



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2023-001363

HU/00406/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On the 03 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

TT

(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Fazli, counsel

For the Respondent: Ms S Lecointe, Home Office Presenting Officer

Heard at Field House on 14 June 2023

Prepared On 16 June 2023

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity. No one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any other person. Failure to comply with this order could amount to a contempt of court.

The Appellant

1. The appellant is a citizen of Thailand born on 6 September 2005. He appeals against a decision of First-tier Tribunal Judge Howorth sitting at Nottingham on 9 February 2023. That decision was to dismiss the

appellant's appeal against a decision of the respondent dated 3 February 2022. That decision in turn was to refuse the appellant's application made on human rights grounds for leave to enter the United Kingdom to join his mother ("the Sponsor").

The Appellants' Case

2. The judge summarised the appellant's case at [3] of the determination stating that the sponsor, had lived with the appellant in Thailand until 2018 when she moved to the United Kingdom with her husband. She was able to visit the appellant after her arrival apart from the period of the Covid pandemic. The appellant maintained that he came within paragraph 297 (i) (e) of the Immigration Rules in that he was seeking to join his mother who was present and settled in the United Kingdom and who had sole responsibility for his, the appellant's, upbringing. The respondent refused the application noting that the appellant lived with his grandmother and grandfather in Thailand and there was no reason why that arrangement could not continue.

The Decision at First Instance

3. The case turned on whether the sponsor had sole responsibility for the appellant or, if not, whether there were exceptional compassionate circumstances which would make the appellant's exclusion undesirable, paragraph 297(i) (f) of the Rules. The judge heard evidence from the sponsor. At [12] the judge stated he believed that the responsibility for the upbringing of the appellant lay primarily with the sponsor but the appellant's father did have some involvement, he was not absent or estranged and he was made aware of events and decisions that occurred which affected the appellant. The judge concluded that the sponsor did not have sole responsibility.
4. The remainder of the determination dealt with whether there were other considerations that made the appellant's exclusion undesirable. The appellant and sponsor had a family life together but there was a wider network of people including the appellant's father and the sponsor's siblings who provided care. At [14] the judge indicated that a future application by the appellant for leave to enter as a visitor might need to be granted in the future to avoid a disproportionate breach of article 8. In the context of the determination this indication appears to be obiter. It was not clear whether the appellant's best interests lay with staying with his wider family in Thailand or moving to United Kingdom with the sponsor.

The Onward Appeal

5. The appellant appealed against this decision arguing that it could not be seen how the judge had reached the conclusion that the appellant's father had some involvement in the upbringing of the appellant. The appellant and his father did not talk to each other. It was unclear whether

the father had made any decisions for the appellant's welfare. That the appellant visited his father did not impact upon the appellant. The appellant's grandmother had said the appellant's father did not work and was unable to support the appellant financially. By contrast the sponsor always called to see how the family was doing and transferred money for the appellant's upkeep. The relationship between the appellant and his father was not a deep one. The appellant had gone to live with his maternal grandmother because the father left the appellant on his own for large parts of the day.

6. The remaining two grounds were that the judge had overlooked the divorce certificate which had noted that the sponsor had full parental power over the appellant. Further the judge had failed to consider the respondent's guidelines which confirmed it was unrealistic to find a situation where a child had no contact with other adults other than the parent claiming to have sole parental responsibility. Sole parental responsibility had to be interpreted in line with the guidelines which reminded decision-makers they were not considering whether an applicant had day-to-day responsibility for a child but whether they had continuing sole control and direction of the child's upbringing including making all the important decisions in the child's life. If that test was not met then the parent did not have sole parental responsibility.
7. The application for permission was refused by the First-tier Tribunal. The application was renewed to the Upper Tribunal where Upper Tribunal Judge Blundell granted permission on 16 May 2023. He found it arguable that the trial judge's concern about the role of the appellant's father was inadequately reasoned. What the trial judge had said at [12] in the determination (which I have quoted above at paragraph 3) was based on the self-direction from TD Yemen [2006] UKAIT 49. However that self-direction was wrong or incomplete by reference to what was said by the Court of Appeal in the case of Buydov [2012] EWCA Civ 1739. It was arguable that the judge erred in law in relation to the role of the father in this case and permission to appeal was granted.

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
9. For the appellant reliance was placed on the decision of TD. Following Buydov the judge's insistence in this case that sole responsibility could only be shown if the other parent had no involvement was wrong. In another case it was found that there was sole responsibility where the other parent lived with the child. It was a question of fact. That the father was made aware of decisions was not sufficient in itself to demonstrate he had an involvement in the appellant's life. What decisions was the

father made aware of? The judge did not refer to the letter from the grandmother in the determination. The conclusion that the father could support the appellant was not reasoned. He did not have the means to do so.

10. As to ground 2, the judge had overlooked the divorce document that showed that the sponsor was the primary carer of the appellant. The document dated from 2015 and said nothing about the father. Ground 3 contained an overlap with ground 1. There did not have to be exceptional circumstances. The analysis in a sole responsibility case should be fact sensitive. The judge had proceeded on the basis that it was a legal test where there were two parents but that was an erroneous understanding of both TD and Buydov.
11. In response the presenting officer indicated she relied on the respondent's lengthy rule 24 reply. The grounds of appeal were without merit. There was evidence from the sponsor herself that she had consulted with the appellant's father about sending the appellant to college and she had consulted again with the father about the appellant being transferred to the city hospital when the appellant's knee was injured. There was also evidence that the appellant sometimes stayed with the father. Buydov was authority for the proposition that the question remained one of fact in each case. In Buydov, paragraph 52 of TD Yemen was described as a helpful summary. This said: "wherever both parents are involved in the upbringing of the child it will be exceptional that one of them will have sole responsibility". The Court of Appeal approved TD Yemen. Although the father made no financial contribution to the appellant's upkeep as he was unemployed, he was still consulted in relation to education and medical issues. The respondent opposed the appellant's appeal.

Discussion and Findings

12. The appeal in this case turned on whether the sponsor, the mother of the appellant, had sole responsibility for him. The appellant's father was still alive and even on the sponsor's own evidence could not be said to have abandoned the appellant. The question in the case was whether what the sponsor did for the appellant as his primary carer was sufficient to show that she had sole responsibility. It does not appear that the judge was referred to the 2012 authority of Buydov but it is not the case that Buydov in some way overturned TD Yemen and substituted a different test to establish sole responsibility to the direction set out in TD Yemen. In Buydov the complaint made about the tribunal's decision was that it had wrongly concluded that a parent can only demonstrate sole responsibility if the other parent was entirely excluded from the life of the child. In effect that is also the complaint made by the appellant in this case about the First-tier decision under appeal.
13. At paragraph 23 of Buydov the Court of Appeal stated they were quite unable to spell out any self-direction that it was only where the

father had entirely abandoned or abdicated interest that the mother could have sole responsibility. Instead the question was one of fact. Equally however the fact that one parent was the primary carer or even home provider would not necessarily mean that they had sole responsibility. The range of possible ways of sharing responsibility for a child's upbringing was as the Court of Appeal put it "almost infinite". In Buydov the appellant had relied on the immigration directorate instructions (the IDIs) that a parent claiming to have sole responsibility must demonstrate that they have had and still have the ultimate responsibility for the major decisions relating to the child's upbringing. The Court of Appeal however found difficulties with the IDIs, see paragraph 27 of their judgement. In part this was because the IDIs were not internally consistent.

14. What then is the conclusion that one can draw in this case in the light of the Court of Appeal guidance in Buydov? What is clear is that the assessment of sole responsibility is a question of fact it is not a legal test as such. Does the parent claiming to have sole responsibility, in fact have it? One has to look at the facts of the case. Ultimately it was a matter for the judge who had the benefit of seeing the witness give evidence to decide whether on the circumstances of this family the sponsor did or did not have sole responsibility. The matters set out at [9] of the determination (the consultations about which college to go to and which hospital the appellant should go to) were picked up in the respondent in her rule 24 response. They tended to show the father's involvement with the upbringing of the appellant. The point being made by the judge was that the father could demonstrate he had some involvement in the child's upbringing.
15. At paragraph 19 of Buydov the Court of Appeal cited the relevant passage from TD relied upon by the judge that "wherever both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility". The Court of Appeal understood by this that TD did not mean to impose a legal test what it was doing was no more than identifying where the necessary factual enquiry was likely in most two-parent cases to lead. The Court of Appeal therefore found that proposition to be accurate. The determination in this case shows that the judge was careful to establish the factual matrix in the case before drawing his conclusion that the sponsor did not have sole responsibility. I do not consider that there is anything in the determination which can show that the judge was making a material error of law. What was said in TD was not a legal test but a question of fact. The judge based his conclusion on the facts. The onward appeal in this case is a mere disagreement with the judge's conclusions. No material error of law has been shown in the determination. I therefore dismiss the appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

Signed this 22nd day of June 2023

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed they can be no fee award.

Signed this 22nd day of June 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge