IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006507

First-tier Tribunal No:
HU/56513/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 August 2023

Before

UPPER TRIBUNAL JUDGE L. SMITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

AIRALYN TORRES YUSORES
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr C. Rahman, Counsel instructed by Ashfield Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 9 August 2023

DECISION AND REASONS

Introduction

1. This is the Upper Tribunal's judgment in the rehearing of the Appellant's appeal against the decision of the Respondent (dated 5 October 2021) which refused her Article 8 ECHR claim by reference to the substantive criteria in para. 297 of the Rules.

2. This judgment should be read in conjunction with this panel's earlier decision (issued on 12 July 2023) which found material error in the First-tier Tribunal's decision (promulgated on 30 June 2022) which dismissed the Appellant's appeal.

3. In short, we set aside the decision of the First-tier Tribunal Judge but in doing so preserved a number of factual findings which we detail later in this judgment.

The remaking hearing

4. In the remaking hearing, we clarified the documentary evidence to be taken into account and confirmed that both parties had all of the relevant material.

5. In the hearing, the Sponsor gave evidence in English. Whilst it is clearly not her primary language, we nonetheless are satisfied that she understood the questions asked of her; the nature of the proceedings and we find that she was fully able to express herself. No issues in respect of understanding were raised by Mr Rahman.

6. Ms Nolan cross-examined the Sponsor and rephrased questions when necessary. We then heard submissions from both representatives of which we have kept our note.

7. At the end of the hearing we formally reserved our judgment.

Findings and reasons

8. In coming to our conclusions, we have looked carefully at the documents before us which consist of: the Respondent's bundle of 194 pages; the Respondent's review (28 April 2022); the Appellant's initial bundle at the First-tier Tribunal of 364 pages; the Appellant's supplementary bundle 1 of 23 pages and the Appellant's supplementary bundle 2 of 224 pages.

9. We have reminded ourselves that the relevant standard of proof is the balance of probabilities and we have considered all the evidence, including the Sponsor's oral evidence, in the round at the date of the hearing.

10. We also note that the relevant legal test continues to be authoritatively explained in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049:

> "*Sole responsibility*" *is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where*

both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".

11. As explained in the error of law judgment, we preserved the following findings which we add into our factual assessment:

    (a) The Appellant's Sponsor has visited her school in the Philippines on occasions [§27].

    (b) The Sponsor has been sending remittances to the Appellant and these funds are used by the Appellant and her grandmother (with whom she lives) [§29].

    (c) The Appellant's father has had no contact with her since she was born [§30].

    (d) The Sponsor has telephone and video contact with the Appellant; provided her with financial support and has set up an insurance policy for her [§32].

    (e) The Appellant and the Sponsor enjoy an Article 8(1) ECHR family life [§44].

12. For reasons which we lay out below, we have ultimately concluded that the Appellant has just about established, at the balance of probabilities, that her mother (Sponsor) does have sole responsibility for her, in that she has ongoing control and direction over the Appellant's upbringing.

13. We should start by saying that we certainly share Ms Nolan's view that the documentary evidence is somewhat light in certain material areas, but having heard from the Sponsor, we have ultimately decided that the evidence is overall enough to show that the Sponsor has had sole responsibility, in that she has had ongoing control and direction over the Appellant's upbringing since she left the Philippines in 2004.

14. In order to explain our decision, we feel it appropriate to deal with the various thematic areas raised by Ms Nolan in her cross-examination and submissions.

The school evidence

15. We have taken into account Ms Nolan's submission that the school letter at page 28 of the Appellant's bundle from Principal Grospe lacks detail and does not confirm how the school knows that the Appellant's fees are paid for by the Sponsor. We have also considered the submission that the Appellant has failed to provide receipt evidence of the Sponsor making payments to the school and that the arrangements for how the fees are paid to the school was not mentioned in the letter itself.

16. We note that Ms Nolan did not go so far as to ask us to give the Principal's letter little weight (applying the starred decision in Tanveer Ahmed), but she submitted to us that the Appellant had not met the relevant standard of proof in respect of the overall evidence.

17. Looking at this letter in the round, we firstly find that it does not contradict the Sponsor's claim and positively confirms that the Sponsor is the person who has paid the school fees since the Appellant started school; it also confirms that on numerous occasions the Sponsor has attended the school and, from "time to time", has called the school to check on the Appellant's progress.

18. Whilst the letter does not confirm all of the detail given by the Sponsor in her oral evidence in response to detailed questions asked by Ms Nolan, we do not accept the Respondent's submission that this should reduce the weight to be given to the letter or that it should otherwise undermine the reliability of this aspect of the claim.

19. In our view the fact that the letter does not include the finer detail of how the school fee payments are made is not entirely surprising given that the principal's letter is obviously intended to confirm that the Sponsor makes the payments. Whilst the Sponsor's oral evidence, that she calls the school about once a year, is superficially different to the principal's account of contact from "time to time", we are prepared to accept that this evidence amounts to much the same thing and is not materially discrepant.

20. Whilst we accept Ms Nolan's observation that there is no documentary evidence showing the Sponsor calling the school, we consider that this rather sets the standard of proof higher than the balance of probabilities and we also do not see any adverse credibility issue in the Sponsor's oral evidence that she does not receive school reports but is told about them. This seems in keeping with her physical distance from the Appellant and the day-to-day role played by her mother.

21. Equally, we see nothing in the point that as there is only one elementary school in the Appellant's local area and that this means that in reality the Sponsor did not choose the Appellant's school. In our view, the evidence given in the Sponsor's witness statement (at paragraph 10), that the Appellant's grandmother defers to the Sponsor over issues to do with the Appellant's education and health, is not undermined by the fact that there is only one elementary school locally and, as we have already observed, the Appellant's engagement with the school is corroborated by the principal's letter, to which we have given weight.

22. We also conclude that there is no lack of credibility in the Sponsor's evidence, as it developed before us, in which she described the kinds of decisions that she might make in respect of the Appellant's academic pursuits, including the Appellant's engagement with extracurricular activities, for instance learning the xylophone/guitar.

23. We note Ms Nolan's submission that it was only after the Sponsor was somewhat pressed during cross-examination that she made mention of these school activities, but we have concluded that this is not evidence of mendacity but indicative of the fact that the Sponsor was clearly nervous during the hearing and indeed relatively emotional (she cried during the submissions).

The Appellant's health

24. Ms Nolan also criticised the Appellant/Sponsor for failing to provide the Appellant's medical records in order to corroborate the Sponsor's evidence that she is the one who decides on the important issues relating to the Appellant's health, i.e. whether the Appellant needs to visit the doctor and/or the dentist, the nature of the required care and so on.

25. It certainly would have been useful to see such records, but we have decided that the absence of those records is not materially destructive to the Appellant's claim and we conclude that there is sufficient evidence to support this aspect of the Appellant's case.

26. There is certainly force in Ms Nolan's additional submission that the absence of a witness statement from the Sponsor's mother (the Appellant's grandmother, who provides the daily care for the Appellant) is potentially damaging to the Appellant's claim. However, whilst this has given us some pause for thought, we are prepared to accept that the Sponsor was a credible witness during her oral evidence and that the broad documentary evidence provided in the three bundles before us is sufficient to establish the nature of the sole responsibility as claimed.

The timing of the application

27. We do not find any problem with the Sponsor's evidence about the time it took her to assist the Appellant in making an application for entry clearance. Ms Nolan pointed out that the Appellant had been residing with lawful Leave to Remain in the UK since 2010; that she had been granted Indefinite Leave to Remain in 2015 yet the application for entry clearance had not been made until 2020.

28. We accept the Sponsor's oral evidence as credible. She told the Tribunal that although she had been granted Indefinite Leave to Remain in 2015, she nonetheless considered that she was not financially stable at that time as she was sending significant sums of money to the Appellant and the Sponsor's mother in the Philippines. We also accept her oral evidence that it was only once she begun to earn more money that she felt that it was the right time to make the entry clearance application.

The Appellant's grandmother's health

29. We find that the documentary evidence before us is not in itself sufficient to establish that the Appellant's grandmother (the Sponsor's mother) is frail in such a way as to impact her ability to care for the Appellant. We do not accept the Respondent's submission that it should be expected that the Appellant would produce a doctor's letter for her grandmother but, at the same time, we are unable to glean very much assistance from the brief medical reports in supplementary bundle 1.

30. We do note however, that the Appellant's grandmother is around 81 years old and we can see no difficulty in accepting that caring for a teenage girl would be particularly challenging for a person of her age.

31. Bringing together our preserved findings and our findings on the evidence before us, we conclude the following:

    a. The Sponsor does have overall control of the important matters relating to the Appellant's life including in respect of her education and her health.

    b. The Appellant's father has played no role in her life.

    c. The Sponsor has been providing the Appellant and her mother with their sole source of financial income since she left the Philippines to find work abroad (from 2004).

    d. The Sponsor pays for all costs in the Appellant's life.

    e. There is ample evidence of communication between the Sponsor and the Appellant which, in our view, reveals a genuine and loving relationship between the Appellant and the Sponsor.

    f. Although the messages only start at around about the end of 2020, we conclude that they are indicative of the kind of communication which the Appellant and Sponsor have had on a daily basis for a significant period of time.

    g. The messages also corroborate the Appellant's claim that the Sponsor is the person who makes the decisions about the major aspects of her life. There are for instance messages in which the Sponsor is worriedly attempting to assist the Appellant who was suffering with illness.

    h. The Sponsor has travelled to the Philippines on numerous occasions and has attempted to time her travels so that she has, on occasion, been able to be at the Appellant's school at the beginning of the school year.

    i. Whilst the Sponsor is not in regular contact with the school about the Appellant's progress, we nonetheless accept that there has been some

contact between the Sponsor and the school about important matters relating to the Appellant's education. We find that other issues in respect of extracurricular activities and so on are matters in which the Sponsor is involved but are more naturally dealt with via communication with the Appellant's grandmother rather than directly with the school itself.

32. Applying para. 297 along with the jurisprudence on the approach to the sole responsibility test, we find that the Appellant has established that the Sponsor has sole responsibility for her upbringing and that therefore para. 297(i)(e) is met.

33. It is therefore unnecessary for us to make any further findings about the alternative test in para. 297(i)(f) i.e. whether or not there are serious or compelling family circumstances.

34. We note that the Respondent has not challenged the Appellant's compliance with any of the other substantive requirements in para. 297 and therefore we conclude that all of the relevant parts of the rule are met.

35. This is materially important, because in the absence of any Suitability or Part 9 issues, the Appellant's success under the relevant component parts of para. 297 is *positively determinative* of both Article 8(1) and Article 8(2), as per the Court of Appeal's binding view in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 at para. 34.

Notice of Decision

36. We remake the decision and conclude that the Appellant's Article 8 ECHR appeal should be allowed on the basis that the Respondent's decision breaches s. 6 of the HRA 1998.

I Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 August 2023