



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/01609/2013
OA/01620/2013

THE IMMIGRATION ACTS

Heard at Field House

On 1 April 2014 and 5 June 2014

Determination

Promulgated

On 13 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

(1) MISS ARYEL TERESE NEGRITO

(2) MISS KYLE ANGELA NEGRITO

Respondents/Claimants

Representation:

For the Appellant:

Mr P Nath (1 April) and Mr P. Deller (5 June 2014), Specialist Appeals Team

For the Respondents/Claimants: Mr D Gibson-Lee (1 April) and Ms Victor-Mazeli (5 June), Counsel instructed by Lloyds PR Solicitors

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimants' appeals against

the decision by an Entry Clearance Officer to refuse them entry clearance as the dependants of a work permit holder with limited leave to remain. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The first claimant Aryel was born on 10 May 1995 and the second claimant, her sister, Kyle was born 15 December 1996. They were aged 17 and 15 respectively at the date of application.
3. On 23 October 2012 an Entry Clearance Officer in Manila gave his reasons for refusing both applications. The grounds of refusal were identical. In the refusal of entry clearance notice addressed to Aryel, the first claimant, the Entry Clearance Officer noted that their mother in the UK had limited leave to remain there until March 2014, working as a staff nurse. Therefore she needed to demonstrate that her mother had had sole responsibility for their upbringing. But she had not shown this to be the case. She had submitted a letter from her mother stating that their father – Dexter Negrito, lived with them at home and could not travel at this time to the UK as he was remaining in the Philippines to look after their two younger sisters, Athea and Daena (aged 13 and 9 respectively). Her mother had left the UK in November 2005, and had been living there ever since. Meanwhile, their father had been responsible for their welfare and upbringing during her near seven year absence. The Entry Clearance Officer also raised a concern about the adequacy of accommodation for the first claimant, given that she was going to become an adult in less than seven months.
4. The claimants' grounds of appeal were settled by Lloyds PR Solicitors. The issue was sole responsibility. The evidence submitted with the application showed that the sponsor had provided her children with food, clothing, and paid their household bills and school fees. She also maintained almost daily contact with them either by telephone or via social media. The ample documentary evidence of exchanges between a loving, caring and devoted mother and her daughters, coupled with the financial assistance which she gave to her daughters, was determinative of the role that the sponsor played in the upbringing of her children. The case of **Cenir v Entry Clearance Officer [2003] EWCA Civ 572** could be contrasted on the facts.
5. On 16 May 2013 an Entry Clearance Manager gave his reasons for upholding the refusal decision in respect of the first claimant. She did not meet the sole responsibility requirement. There was no doubt that her mother played a role in her life, but the family was still together and she lived with her father. At best her mother could argue she had shared responsibility, “and it is fair to assume that, as the parent who cares for her on a day-to-day basis, her father has the major role.”

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The claimants' appeals came before Judge Keane sitting at Taylor House in the First-tier Tribunal on 8 November 2013. There was no representative for the Entry Clearance Officer in attendance. The judge received oral evidence from the sponsor and another witness.
7. In her witness statement, the sponsor confirmed that she was married to Dexter Negrito, and that they had four children. She had continuously and fully supported them in a number of ways. She regularly sent money to her family through a money remittance service. She also sent money on a monthly basis to cover ordinary living expenses and household bills. She had been responsible for the tuition fees in relation to her daughter Aryel, while she was studying at university in Manila. She also paid for the education of her two youngest daughters. Her daughter Kyle was funded by her university.
8. She maintained daily contact with her children, especially her eldest daughter Aryel. Since being in the UK, she endeavoured to travel and visit her children at least once every year.
9. Her husband had been without work for around two years. He had just returned to work in July 2013. He worked as an engineer, and was required to travel around the country. He lived with the two younger daughters, while the other two lived in school. He got to see Aryel and Kyle on a fortnightly or monthly basis. She had all the parental responsibility in relation to her two oldest daughters. Her husband did not provide for them at all, and he could confirm that. In relation to the two youngest daughters, she employed a nanny who stayed at the home on a permanent basis in order to look after them.
10. In her evidence, Mrs Murdock said the sponsor was a hands-on mother. She had been involved in day-to-day decisions affecting the claimants and family affairs generally. She emphasised that the claimants, as adolescent females, had far reaching demands which needed to be met in order that they became responsible young women.
11. In his subsequent determination, the judge found that the sponsor had had sole responsibility for the upbringing of the claimants. His reasoning was fourfold. Firstly, the phrase "sole responsibility" was intended to reflect a situation where the primary parental responsibility for the child's upbringing rested to all intents and purposes with one parent and was a factual matter to be decided upon all the evidence. Secondly, he had not heard or read evidence from Mr Dexter Negrito. The Entry Clearance Officer had placed weight on a letter written by Mr Dexter Negrito in support of the applications for entry clearance. Mr Negrito confirmed that the claimants resided with him, and the judge inferred that this was during the school holidays. Plainly, Mr Negrito did not dispute the sponsor's claim to have had sole responsibility for the upbringing of the claimants, and he was plainly amenable to the applications for entry clearance being made. Thirdly, the sponsor and Mrs Murdock had provided comprehensive evidence of the circumstances of the claimants, and their contentions of fact were supported by the documentary evidence. Finally, evidence was

not presented which fairly and properly permitted the drawing of an inference that any material contention advanced by the sponsor or Mrs Murdock was untrue. A finding that it was Mr Dexter Negrito and not the sponsor who had conduct over day-to-day decisions affecting the claimants could not be based on any fact or evidential foundation:

I was left with the evidence of the sponsor and Mrs Murdock, strongly corroborated by the documentary evidence to which I have referred and that evidence all pointed to a single finding namely that day-to-day decisions affecting the [claimants] have been arrived at by the sponsor, financial and moral support to them has been exclusively extended by her and that it is to the sponsor and not to Mr Dexter Negrito that the claimants look for guidance and support.

The Application for Permission to Appeal

12. The Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. They argued that the judge had materially erred in law failing to have regard to **TD (Yemen) [2006] UKAIT 00049** in making his findings on sole responsibility. He should have proceeded from the starting point that both parents shared responsibility for their child's upbringing. The fact that the claimants lived with their father during the school holidays indicated that he was involved in their upbringing. The judge had failed to give adequate reasons for his finding the father did not share responsibility for the children's upbringing with the sponsor.

The Grant of Permission to Appeal

13. On 26 February 2014 First-tier Tribunal Judge Reed granted permission to appeal for the following reasons:

The judge has not referred to **TD** in the determination. The guidance given at paragraph 52(4) states: 'Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility'. The judge acknowledged the evidence submitted in support of the appeal included a letter from the father in which he said that the children live with him 'it was to be inferred during the school holidays'. The judge has failed to give adequate reasons as to why the sponsor had sole responsibility as opposed to this being shared with their father.

The Hearing on 1 April

14. At the hearing before me, Mr Nath developed the argument raised in the grounds of appeal. In reply, Mr Gibson-Lee drew my attention to a number of passages in **TD (Yemen)** upon which he relied. He also took me through the evidence that was before the judge, including a witness statement from Dexter Negrito dated 27 October 2013. He submitted that the judge had given adequate reasons for finding that the sponsor had sole responsibility for the claimants, and the findings were fully supported by the evidence.

15. I reserved on the question of whether there was a material error of law; and, if so, whether the decision could and/or should be remade without a further hearing.

Reasons for finding an error of law

16. I consider that the following paragraphs in **TD** are particularly pertinent to the issue which is before me:

45. To understand the proper approach to the issue of sole responsibility, we begin with the situation where a child has both parents involved in its life. The starting point must be that both parents share responsibility for their child's upbringing. This would be the position if the parents and child lived in the same country and we can see no reason in principle why it should be different if one parent has moved to the United Kingdom.

46. In order to conclude that the UK based parent had sole responsibility for the child, it would be necessary to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK based parent and was otherwise totally uninvolved in the child's upbringing. The possibility clearly cannot be ruled out: Alagon provides an example of this exceptional situation and turns upon an acceptance by the judge of the wholly unusual situation that the father was 'doing nothing for the child beyond the bare fact of living with her on reasonably good terms'.

17. The significance of the letter from the sponsor referred to in the refusal decision was that she was explaining why the claimants were going to be travelling to the United Kingdom unaccompanied. The reason was that their father, who was in the Philippines with them, could not accompany them as he needed to stay and look after her two younger daughters. The Entry Clearance Officer reasonably understood from the sponsor's letter that their father had some involvement in their upbringing, and this was not an exceptional case where the parent left behind in the country of origin had completely abdicated any responsibility. The significance of the grounds of appeal to the First-tier Tribunal is that the claimants' solicitors did not advance the case that the father had abdicated responsibility. They also did not put in any evidence pointing to an abdication of responsibility.

18. It was only at the appeal hearing that the sponsor tendered evidence which was arguably to the effect that the father had abdicated responsibility for the upbringing of his two oldest daughters. In the light of the fact that this was a new case so far as the respondent was concerned, it is reasonable to question whether the approach adopted by the judge was entirely fair. In effect, he said that the Entry Clearance Officer could not complain if he, the judge, made findings in favour of the claimants in circumstances where the Entry Clearance Officer had not sought to interview them or their father, and where the evidence tendered by the sponsor had not been cross-examined. But there was no controversy over

the sponsor's involvement in the upbringing of the children. There was no controversy over her having *shared* responsibility, which was all the evidence had hitherto showed.

19. The judge's attention was not directed to the relevant passages in **TD**, and so the judge was not reminded that the claimants had to prove that they were in an exceptional situation, where the parent abroad had abdicated any responsibility for them and was merely acting at the direction of the UK based parent; and was otherwise totally uninvolved in the child's upbringing.
20. Mr Gibson-Lee submits that it does not matter that the judge did not make a self-direction to this effect, as he gave adequate reasons for finding that the sponsor had sole responsibility and therefore, by necessary implication, that the father had abdicated all parental responsibility. However, on analysis, the judge's finding to this effect is based on flawed reasoning and he has also wholly failed to take into account a highly material document.
21. The judge's reasoning is flawed because he refers to a letter from Mr Negrito which he says is quoted by the Entry Clearance Officer in the refusal notice. In fact, the Entry Clearance Officer quoted from a letter which came from the claimants' mother. It was the claimants' mother who confirmed that Mr Negrito lived with the claimants at home and could not travel to the UK as he was remaining in the Philippines to look after the two younger sisters. The significance of the judge's misattribution of the letter to the father, rather than to the mother, is that he asserts that in this letter Mr Negrito did not dispute the sponsor's claim to have had sole responsibility for the upbringing of the claimants. As the letter was in fact written by the sponsor, the declaration that the claimants live with their father, *without any qualification whatsoever*, tends to undermine the proposition that the father is not involved in their upbringing. Furthermore, as the letter comes from the mother, not the father, it is not evidence that the father accepts the sponsor's claim that she has had sole responsibility for the upbringing of the claimants.
22. More egregiously, the claimants' bundle for the hearing contained a letter from the father which he apparently wrote shortly after the refusal decision. Since the judge says that he has not read any evidence from the father, it would appear that he overlooked this letter entirely. Mr Gibson-Lee submits that the letter is consistent with the father having abdicated responsibility for the two older children, although the father does not say so in explicit terms. However, I consider that the letter is susceptible to another interpretation, which is more consistent with the father having shared responsibility for the upbringing of the claimants, than the opposite. In paragraph 6 he says that his new job (as of July 2013) requires him to travel out of town for more than a week at a time, and he cannot possibly look after the four children "all in my custody" and his wife has to relieve him of this responsibility. In paragraph 7 he says he has therefore asked Donna to look after the two eldest daughters: they are growing vulnerable young adults and need close parental guidance,

especially from a mother. He is not coping with all the parental pressures at the moment.

23. In paragraph 31 of **TD**, the Tribunal discussed the Court of Appeal decision in **Cenir v Entry Clearance Officer**. Mr Gibson-Lee drew my attention to the following passage in the judgment of Buxton LJ at paragraph 10 where he stated:

The general guidance is to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent.

24. It will be noted that in the letter from the father, he does not say that he is acting under the direction of the sponsoring settled parent. He does not say that the initiative for the claimants joining their mother in the UK has come from the mother, with him being simply a passive bystander. On the contrary, the thrust of his evidence is that he has asked the mother to take on the responsibility of looking after the claimants in the United Kingdom. So it follows that he is the parent who has made a decision about the upbringing of the claimants. He has decided that it is in their best interests, and also his own, for the two older children to join their mother in the UK. *He is thus purporting to exercise parental responsibility.*
25. In conclusion, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside. The nature of the error of law is such that the findings of fact made by the judge cannot safely be preserved, and it would not be fair to either party to seek to remake the decision without giving the sponsor the opportunity to give further evidence, and to be cross-examined on such evidence.

The Hearing on 5 June

26. Following my error of law ruling on 10 April 2014, a further hearing in the Upper Tribunal took place before me to re-make the decision. My directions for the continuation hearing were that none of the findings of fact on sole responsibility would be preserved; it was not in dispute that the sponsor is involved in the claimants' upbringing, and so further evidence to establish that the sponsor has shared responsibility was unnecessary and would not be admitted; but both parties had permission to both parties to adduce evidence that was not placed before the First-tier Tribunal strictly limited to the issue in controversy (sole responsibility on the part of the sponsor *and* abdication of all responsibility by the father as at the date of decision), such evidence to be provided to the Upper Tribunal and to the other party not less than seven days before the resumed hearing in a paginated and indexed bundle.
27. At the outset of the hearing, Ms Victor-Mazeli confirmed that no new evidence on the issue in controversy had been filed with the Upper Tribunal.
28. Ms Victor-Mazeli tendered the sponsor for cross-examination. She was questioned extensively about the letter signed by the children's father on

31 October 2013, which was addressed to the Tribunal. It was put to her that it was only after her husband got a new job in July 2013 that he found it difficult to look after all four children. She answered it was all her decision all her money, and she decided what to do, and what not to do. She was asked to clarify Dexter's role. She answered they did not really communicate as he was upset with her for not sending the money for the family directly to him. She would send out money on a monthly basis, and after two weeks he would complain that the money had run out. This was four years ago. He was more upset because the children were following her instructions. But yes, they had stayed married. The two oldest children were attending university and staying in a dormitory during the week. They went home at weekends to do the shopping. The children always had a nanny. Also her mother stayed with the children from time to time. It was put to her that her witness statement for the hearing in the First-tier Tribunal did not include an allegation that her husband had misused the money which she had remitted.

29. In answer to questions for clarification purposes from me, the sponsor said she did not think that Dexter had lied in the letter which he had written to the Tribunal.
30. In re-examination, the sponsor said her husband was not working when the application was made. He had been out of work for three years. She was asked whether her husband was looking after the children. She answered that he was there. He was benefiting from all the money that she was sending. Even now that he was working, he could not afford to pay the internet bill. She sent money to him directly until 2008. But as he was not handling it properly, since then she had sent the money direct to her eldest daughter. She continued:

For me, he doesn't care at all. It is just a formality that he is there.

31. In his closing submissions on behalf of the Entry Clearance Officer, Mr Deller submitted a distinction had to be drawn between shared responsibility and sole responsibility, and also between primary responsibility and sole responsibility. It was not enough that the sponsor should be primarily responsible for the children's upbringing, by virtue of her historic role as the sole breadwinner for the family and her close involvement with the lives of her daughters, through regular communication with them. It would have to be shown that at the time of decision their father had completely disappeared from the scene, and was no more than a ghost presence in the house.
32. In reply, Ms Victor-Mazeli reminded me that the First-tier Tribunal Judge had received supporting evidence from Mrs Murdock to the effect that the sponsor was a hands-on mother. She submitted that the judge had sufficient evidence before him to find that the sponsor had sole responsibility for her two elder daughters, irrespective of the letter from the father. He was not making day-to-day decisions with regard to the older children, because they were at boarding school. He was misappropriating the money which his wife was sending, and she was

financially responsible for everything. The judge below had found the sponsor to be a credible witness, and she invited me to accept her evidence that she had had sole responsibility for the upbringing of her two daughters at the date of the refusal decision.

Discussion and Findings

33. The letter from the children's father, which the judge below ignored, changes the complexion of this case. The contents of the letter contradict much of the sponsor's testimony. But at the same time the sponsor does not claim that her husband has said anything in this letter which is false.
34. In paragraph 3 of the letter, Mr Negrito confirms that his wife has been sending money for the family's basic needs since the time that she left the Philippines to work in the United Kingdom in 2005. He goes on to say that she calls "us" almost every day to see how "we" are doing, and that "we" communicate with her in various ways, including through face time video and Skype. This is not indicative of a breakdown in the relationship between husband and wife.
35. In paragraph 5, Mr Negrito, who is a civil engineer, reports that he has been gainfully employed in a construction project since July 2013. He says he finds it very hard coping with four children, especially the two oldest daughters and attending to their needs. He says he thinks he has lost parental control over the two older children as they live outside the house and more often they will not follow his instructions, and will only listen to their mother.
36. This aspect of Mr Negrito's evidence chimes with some of the evidence given by the sponsor. But losing parental control of the two older children because (on their mother's insistence) they will not follow their father's instructions, is not the same as an abdication of parental responsibility.
37. At paragraph 6 of his letter, Mr Negrito says that his new job requires him to travel out of town for more than a week, and he cannot possibly look after all four children "all in my custody" and that his wife has to "relieve me from this responsibility."
38. As submitted by Mr Deller, it needs to be borne in mind that this letter is written a year after the date of the refusal decision, and what matters is the state of affairs appertaining at the date of the refusal decision. The clear thrust of the letter is that at the time of the refusal decision, and indeed up until the date of this letter and beyond, Mr Negrito regards himself as exercising parental responsibility for all four daughters.
39. This message is reinforced by the contents of paragraph 7 of the letter where Mr Negrito says as follows:

I therefore ask Donna to look after her two eldest daughters ... as they are growing vulnerable young adults and needs close parental guidance, especially from a mother. I am not coping with all this parental pressures at

the moment and it is costing me my job and my life as a whole. I can't tell you everything in detail.

40. It is impossible to reconcile the sentiments expressed in this paragraph with the sponsor's disparaging portrayal of her husband as someone who does not care at all for his children, and is merely a lodger in the house taking the benefit of her financial remittances, and having no involvement at all in the upbringing of the children, including the two older daughters.
41. Most pertinently, the sponsor does not deny the truth of Mr Negrito's claim that he asked her to take the two older daughters off his hands. So the biggest single decision about the children's upbringing has ostensibly been made by the father alone, not at the direction of the sponsor.
42. There are clearly strains in the relationship between husband and wife, and it is for that very reason that the sponsor's portrayal of Mr Negrito and his relationship with the children must be approached with caution. Despite the strains in the relationship, the couple are still married. Moreover, the photographic evidence in the claimants' bundle presents a happy family unit, with Mr Negrito being no less a presence in the family than the sponsor. Given the various different ways in which the sponsor communicates with the family in the Philippines, including by face time video calls and Skype, the Facebook messages in the claimants' bundle can only give a very partial picture of the content of such communications. In addition, only some of the Facebook messages are in English. But there are discernible references to "daddy," such as on 29 January 2011 when the sponsor sent the following message: "ask daddy kung paano?"
43. The Facebook messages are indicative of shared responsibility. I do not consider that they advance the case that at the date of application or the date of decision the sponsor was exercising sole responsibility for the upbringing of the claimants.
44. I also do not consider that the evidence of Mrs Murdock advances the appellant's case on this issue. She is the first cousin of the sponsor, and thus the two claimants are her nieces. She says that Donna is left with no choice because her husband "cannot look after all of them." She says the children have far-reaching demands as growing up young women, and Donna has to be there physically to guide them through their journey to adolescence. The witness statement provides no support for the proposition that hitherto Donna's husband has not been looking after the claimants, or has not hitherto been exercising some parental responsibility for them.
45. There is no mention of a nanny in the Facebook communications, which include communications with the younger daughters. There is no mention in the letter from Mr Negrito of the household expenses including payment for a nanny. But even if the sponsor has been paying for a nanny to look after the children since she left the Philippines in 2005, this has no bearing on the issue in controversy. The claimants have long since outgrown the need for a nanny, and the presence of a nanny in the household to provide

day-to-day care for the younger children does not constitute an abdication of parental responsibility by either of the two parents.

46. In conclusion, I find that the claimants have not discharged the burden of proving that at the date of the refusal decision their mother was exercising sole responsibility for their upbringing.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimants' appeals against the refusal of entry clearance are dismissed.