Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19897/2010

THE IMMIGRATION ACTS

Heard at : Laganside Courts	**Determination Promulgated**
On : 22nd August 2013	**On : 3rd September 2013**

Before

Upper Tribunal Judge McKee

Between

GU, JIA-YING

Appellant

and

Entry Clearance Officer, Peking

Respondent

Representation:

For the Appellant: Mr Martin Brennan, Solicitor
For the Respondent: Mr Andrew Mullen of the Specialist Appeals Team

DETERMINATION AND REASONS

1. As long ago as May 2010 Miss Gu, then aged 15, applied for entry clearance to join her mother, Fu Li, with a view to settlement. Mrs Fu was currently going through her 'probationary period' as the wife of Fang Zhi-Wei, a British citizen whom she had married after divorcing Miss Gu's father. The latter had written to declare that he was giving up 'custody rights' to his daughter, which led the Entry Clearance Officer to

suppose that he had hitherto been exercising responsibility for his daughter's upbringing. The ECO also noted that Mrs Fu had gone to the United Kingdom on a visit visa in September 2001, overstaying thereafter, and had only been back in China between September 2008 and October 2009. He was not satisfied therefore that Mrs Fu had had 'sole responsibility' for her daughter's upbringing, or that there were serous and compelling family or other considerations which rendered Miss Gu's exclusion undesirable. The application was refused on 3rd July 2010 under paragraph 301(i)(b) and (c) of the Immigration Rules.

2. On 7th July 2011 an appeal to the First-tier Tribunal came before Judge Morrison, who heard oral evidence from Mrs Fu, Mr Fang and a family friend, Mrs Cui Jian, who was privy to Miss Gu's living arrangements before moving to this country herself in June 2010. The factual background to the case is set out at paragraph 26 of the determination and, as it is uncontentious, I shall not repeat it here. What was still uncertain was, according to Judge Morrison, whether Miss Gu's father had contributed to her upbringing before he and her mother were divorced, and how many other relatives were on the scene apart from Mrs Fu's mother and her sister, Miss Fu Min, who were said between them to have been responsible at different times for the appellant's day-to-day care. The judge was also concerned about the lack of evidence that the sponsor had been paying the appellant's school fees and keeping in touch with the school about her progress, and about how the appellant was maintained financially during the long period when the sponsor was back in China, before returning to the UK with a spouse visa.

3. In the end, Judge Morrison, having alluded earlier to *Nmaju* [2000] EWCA Civ 505, confined himself to the period between Mrs Fu's return to the UK in October 2009 and the date of decision in July 2010 for assessing whether the sponsor had exercised 'sole responsibility'. He gave two reasons for holding that she had not, first because there was no evidence of any direct contact between the sponsor and the appellant's school, and secondly because there was no evidence of what arrangements Mrs Fu and Mr Fang had made for the appellant's reception and future education in this country, if she were given leave to enter. Both reasons were addressed in the application for leave to appeal to the Upper Tribunal, but only the second struck Upper Tribunal Judge Chalkley, when granting leave, as arguably erroneous in law.

4. When the appeal came before me today, I took the view, despite the contention in the 'Rule 24 Response' that it was not an impermissible observation, that Judge Morrison had erred in law by expecting any more of the sponsor than that she should have demonstrated sole responsibility. That suitable arrangements should have been made for the child's care in the United Kingdom is a requirement of the 'exclusion undesirable' rule, but it forms no part of the 'sole responsibility' rule to which Judge Morrison was confining himself. As this was the second of only two reasons for dismissing the appeal, I could not say that it was not a material error.

5. I therefore proceeded to hear oral evidence from the sponsor, in order to re-make the decision on the appeal. Mr Fang and Mrs Cui were also in attendance, and adopted their statements. In her evidence-in-chief, Mrs Fu clarified that her ex-husband had contributed to their daughter's support before the divorce, but not subsequently. She explained how money was made available during the two-year period between March

2008 and March 2010, for which documentary evidence of remittances had not been provided. It was her sister, Fu Min, who dealt directly with the appellant's school, but Mrs Fu insisted that it was her decisions which were transmitted through her sister. In cross-examination, Mr Mullen focused on the details of the appellant's schooling, how it was paid for and what interest the sponsor took in her daughter's progress. Mrs Fu outlined the rather informal arrangements for cash payments and for monitoring progress through her sister, who had taken over the day-to-day care of the appellant after her grandmother passed away.

6. In his closing submissions, Mr Mullen expressed surprise at the lack of documentary evidence that the sponsor was paying the appellant's school fees. If payment was made in cash, one would still expect to see receipts. There were no specific examples of what the sponsor had done about the appellant's poor grades, and it could be inferred that the sponsor was content to leave such matters to her mother and sister. She had not been making the major decisions in her daughter's life. In response, Mr Brennan observed that there may not have been many major decisions to take. The main one was sending the appellant to a decent school and paying for it. The evidence of Mrs Cui, who was not a member of the family, showed that the sponsor was indeed concerned about her daughter.

7. In my view, the present case follows a very familiar pattern. A mother goes abroad in the hope of economic betterment, leaving behind a child in the care of close relatives – not because she feels little attachment to the child, but in order to make money and so provide for the child more advantageously than she could if she has stayed at home. Eventually, the mother achieves settlement in this country, and then applies for the child to join her. But the 'sole responsibility' rule must first be satisfied. She must show that she has not 'shared' responsibility with the relatives who were entrusted with the child's day-to-day care.

8. In the instant case, I do not think the absence of receipts or other documentary evidence means that the sponsor has not been paying for the appellant's education. I believe her explanation that in China, cash in hand is a very acceptable form of payment. Like Judge Morrison, I confine myself to the period between the sponsor's return to the UK and the decision on her daughter's application. Both Mrs Fu and Mr Fang were working during this period. There is no reason to suppose that the appellant was not supported by her mother before the money transfer of £2,000 dated 4th March 2010, which is in the Appellant's Bundle. Mr Brennan makes a good point when he says that there may not be all that many major decisions to take. There may have been a time when the appellant was not doing as well at school as her mother would have liked, but she seems to have progressed satisfactorily in the end. She is now nearly 19 years old, and at university. There is no reason to suppose that the sponsor, by sending money and keeping in touch with her mother and sister, did not take an active interest in her child's upbringing and did not take any major decisions that needed to be made.

9. The inconsistencies in the sponsor's evidence which exercised the First-tier Tribunal ~ at what point the appellant's father stopped making contributions, and how many other relatives were on the scene apart from the appellant's aunt and grandmother ~ are of peripheral importance, and do not undermine what seems to me a generally credible account. I do not think that her father's confirmation that he asserts no rights

over the appellant can be taken to mean that he has been sharing responsibility for her, as the respondent supposed. All in all, I am satisfied that, as at the date of the respondent's decision, the sponsor had been exercising 'sole responsibility' for the appellant, in the sense required by the Immigration Rules.

10. As more than three years have gone by since the decision under appeal was notified, it is clearly appropriate that the appellant should be issued with entry clearance without further delay. At the time of the application and decision, the sponsor had only limited leave to enter the United Kingdom, and so the appellant would only have been eligible for limited leave herself at that time. Now that the sponsor has indefinite leave, it seems to me that indefinite leave to enter should now be granted.

DECISION

The appeal is allowed, with a direction for entry clearance.

Richard McKee
Judge of the Upper Tribunal

29th August 2013