



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

Appeal Number: OA/05632/2013

THE IMMIGRATION ACTS

Heard at Field House

On 3rd October 2014

Determination

Promulgated

On 16th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**JP
(ANONYMITY ORDER MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr A Slatter of Counsel instructed by Maxwell Alves Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Broe promulgated on 1st May 2014.

2. The Appellant is a Chinese citizen born 13th October 1995 who applied for entry clearance to enable him to settle with his mother YC (the Sponsor) in the United Kingdom.
3. The application was refused on 7th January 2013. In brief summary the Respondent did not accept that the Appellant and Sponsor were related as claimed.
4. It was not accepted that the Sponsor had had sole responsibility for the Appellant's upbringing, nor that there were any serious and compelling family or other considerations which made exclusion of the Appellant undesirable, and it was not accepted that the Appellant was not leading an independent life. The application was therefore refused with reference to paragraph 297(i)(e), (f), and (iii).
5. In giving reasons for this decision the Respondent noted limited evidence had been provided as to contact between the Appellant and Sponsor since she left China in 2003. The Appellant had failed to submit any evidence to show who he resided with in China and there was no confirmation as to who was his guardian. His father had written a letter to state that he and the Sponsor separated in 2001 and that he was happy for the Appellant to travel to the United Kingdom and live with the Sponsor.
6. The Appellant appealed to the First-tier Tribunal, and the appeal was heard by Judge Broe (the judge) on 25th March 2014. The judge heard evidence from the Sponsor and took into account DNA evidence which proved the relationship between the Sponsor and Appellant.
7. The judge found that the Appellant was leading an independent life. The judge found that the Appellant was at boarding school during the week, and lived alone at weekends.
8. Having found that the Appellant was living an independent life, the judge did not go on to make any findings in relation to sole responsibility. The judge did consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and found that refusal of entry clearance did not breach Article 8 of the 1950 Convention.
9. The Appellant was granted permission to appeal to the Upper Tribunal and at a hearing before me on 31st July 2014 I found that the judge had erred in law and that the decision of the First-tier Tribunal must be set aside with no findings preserved, with the exception of the finding that DNA evidence proved that the Appellant and Sponsor were related as claimed. Full details of the application for permission, the grant of permission, and my reasons for finding an error of law are contained in my written decision promulgated on 8th August 2014.
10. The hearing on 31st July 2013 was adjourned so that further evidence could be given and the decision re-made by the Upper Tribunal.

The Upper Tribunal Hearing

Preliminary Issues

11. I ascertained that I had received all documentation upon which the parties intended to rely and each party had served the other with any documentation upon which reliance was to be placed.
12. I had received the Respondent's bundle which is attached to an Entry Clearance Manager review dated 2nd December 2013. I also received witness statements from the Appellant, the Sponsor and the Sponsor's sister all dated 30th September 2014. A bundle comprising 458 pages was submitted on behalf of the Appellant.
13. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

The Sponsor's Evidence

14. The Sponsor adopted her witness statement dated 30th September 2014 as her evidence. She gave her evidence with the assistance of an interpreter in Mandarin. Both the Sponsor and interpreter confirmed that there were no difficulties in communication.
15. The Sponsor was questioned by both representatives and I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here. I will refer to them if necessary in my findings and conclusions.
16. In summary the Sponsor's account is that she separated from the Appellant's father in 2001. She left China in 2003 and travelled to the United Kingdom. She claimed asylum which was not granted, but she was eventually granted indefinite leave to remain and is now a British citizen.
17. The Sponsor left the Appellant to be looked after by her sister and her mother and between 2003 and 2011 the Appellant lived with the Sponsor's sister.
18. The Sponsor had sole responsibility for him. The Appellant's father, although he lived in the same area, did not have any responsibility for his upbringing. The Sponsor kept in regular contact with the Appellant and following a grant of indefinite leave, has visited him on four occasions in China. The Sponsor has been sending him money and presents and has been in touch with his teachers and has taken all the important decisions in the Appellant's life.
19. In September 2012 the Appellant started boarding school, and at weekends started living at 21 ZZD, on his own. The property is owned by his paternal grandfather. The Sponsor's sister and mother would visit him because they lived nearby, and would cook for him at weekends.

The Respondent's Submissions

20. Mr Melvin relied upon the refusal decision dated 7th January 2013 and the Entry Clearance Manager's review dated 2nd December 2013. Mr Melvin described the Sponsor's evidence as vague and inconsistent and noted that the Sponsor blamed previous legal representatives for the lack of evidence submitted to the Entry Clearance Officer, and before the First-tier Tribunal, although no formal complaint against those representatives had been made.
21. I was asked to conclude that having considered the evidence, the Appellant's circumstances in China were entirely unclear. I was asked to note that in the Visa Application Form in answer to questions 19-26, the Appellant had indicated that his address was 21 ZZD and that he had lived at that address since 27th March 1996. This conflicted with the Sponsor's evidence that the Appellant had lived at a different address between 2003 and 2011, as he had been living with her sister.
22. I was asked to note that the Appellant's father's address was also 21 ZZD, exactly the same address as the Appellant. This was referred to in the DNA evidence, a separation agreement between the father and the Sponsor which was dated 3rd March 2014, and in a letter written by the father to the Entry Clearance Officer dated 15th May 2012. I was asked to find that the Appellant's father was still living with the Appellant in China and that the Sponsor had given misleading evidence in an effort to indicate otherwise.
23. In relation to the three witness statements that had been submitted at the hearing on behalf of the Sponsor, the Appellant and the Sponsor's sister, Mr Melvin pointed out that the Sponsor had admitted in her oral evidence that she had given evidence to the Appellant's solicitors on behalf of the Appellant and her sister so that the statements could be prepared, and the Sponsor had admitted the solicitors who prepared the statements had had no direct contact with the Appellant or the Sponsor's sister.
24. I was asked to dismiss the appeal under the Immigration Rules because insufficient evidence had been submitted to discharge the burden of proof.
25. Mr Melvin did not address Article 8, as it was understood from Mr Slatter, that the appeal was not being pursued on Article 8 grounds.

The Appellant's Submissions

26. Mr Slatter confirmed that the appeal was pursued under the Immigration Rules that being paragraph 297, and not under Article 8.
27. Mr Slatter submitted that the main issue in the appeal related to the credibility of the Sponsor. I was asked to find her a credible witness and

that her evidence could be relied upon. I was asked to accept that previously there had been poor legal representation.

28. I was asked to accept that at the date of application, and decision, the Appellant was at a boarding school, and that he lived at 21 ZZD at weekends, and that he was visited at that address by his aunt and grandmother on occasions.
29. Mr Slatter submitted that if I accepted the Sponsor's evidence, then it was clear that the Appellant was not leading an independent life.
30. In relation to sole responsibility, Mr Slatter submitted that the issue was whether I was prepared to accept that the Appellant's father was not involved in his upbringing. I was asked to find that the Sponsor's evidence was consistent, and to accept that the Appellant's father was not involved in his upbringing. I was referred to paragraph 49 of **TD Yemen [2006] UKAIT 00049**, and asked to note that this stated that where one parent had disappeared from a child's life or abdicated responsibility, the starting point was that it was the remaining active parent who has sole responsibility for the child. The fact that the remaining active parent is in the United Kingdom makes no difference to this. I was asked to accept that the important decisions in the Appellant's life had been made by the Sponsor, and therefore she had sole responsibility for him, and paragraph 297(i)(e) was satisfied.
31. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

32. In considering the Immigration Rules, I take into account that the burden of proof is on the Appellant, and the standard of proof a balance of probability.
33. As this is an entry clearance case, I must consider the circumstances appertaining at the date of refusal of entry clearance, that being 7th January 2013.
34. I have considered the evidence in the round, and taken into account all the evidence, both oral and documentary placed before me. I have also taken into account the submissions made by both representatives. If a particular piece of evidence is not referred to, this does not mean that it has not been considered, as it is not possible, or appropriate, to refer to every single piece of evidence.
35. The relationship between the Sponsor and Appellant has been proved by DNA evidence. The Sponsor is the Appellant's mother.
36. The Sponsor came to the United Kingdom in 2003. She was granted indefinite leave to remain on 13th June 2011. She is therefore settled in this country, and she is now a British citizen.

37. In considering sole responsibility I have taken into account the principles in **TD Yemen** and set out below the head note to that decision;

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 a 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.

38. I agree with Mr Slatter that a very important issue in this appeal relates to the credibility of the Sponsor. I did not find her to be a credible witness in all respects.
39. The Visa Application Form was completed when the Appellant was 17 years of age. In that form his address was given as 21 ZZD which the Sponsor accepts was his address at weekends when the application was made. However the application form indicated that he had lived there since 1996 and there was no indication that he had lived at any other address. A landline telephone number was given for the Appellant at 21 ZZD.
40. I do not accept that the Appellant's father has had no involvement in his upbringing. I reject the Sponsor's evidence on this point. It is accepted on behalf of the Appellant that his father lives near to him. It is clear that the father has been contacted about this application because he has written letters consenting to the Appellant travelling to the United Kingdom and he has co-operated in filing a separation agreement between himself and the Sponsor, and he has co-operated in the provision of DNA evidence.
41. The DNA evidence is contained within a bundle submitted on behalf of the Appellant by his previous representatives, and this bundle was placed before the First-tier Tribunal. The address of the Appellant and his father is exactly the same in the sample collection form contained within the DNA evidence. They also give the same telephone number, and this is the same telephone number as listed in the Visa Application Form as being the landline for 21 ZZD.
42. A separation agreement was entered into between the Sponsor and the Appellant's father on 3rd March 2014. The address of the Appellant's father listed in that agreement is 21 ZZD, the same address as in the DNA evidence, and the Visa Application Form. A translation of the agreement is at page 97A of the Appellant's bundle.
43. At page 98 of the Appellant's bundle is a translation of a letter written by the Appellant's father dated 15th May 2012. In that letter he gives his address as 21 ZZD, the same address as contained in the separation agreement, the DNA evidence, and the Visa Application Form.

44. These matters were specifically put to the Sponsor when she was cross-examined. She could give no satisfactory explanation as to why the address of the Appellant's father was given in three separate pieces of evidence, as being 21 ZZD, the same address as the Appellant. The Sponsor said that the Appellant's father did not live at that address, but could give no further adequate explanation.
45. The Sponsor when cross-examined, did not directly answer a number of questions. She blamed the Appellant's previous representatives for a lack of information in the original application, and for a lack of evidence before the First-tier Tribunal. The Sponsor did accept, quite frankly, that she had given the Appellant's solicitors evidence on behalf of her sister and the Appellant, so that the witness statements could be completed. She said that the solicitors did not have direct contact with either the Appellant or her sister.
46. It may be that the Sponsor is mistaken on this, as the statements are signed by the Appellant and the Sponsor's sister, and contain a statement of truth that the statement has been read to them in Chinese by the solicitors.
47. I do however accept the Sponsor's evidence that she did give information to those solicitors on behalf of the Appellant and her sister, as I can see no reason why she would say that if it was not true. The statements are very similar in content, and as the evidence of the Appellant and Sponsor's sister was not tested by cross-examination, I place very limited weight on their written statements.
48. As previously indicated, I do not regard the Sponsor as credible in all respects, and I find it relevant that she was unable to give an explanation as to why the Appellant and his father have the same address. The circumstances of the Appellant in China are not entirely clear. In paragraph 22 of the Sponsor's statement she states that since her departure from China the Appellant has been living in a boarding school from Monday to Friday. That contrasts with her evidence that between 2003 and 2011 the Appellant was living with her sister. It also conflicts with paragraph 17 of her statement in which she confirms that it was September 2012 when the Appellant started high school and was boarding at a school while living at 21 ZZD at weekends.
49. The Appellant in paragraph 22 of his witness statement makes a similar comment, that since his mother's departure he has been living in a boarding school from Monday to Friday and that he started living at 21 ZZD at weekends since December 2011. It is therefore not clear if that is correct, where he was living in the weekdays between December 2011, and starting boarding school in September 2012.
50. I do not accept that the evidence produced on behalf of the Appellant has produced an accurate or comprehensive account of his circumstances in China. I do accept the Appellant was attending a boarding school at the

date of refusal, and I accept that the Sponsor has sent money not only to the Appellant but also to other family members in China, and I accept that she has been in contact with the Appellant, and in contact with his school. I also accept that she has visited China on four occasions after she was granted indefinite leave to remain in the United Kingdom.

51. That however does not prove that she has had sole responsibility for the Appellant, and I do not accept that the Appellant's father has abdicated all responsibility for him. In my view the evidence indicates that the Appellant and his father had been living at the same address and that the father has been involved in the Appellant's upbringing. As stated in paragraph 52(4) of TD Yemen, "if both parents are involved in the upbringing of the child, it would be exceptional that one of them will have sole responsibility."
52. I do not find this to be one of those exceptional cases, and I conclude that the burden of proof has not been discharged and it has not been proved that the Sponsor has had sole responsibility for the Appellant's upbringing.
53. I next consider paragraph 297(i)(f), and I do not find that there are serious and compelling family or other considerations which make exclusion of the Appellant undesirable. The Appellant is attending school in China. When not at boarding school, the evidence indicates that he lives with his father. He also has contact with other close family members. There are no relevant medical issues. The Appellant is not living in poverty or in overcrowded conditions. In addition to family support he has financial support from the United Kingdom. The appeal cannot succeed with reference to paragraph 297(i)(f).
54. I then consider paragraph 297(iii) and whether the Appellant is leading an independent life. I find that he is not. I have taken into account the principles in NM Zimbabwe [2007] UKAIT 00051. Although the Appellant is living away from his family home in the week, he is at a boarding school and this does not mean he is leading an independent life. The Appellant, in my view, has not formed an independent social unit separate from his parents' family unit. I find that the Appellant is supported both emotionally and financially by his family and therefore is not leading an independent life.
55. I do not go on to consider Article 8, because Mr Slatter confirmed that the appeal was not pursued on Article 8 grounds.

Decision

The Determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is dismissed.

Anonymity

An anonymity direction was made in the First-tier Tribunal as the Appellant was a minor when his application was made. I continue that direction under rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 8th October 2014

Deputy Upper Tribunal Judge M A Hall
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 8th October 2014

Deputy Upper Tribunal Judge M A Hall