



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19338/2018 ('V')

THE IMMIGRATION ACTS

Heard at Field House
And via Skype
On 13th January 2021

Decision & Reasons Promulgated
On 3rd February 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE ENTRY CLEARANCE OFFICER - PAKISTAN

Appellant

and

MUHAMMAD WAMIQ AFZAL
(NO ANONYMITY DIRECTION)

Representation:

For the appellant:
For the respondent:

Mr T Melvin, Senior Home Office Presenting Officer
Ms E Harris, instructed by Briton Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 13th January 2021.

2. Both representatives and I attended the hearing via Skype, while a hearing room remained open for public access at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.
3. The Entry Clearance Officer appeals against the decision of First-tier Tribunal Judge Brewer (the 'FtT'), promulgated on 4th March 2020, who, following a hearing at Taylor House on 17th February 2020, allowed the appeal of the respondent (hereafter, 'Claimant') of the Entry Clearance Officer's refusal on 7th June 2018 to grant the Claimant entry clearance under paragraph 297 of the Immigration Rules as the dependent son of Mr Mohammed Afzal (the 'Sponsor').
4. In essence, the sole issue before the FTT was whether the sponsor had sole parental responsibility for the Claimant's upbringing for the purposes of paragraph 297(e) of the Immigration Rules. The Entry Clearance Officer accepted that the Sponsor was present and settled in the UK and that there would be adequate maintenance and accommodation if the Claimant were admitted to the UK to join the Sponsor. The Entry Clearance Officer also accepted that the Sponsor and the Claimant were related as claimed.

The FtT's decision

5. The FtT reminded herself of the leading authorities of TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 and Buydov v Entry Clearance Officer, Moscow [2012] EWCA Civ 1739, and concluded that the Sponsor had sole parental responsibility for the Claimant. Whilst the Claimant remained living with his biological mother (he was 17 ½ years old), and his mother played some role in his daily living arrangements, assisted by financial support provided by the Sponsor with whom he had not resided since 2010; and whilst the Claimant's mother had not abandoned him or abdicated all responsibility, the arrangements were for the Sponsor to be responsible for all of the decisions in the key areas of the Claimant's life, for example financial, educational and residence decisions (§25).
6. Having considered the evidence, the FtT allowed the appeal.

The grounds of appeal and grant of permission

7. The Entry Clearance Officer initially lodged a ground of appeal, on which she no longer seeks to rely, (relating to the Sponsor's status), permission for which was refused by a First-tier Tribunal (Judge O'Garro) on 18th May 2020. The Entry Clearance Officer renewed her application on a different ground, specifically that the FtT had erred on the one hand in concluding that the Claimant's mother had not abdicated all responsibility, whilst on the other hand, finding that the Sponsor had sole parental responsibility. The weight attached to family life between the Claimant and Sponsor should not have greater weight than the family life between the Claimant and his mother who continued to provide all day-to-day care for him, along with his four siblings.

The grant of permission by the Upper Tribunal

8. The Upper Tribunal (Judge Owens) subsequently granted permission for this appeal to proceed on all grounds on 13th August 2020, on the basis that the FtT had arguably failed to consider that the situation was exceptional, if both parents were involved in the Claimant's upbringing.

The hearing before me

9. I identified with the parties at the beginning that the sole focus in relation to this case was whether the FtT had erred in terms of her finding of sole parental responsibility. The Entry Clearance Officer relied on the authority of TD for the proposition that in the case of two parents involved in a child's care, there needed to be exceptionality to find that one had sole parental responsibility. The authority of Buydov did not resile from that principle, where, as here, the other parent had day-to-day care for the child.

The Entry Clearance Officer's submissions

10. Mr Melvin confirmed that the Entry Clearance Officer did not challenge the FtT's findings, although he pointed to one nuance in relation to the claimed communications between the Sponsor and the Claimant's school, which he queried the plausibility of in light of the time difference between the UK and Pakistan.
11. Nevertheless, the central focus in relation to this appeal was that the FtT's finding that the Sponsor had sole parental responsibility for the Claimant "bordered", (in Mr Melvin's words), on the perverse. In particular, the FtT had referred to the Sponsor "*taking part in all decisions*", as noted at §[15] of her decision, which was not the same as exclusively taking the decisions and indeed on checking the reference at §[3] of the Claimant's mother's witness statement, this referred to the Sponsor taking part in rather than taking all of the decisions.

The Claimant's decisions

12. Ms Harris relied upon the Claimant's Rule 24 response. The FtT had set out clearly the relevant law and noted the comments of the Court of Appeal in Buydov that sole responsibility remained a question of fact in each case and although, where two parents are involved in a child's life, the usual starting point would be that both parents have responsibility for the child's upbringing, that was not a presumption of law and did not import a separate requirement of exceptionality. The question was always one of fact. The FtT had made detailed findings as set out at §[24] about the arrangements for the Claimant, from which the FtT had concluded that the Sponsor had sole parental responsibility and these facts as found were not substantively challenged. In particular, and a nuance in this case, was that the Claimant had not lived with his mother throughout his life and indeed since 2010 when the Sponsor came to the UK. The Claimant had previously been living with his paternal

grandparents, and sadly by virtue of the Claimant's paternal grandmother passing away, the Sponsor had regarded it appropriate that the Claimant should live temporarily with the Claimant's mother, for a brief period, prior to the application being made in June 2018. Ultimately the decision that the Sponsor had sole responsibility for the Claimant was one of fact and was open to the FtT to make on the evidence before her and did not disclose any error of law.

13. In oral submissions, Ms Harris referred me to the authority of Buydov, in which the Court of Appeal emphasised that there was no requirement of exceptionality. Buydov states at §[19]:

"There may be some risk of misreading the distinction as such a presumption, or as importing some independent legal test of exceptionality, if one were to take out of context one part of the helpful summary ... of TD..... The IAT clearly did not mean to impose a legal test. Its review of the cases is predicated on the fundamental proposition that the issue of sole responsibility is one of fact. It was doing no more than identifying where the necessary factual enquiry is likely in most two-parent cases to lead and as such the proposition is accurate."

14. That case then went on to consider, although not as a precedent case, the other side of the factual dividing line of Alagon v ECO, Manila [1993] Imm AR 336, where the father remained living in the country of origin, occupying the same house as the child, but took no part in the child's life. In that case, there was no more than a friendly co-existence.
15. Even if it were challenged that there might be a difference in the Claimant's mother's evidence about the Sponsor "taking part" in all of the decisions, she had not given evidence, whereas the Sponsor had and his evidence, which was not substantively challenged in the grounds of appeal, was that he took all of the decisions alone.

Discussion and conclusions

16. First, I accept Ms Harris's submission that the requirement of sole parental responsibility does not import a test of exceptionality or a presumption of shared parental responsibility in what may be termed a "two-parent" case. It may well be that in "two-parent" cases, the factual enquiry is likely to lead to a finding of shared responsibility, but as Buydov makes clear, that is not the same as a presumption or a test of exceptionality.
17. I also noted that while Mr Melvin said that the FtT's conclusion "bordered" on the perverse, he did not in fact advance a perversity challenge or go on to suggest that the evidence before the FtT did not entitle the FtT to reach the findings that she did.
18. I have considered the clearly structured and detailed findings of the FtT. She correctly reminded herself of the law at §§[17] to [18] in relation to the authorities of TD and Buydov. As she correctly noted, the Court of Appeal in Buydov held that it was not necessary to show that one parent had entirely abandoned or abdicated interest in the child to show that the other parent had sole parental responsibility; and the question was one of fact. She also reminded herself correctly at §[19] that the

provision of financial support did not necessarily mean that the person providing such support had sole parental responsibility.

19. In these circumstances, the FtT was at pains to remind herself of the fact-sensitive nature of the assessment and the correct test, in terms of it not being an “abdication of responsibility” test or one of exceptionality. She set out clearly at §[24] the various findings which form the basis of her conclusion at §[25] that the Sponsor has sole parental responsibility. For the sake of brevity, I do not cite these findings in full, but they set out, as Ms Harris cogently reiterated, the chronology and the recent nature of the Claimant’s residence with his mother, as well as the Sponsor being the main point of contact and making key decisions in respect to various aspects such as the Claimant’s schooling, religious studies, and medical treatment.
20. The FtT noted at §[25] that sole financial provision should not be a determinative factor and that there had not been an abandonment or abdication of all responsibility, but it was clear from the Ft’s findings that the Claimant’s mother’s role was correspondingly limited, and such conclusions were open to the FtT to make in a two-parent case, just as they were in Alagon.
21. In the circumstances, I accept Ms Harris’s submissions that there was no perversity in the FtT’s decision (even if perversity had been the basis of a challenge); that the FtT had correctly reminded herself of the law; correctly applied the law; and the conclusions she reached were clearly explained and unarguably open to her to reach on the evidence before her. In particular, the FtT’s conclusion that the Claimant met the requirements under paragraph 297(e) of the Immigration Rules was one that was unarguably open to her to reach and the FtT did not err in reaching that conclusion.
22. In the circumstances, the Entry Clearance Officer’s appeal against the FtT’s decision fails.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed *J Keith*

Date: 20th January 2021

Upper Tribunal Judge Keith