Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12299/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd April 2019	**On 25th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

[X L]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Murphy instructed by Colindale Law
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of China who was born in June 2002. He appealed to the First-tier Tribunal against a decision made by the Entry Clearance Officer to refuse his application for entry clearance in the United Kingdom to join his mother (the Sponsor) under paragraph 297 of the Immigration Rules. First-tier Tribunal Judge Freer dismissed the appeal in a decision promulgated on 17th December 2018. The Appellant now appeals with permission granted by First-tier Tribunal Judge Gumsley on 6th March 2019.

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2. The background to this appeal is that the Sponsor left China when the Appellant was young and came to the UK on 10 October 2008. She met Mr [R], a British citizen, in 2009 and they married in the UK on 8th October 2010. It is claimed that the Appellant lived with his father for a period of time but that he no longer contributes financially to the Appellant's upkeep and that they have not seen each other for a period of four years. The Sponsor claims to have travelled to China every year and that this put a strain on her marriage to Mr [R] leading to them divorcing in December 2016 because she wanted to move back to China to live with the Appellant. However she remained in China for four months and returned to the UK in April 2017 to reconcile with Mr [R]. The Appellant subsequently applied for entry clearance to join his mother in the UK. The application was refused on the basis that the Entry Clearance Officer (ECO) considered that the Chinese Court documents showing a change of custody form the Appellant's father to the Sponsor was undertaken only in order to facilitate the Appellant's travel to the UK. The ECO was not satisfied that the evidence demonstrated that the Sponsor has had sole responsibility for the Appellant or that there are serious and compelling family or other considerations that make the Appellant's exclusion from the UK undesirable and refused the application under paragraph 297 (i) (e) and (f) of the Immigration Rules.

3. Paragraph 297(i)(e) and (f) of the Immigration Rules provide as follows:

> **"Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom**
>
> 297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
>
> (b) both parents are being admitted on the same occasion for settlement; or
>
> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
>
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement 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; and

… "

4. The Grounds of Appeal are subdivided into six grounds. These were articulated by Mr Murphy at the hearing. He submitted that the application and the appeal were advanced on two bases. It was contended that the Sponsor exercised sole responsibility in relation to the Appellant when she was in the UK and during periods when she returned to China to stay with the Appellant there.

5. I clarified with Mr Murphy whether there was evidence before the judge of a visit in 2018 and whether it was contended that the judge had ignored any evidence in this regard. However he accepted that the reference in ground 5 to a visit in 2017 for four months was erroneous and he withdrew that ground. He accepted that the Sponsor was in China from January to February 2017. He submitted that she was in China for a period of seven months in total in 2018 but he said that there was no evidence in relation to this visit before the judge.

6. At the hearing Mr Murphy submitted that there was a conflict between the judge's finding at paragraph 40 that: "the witnesses were credible, particularly Mr [R]. He is however not a person with much direct knowledge of the situation in China or its history" and the findings from paragraphs 41 to 64 leading to the ultimate conclusion that the Immigration Rules were not met and that the Appellant had not shown that the Sponsor had any period of sole responsibility as required by 297(i)(e) or that there were any particular or adverse circumstances that reached the level of 297(i)(f) [65].

7. Mr Tufan accepted that there appeared to be a slip at paragraph 40 but contended that it was clear from the rest of the decision that the judge had issues in relation to credibility and in particular in relation to the absence of documentary evidence. He stressed that it is up to the Appellant to make his case and the judge had considered all of the evidence and reached a conclusion open to him on the evidence which was not irrational that there was insufficient evidence to discharge the burden of proof.

8. I have considered the submissions in relation to paragraph 40. I accept that on first reading it appears inconsistent with the subsequent paragraphs. However on closer reading it is clear that, whilst he found Mr [R] to be credible, the judge found that Mr [R]'s evidence in relation to circumstances in China was limited because he did not have much direct knowledge of the situation there. This was a finding open to the judge on the evidence. It was also open to the judge to find the Sponsor credible and to consider all of the evidence and to find as he did that the evidence was not capable of leading to a conclusion that the Sponsor had sole responsibility for the Appellant.

9. Paragraph 41 is key. There the judge said that spending some time each year with the Appellant in China is not proof of sole responsibility at any

date. What it shows according to the judge is "that there may be shared responsibility with various other people who spend more time with the Appellant". The judge went on to say that evidence from those other people could clarify who is making the important decisions all year round and with specific examples. The judge also pointed out that the father was cooperating as recently as last year and he could reasonably have provided a witness statement. The judge pointed out that there was no proof of any visit to China after the date of the court document and the judge found that there was no evidence of any visits to China after the visit in January 2017. The judge also pointed out that there was no evidence about the guardian who was referred to in the application form [46]. The judge referred to the fact that the Sponsor's sister is the main point of contact with the school [47]. The judge pointed to that there was no supporting evidence in relation to the paternal grandmother or the sister and no evidence about the timeframe their responsibility covers [48]. Again at paragraph 50 the judge is not saying that the Sponsor's evidence in itself is not credible but saying that the Sponsor's evidence in itself does not point to sole responsibility. At paragraph 50 the judge highlighted that the possibility that responsibility for the Appellant is shared have not been addressed by reasonably available evidence. The judge considered that the custody document from 2017 was not sufficient to prove sole responsibility for the reasons set out at paragraph 51. The judge also pointed at paragraph 53 to the fact that there was no major decision made after the court document was issued in 2017 and the Sponsor then had not shown an example of a decision which is clearly her sole decision.

10. The judge again pointed at paragraph 54 to the fact that the Sponsor had not produced evidence of the exercise of sole responsibility. Again at paragraph 55 the judge acknowledged that the Sponsor sends financial support to China but pointed out that this is not adequate proof as to who is the beneficiary of the money. The judge again highlighted that a statement from the recipient explaining what the money was used for would have been appropriate evidence. Significantly at paragraph 60 the judge found that there was no proof that the school regards the Sponsor as the main or sole adult contact for the Appellant and noted that there was remarkably little evidence from the school in relation to this matter.

11. In the paragraphs highlighted the judge pointed to inadequacies in the documentary evidence which could have gone to demonstrate sole responsibility. In making these findings the judge was highlighting the inadequacy in the documentary evidence pointing to evidence which could reasonably have been attained. Mr Tufan submitted that this case is one where **TK (Burundi) [2009] EWCA Civ 40** applies in that this is a case where it would have been reasonable to expect that evidence could have been produced and that this is something the judge is entitled to take into account. I accept that submission.

12. In my view there is no conflict with paragraph 40 because the judge did not attack the Sponsor's credibility in the subsequent paragraphs but

essentially found that, even accepting that she is credible, her oral evidence was insufficient to demonstrate sole responsibility. This conclusion was open to the judge on the evidence.

13. Mr Murphy submitted that the conclusion at paragraph 58 indicated that the judge accepted that, whilst in China, the Sponsor exercised sole responsibility of the child. At paragraph 58 it states that “the Sponsor has been spending a great deal of time each year with the boy in China”. However I accept Mr Tufan’s submission that this does not go to sole responsibility in that a finding that the Sponsor spends a great deal of time each year with the boy in China is not the same as a finding that she has sole responsibility for the child. The judge made a clear finding at paragraph 41 which references paragraph 58 that spending some time each year with the Appellant in China is not proof of sole responsibility. This was a finding open to the judge on the evidence.

14. Mr Tufan accepted that at paragraph 59 the judge appeared to state the wrong test where the judge stated that there is inadequate evidence to show that the threshold in law that any sole decision was ever taken by the Sponsor and that there is “a real possibility that shared responsibility is exercised where the parental grandparent and/or the Sponsor’s sister”. He accepted that it appeared that the judge may have confused this with the asylum standard. However he submitted that this is not a material error looking at the decision as a whole.

15. I note that the judge did refer to the standard of proof elsewhere. I bear in mind that this was an appeal based on human rights grounds. Throughout the decision and reading of the decision as a whole it is clear that the judge was aware of the burden and standard of proof and that it was properly applied. The judge clearly had in mind the appropriate case law of **<u>TD</u> (Yemen) [2006] UKAIT** saying at paragraph 43 that the Sponsor was clearly well aware of what she had to prove under the test in **<u>TD</u> (Yemen)**. The judge took a proper approach to the evidence.

16. Mr Tufan also accepted that at paragraph 61 the judge may have misstated the reasoning in **<u>Nmaju and Others</u> [2000] EWCA Civ 505** which refers to whether there could be evidence of two months sole responsibility. However again he submitted that this is not a material error. I accept that this is not a material error as the judge made clear findings that the evidence did not show that the Sponsor had exercised sole responsibility for the Appellant over any period of time. The judge did not simply find that the period of one month spent in China in January/February 2017 not long enough. He found that sole responsibility was not shown by a period of time in China (see also paragraph 41) and that there was insufficient evidence that sole responsibility was exercised after the visit in January/February 2017. This finding was open to the judge on the evidence.

17. The judge’s findings are summarised at paragraph 64 where he concluded that the Immigration Rules were not met due to a lack of corroboration on

a number of pertinent issues. This finding was open to the judge. This was properly a weighty factor in considering the proportionality of the decision under Article 8.

Notice of Decision

There is no material error of law in the First-tier Tribunal's decision.

The First-tier Tribunal decision shall stand.

No anonymity direction is made.

Signed Date: 16 April 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 16 April 2019

A Grimes
Deputy Upper Tribunal Judge Grimes