Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/01614/2018**
HU/01624/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 25 April 2019 **On 1st May 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

JAYRAM BATUKBHAI THAKKAR

POONAM BATUKBHAI THAKKUR

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Rehman of counsel, instructed by London Imperial Immigration Services Ltd

For the Respondent: Ms B. Jones, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellants are nationals of India, who were both under 18 on 26 August 2017 when they applied for entry clearance to join their mother in the United Kingdom. The basis of their applications was that their mother had retained sole responsibility for them for the purposes of paragraph 297 of the Immigration Rules.

2. The Appellants' mother had previously registered as a British citizen on 31 August 2010 and entered the United Kingdom on 12 May 2011. The Appellants had remained in India with their father.

3. The Applicants' applications were refused on 29 November 2017. They appealed against this decision and First-tier Tribunal Judge Seelhof dismissed their appeal in a decision promulgated on 18 December 2018. They appealed against this decision and Deputy High Court Judge Gullick granted them permission to appeal on 26 March 2019.

ERROR OF LAW HEARING

4. The Appellants' Bundle contained some evidence which post-dated the decision under challenge and this will only become relevant if an error of law is find. Therefore, I did not consider their Rule 15(2A) application at the start of the hearing. Both counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

5. The grounds of appeal did not give any particulars about why the decision reached by the Respondent in relation to paragraph 297 of the Immigration Rules was said to be unlawful but Deputy High Court Judge Gullick gave permission to appeal in relation to both grounds of appeal. In considering this appeal, I note that the basis upon which the Appellants' appeal could be allowed was whether the refusal to grant them entry clearance gave rise to a breach of Article 8 of the European Convention on Human Rights. The Appellants' ability to show that they met the requirements of paragraph 297 of the Immigration Rules was relevant to

assessing whether the requirements of Article 8(2) had been met but was not determinative on its own of the appeal.

6. Paragraph 297 of the Immigration Rules states that:

> "The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) he is seeking leave to enter to accompany or join a parent…in one of the following circumstances:
>
> (e) one parent is present and settled on the United Kingdom…and has had sole responsibility for the child's upbringing; or
>
> (f) one parent is present and settled in the United Kingdom…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…"

7. In *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049 the Upper Tribunal held that:

> "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".

8. It is clear from the Appellants' application forms that they were living at the same address as their father in India. In their grounds of appeal, it was said that their father's job had changed and that, therefore, he had to spend more time away from the family home. It was not clear from the evidence before me how much time he spent away from the home. At paragraph 9 of her witness statement, dated 22 November 2018, the Appellants' mother said that their father was out of the house most of the day. Later in her evidence she said that he was only at home once a week. There is also a letter from RASNA, dated 25 November 2016, which stated that he now had responsibility for the Rajasthan region as well as the Gujarat region, where they live and that he was required to spend 15 days in each of these regions.

9. Therefore, it was not surprising that First-tier Tribunal Judge Seelhoff found in paragraph 24 of his decision:

> "The children's father lives with them and although it is said that he travels regularly for work, the evidence of that it lacking. It was however accepted that he is at home at least one day a week and that reflects significantly more direct contact with the children than their mother has".

10. This finding has not been challenged. The Judge also noted that it was accepted that the children's father received copies of their school reports and that he also provided them with some financial support and a home. It was also the sponsor's own evidence that she discussed the Appellants with their father every day, which indicated that he was involved with their welfare and care even when he was travelling for work. In her oral evidence the Appellants' mother also stated that she only started to send the Appellants money by money transfer about a year and a half before the hearing and that was because her solicitor had advised her to do so. Prior to that she gave them money when she visited them.

11. The photographs in the Appellants' Bundle indicate that when the Appellants' mother visits India she is part of a family unit with the Appellants and their father. In the light of this evidence, it was not irrational or unlawful for First-tier Tribunal Judge Mill to find that the Appellants' mother did not have sole responsibility for them. It was clear from the particular facts of this appeal that their parents had made a joint decision that the sponsor should travel here in order to work and provide the family with financial support and that she and the Appellants' father continued to share responsibility for them. There was no basis upon which it could be concluded that the father had abdicated responsibility for the Appellants or was totally uninvolved.

12. I have also taken into account that in the case of *TD* the Upper Tribunal found that where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility". There was no evidence of any such exceptionality.

13. In relation to paragraph 297(i)(f) of the Immigration Rules, the evidence taken at its highest was that the Appellants were depressed because they had to look after themselves and prepare for school when their father was at work and that sometimes he missed parents' evenings. It

was not said that the Appellants had any health problems or other vulnerabilities. Therefore, there was no basis upon which the First-tier Tribunal Judge could rationally have found that there were serious or other compelling family or other considerations which made their exclusion undesirable.

14. However, the principle reason given by Deputy High Court Judge Gullick for granting leave was that First-tier Tribunal Judge Seelhoff had not treated the Appellants best interests as a primary consideration.

15. I accept that it was not correct for the Judge to find that "the best interests of children do not directly apply [to] cases of entry clearance". It may be that he was confusing the best interests principle with the duty arising from section 55 of the UK Borders Act 2007 which only applies directly to children within the jurisdiction of the United Kingdom. In the case of *Mundeba (s.55 ad para 297(i)(f)* [2013] UKUT 00088 (IAC) the Upper Tribunal did find that:

> "Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for admission of a child under 18 is "an action concerning children…undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".

16. However, in paragraph 29 of his decision, First-tier Tribunal Judge Seelhoff did directly address the question of whether refusing the Appellants entry clearance would be in their best interests. He relied on the fact that the Appellants' mother and father had decided that she move to the United Kingdom and live separately from them some eight years previously and that family life was then continued from a distance and through visits and other forms of contact. He also noted that the Appellants had continued to live with their father for those years.

17. As discussed above, there was nothing in the evidence provided on behalf of the Appellants to show that they were not provided with an adequate home or financial support in India or that they were not receiving suitable education. Whilst, it was true that their father was away from home working, there was nothing to suggest that they suffered abuse or neglect on account of his absence. There was also no medical evidence to show that his absences had any adverse effect on their physical or mental health. Reading the decision of First-tier Tribunal Judge

Seelhoff as a whole, it is clear that he did treat the Appellants' best interests as a primary consideration.

18. The grounds relied upon by the Appellants failed to address why it would be in the children's best interests to live with their mother, as opposed to their father, and this was an important omission when their best interests were an essential part of the proportionality assessment to be carried out under Article 8(2) of the European Convention on Human Rights and the Judge had made clear findings in relation to section 297 of the Immigration Rules.

19. In paragraph 38 of *Mundeba* the Upper Tribunal found that:

> "As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important…"

20. In paragraph 50 the Upper Tribunal also found that:

> "…The material advantages of life in the United Kingdom is not the test; the loss of his cultural roots in the society in which he had grown up to date is a relevant factor. There is no evidence that he is at risk of harm where he is…"

21. As a consequence, there was no material error of law in relation to the First-tier Tribunal Judge Seelhoff's approach to the Appellants' best interests within the proportionality assessment.

DECISION

(1) There were no material errors of law in First-tier Tribunal Judge Seelhoff's decision and his decision is not set aside.

Nadine Finch

Signed Date 29 April 2019
Upper Tribunal Judge Finch