared responsibility with another relative and, as here, that relative passed away. While, on the basis of **NM**, it is possible that in the circumstances of this case there would have been shared responsibility between the sponsor and her mother, that dynamic changes markedly once the mother had died. It does not necessarily follow that it would not then be a situation when nearly all the decisions evolved upon the parent, perhaps inevitably where the other relative who might be said to have responsibility is a younger sister, in this case Jeanivy, who has her own responsibilities and family (see witness statement at pp67 to 68)

25. The starting point in any fact-finding exercise is the findings of Judge Metzer. Although, as I observed during the course of argument, the factual basis was somewhat different in that the father of the child who was the subject of the appeal, was deceased and so this was an appeal to which paragraph 297 (i)(d) applied, nor paragraph 297 (i)(e). It therefore follows that the issue of "sole responsibility" was not relevant, that arising only when there are two parents who are alive. Nonetheless I conclude that it is an accurate finding with respect to the family situation as at the date of that hearing. I am satisfied that as at that date, in light of all the evidence, the appellant had had sole responsibility for the appellants in this case. The question then arises as to whether that situation had changed over time.

26. I am satisfied that the death of the grandmother altered significantly the dynamic in the family. Having heard evidence from the sponsor, and in light of the witness statements from both the appellants, the contents of which were not challenged directly, I accept that Jeanivy is not committed to looking after the children as was her mother as she has her own family.

27. Viewing the evidence as a whole, I am satisfied that the sponsor continued to exercise responsibility for the second appellant consistently. I accept that the financial support has come from the sponsor and there was a close family relationship and, contrary to what was found by Judge Moore, I find that there is significant evidence of contact with the family in the Philippines which was provided in the material. Whilst the situation prior to the death of the mother may have been different, and I bear in mind that her death was not long before the decision of Judge Metzer, I conclude the situation has changed. I consider that there is little evidence of any significant input into the care of the children coming from their aunt, Jeanivy, or there now elderly grandfather. I find that neither has had any significant input into decisions regarding either of the appellants. I do not consider that, properly applying TD (Yemen) that on the facts of this case the situation of sole responsibility for the second appellant had as at the date of decision, changed from that found by Judge Metzer. I find that weight of the evidence is, taking into account his evidence, that the sponsor has had sole responsibility for the second appellant as at the date of decision.

28. The position of the second appellant is more complex given the accepted account of her life, moving away from the family home, taking a job, and then returning. There is now (unlike the position before Judge Moore) a witness statement from the first appellant. It is of note that although she explains that her mother has exercised sole responsibility for her, and that [5] her mother had always provided care as with funds necessary for her maintenance and accommodation she makes no mention of her moving away from home to obtain work or to have rented accommodation. There is thus a tension between her as to what she admits and what her mother said.

29. There is, however, a degree of consistency over her immaturity, and the fact that she did not plan to have a child, and the fact that she had in effect given up her child to the father's family. There is an overlap between the factors to be taken into account in assessing sole responsibility and independence and membership of a separate family unit. That is inevitable in somebody approaching adulthood and it is difficult to see how if a child had, for example, married and set up home with a partner, that the issue of sole responsibility would have any meaning.

30. The factual matrix of what occurred is relevant both to whether she meets the requirements of 297(iii) as well as the issue of whether sole responsibility is exercised. The latter is because of the admitted lack of communication between the first appellant and her mother to the extent that it was only after the birth of the child that the sponsor knew about this which causes me concern.

31. The first appellant turned 18 on 27 July 2018. The child was born on 2 January 2018. Whatever differences there may have been between the first appellant and sponsor appear to have eased by the date of application.

32. Viewing the evidence as a whole, I am satisfied that although she has returned to the family home, the first appellant was leading an independent life prior to that, albeit that she is now, to a degree, financially dependent on her mother. That is because of her moving out of the family home for a significant period, entering into a relationship, having a child and having taken employment. Further, the was in the context of a lack of communication between her and her mother, to the extent that the mother knew of the pregnancy only after the child had been born, is indicative of independence. That, in my view, falls squarely within what is said in NM at [14], cited above. She may have returned to the family home, but her actions prior to that were out of choice.

33. While she has no longer much of a family life with her child, she still has contact on a regular basis. There is, clearly, a family life in existence between her and the child; the bond between a mother and such a young child is not easily broken. I am satisfied that a family unit has thus been created and that it is independent from the family unit in which she and her brother live, and again from any family unit from her mother.

34. I conclude also that in light of the first appellant's actions, and the lack of communication on major issues such as her moving away, taking work and then having a child, cast significant doubt on whether, in her case, the sponsor has had sole responsibility for her, and while that situation had changed by the date of decision, in the sense that there were communications,

35. For these reasons, I am not persuaded that the sponsor had had sole responsibility for the first appellant or that she was not leading an

independent life or that she had not formed an independent family unit. She therefore does not meet the requirements of the Immigration Rules.

36. As I am satisfied that the second appellant has fulfilled the requirements of the Immigration Rules and whilst this is an appeal technically under human rights grounds it follows that there is no public interest in refusing him entry clearance to the United Kingdom given that he meets the requirements of the Rules and for these reasons I am satisfied that it would be a breach of the United Kingdom's obligations pursuant to the Human Rights Convention specifically Article 8 to refuse him entry clearance to the United Kingdom and I allow the appeal on that basis.

37. The first appellant has not met the requirements of part 9 of the Immigration Rules, following GEN 3.2, the second appellant must show whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application. That exercise must also be undertaken, applying section 117B of the Nationality, Immigration and Asylum Act 2002

38. There is insufficient evidence to show that the first appellant has any significant health issues, or that the consequences of refusal would result in unjustifiably harsh consequences. She is a young woman who has accommodation and has shown she is able to get employment. She has close family in Philippines, and is in contact with her mother. Accordingly, I am not satisfied that refusal of entry clearance is, on the facts of this case, disproportionate and I dismiss her appeal.

Notice of Decision

1. The decisions of the First-tier Tribunal involved the making of an error of law and I set them aside

2. I remake the decision of the First-tier Tribunal by **dismissing the appeal of the first appellant**

3. I remake the decision of the First-tier Tribunal by **allowing the appeal of the Second appellant**

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 their 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 9 December 2019

Upper Tribunal Judge Rintoul