



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

Appeal Numbers: OA/19662/2013
OA/19665/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 18th November 2014**

**Determination
Promulgated
On 28th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

**XL
XL**

(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Miss C Johnstone, Senior Home Office Presenting Officer
For the Respondents: Mr S Levine, of Counsel instructed by Lloyds Law Limited

DETERMINATION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against the determination of Judge of the First-tier Tribunal J S Law promulgated on 6th August 2014.

2. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal. I will refer to them as the Claimants.
3. The Claimants are Chinese citizens born 20th November 1998 and 18th July 2000 respectively. They are siblings who applied for entry clearance to join their mother (the Sponsor) who is settled in the United Kingdom.
4. The applications were refused on 14th October 2013 with reference to paragraph 297(i)(e) of the Immigration Rules, the ECO not accepting that the Sponsor had had sole responsibility for the Claimants' upbringing.
5. The Claimants lodged appeals, and the appeals were heard together by Judge Law (the judge) on 22nd July 2014. The judge heard evidence from the Sponsor who he found to be a credible and reliable witness, and found that the Sponsor had had sole responsibility for the upbringing of her children and allowed the appeal under the Immigration Rules. The judge did not go on to consider human rights, although indicated in paragraph 25 of his decision that he would also allow the appeal on human rights grounds.
6. The ECO applied for permission to appeal to the Upper Tribunal. In summary two grounds were relied upon. Firstly it was contended that the judge had erred in law by finding the Sponsor to have had sole responsibility for the Claimants. The ECO noted that in paragraph 12 of the determination the judge recorded the Sponsor's evidence, taken from her witness statement, that she "did not apply earlier for the children to come to her as her ex-husband was not happy with this".
7. The ECO contended that the fact that the Sponsor's ex-husband prevented her from taking the children out of China demonstrated that he had an element of continuing control over their lives, and therefore it could not be said that the Sponsor made all the important decisions in their lives and therefore did not have sole responsibility, but responsibility was shared with her ex-husband.
8. The second ground contended that the judge misdirected himself in law by reversing the burden of proof as to the question of whether the Claimants' father was still in their life. The ECO referred to paragraph 19 of the determination in which the judge referred to a visit by ECO staff to the Claimants' home, and stated "which I found not to be providing conclusive evidence that the father lived there". It was contended that the judge erred in requiring conclusive evidence that the father lived with the children, and that the evidence of the ECO staff met an evidential burden.
9. Permission to appeal was granted by Judge of the First-tier Tribunal Parkes who found the grounds arguable.
10. Following the grant of permission the Claimants lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008

contending in summary that the judge directed himself properly and did not err in law.

11. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The ECO's Submissions

12. Miss Johnstone relied upon the grounds contained within the application for permission to appeal. I was reminded that the burden of proof is on the Claimants and to take into account that the Sponsor had been in the United Kingdom since 2008, and the Claimants had been living with their paternal grandparents. There was no corroborative evidence to prove that the Sponsor had been visiting China as claimed, and Miss Johnstone submitted that there were discrepancies in the evidence before the First-tier Tribunal, and the evidence was not properly considered by the judge. In particular he should have given weight to the visit by ECO staff to the Claimants' home and to the fact that there was a locked door in that home occupied by an individual who refused to communicate with the ECO staff.

The Claimants' Submissions

13. Mr Levine relied upon the rule 24 response. I was asked to find that there was an abundance of evidence before the First-tier Tribunal which clearly indicated that the Sponsor had been exercising sole responsibility for the children. Mr Levine submitted that on that basis the judge had not erred in law. The evidence indicated that the Sponsor had visited the Appellants, and had maintained contact with them and financially supported them.
14. I was asked to note that there was a custody agreement drawn up between the Sponsor and the father of the Claimants, before the Sponsor left China that confirmed the Sponsor had custody, and the Claimants' father did not even ask for rights to visit.
15. At the conclusion of oral submissions I reserved my decision.

My Conclusion and Reasons

16. I find the first ground contained within the application for permission to appeal to be misconceived. Miss Johnstone very fairly accepted before me, that the reference in the determination at paragraph 12 could be to the Sponsor's ex-husband in the United Kingdom, as the Sponsor had never married the Claimants' father, and therefore would not describe him as her ex-husband.
17. In my view the author of the grounds has erred in believing that the reference to the ex-husband, was a reference to the father of the Claimants. Reading the determination as a whole, and considering the Sponsor's witness statement which contains the evidence, I find that it is

clear that the Sponsor was explaining that she had not applied for her children to join her earlier, because her husband who is a British citizen, and from whom she is now divorced, did not wish her to make such an application. Paragraph 20 of the determination makes the point that the Sponsor received indefinite leave to remain in the United Kingdom in 2010 as the spouse of a British citizen, but that her marriage did not last, and that her husband had been reluctant to allow her to seek settlement for the children that she had in China. As soon as the marriage came to an end she tried to make arrangements for the children to come and live with her. She refers to the Claimants' father as their natural father, not as her ex or former husband.

18. I therefore conclude that there is no merit in the first ground, as it was not the father of the Claimants that prevented the Sponsor from taking the children out of China, so this did not demonstrate that he had an element of continuing control over their lives.
19. The second ground contends that the judge reversed the burden of proof and thus erred in law. I do not accept that the judge erred materially on this issue. At paragraph 19 of the determination the judge was considering the visit that had been made to the Claimants' home in China, by ECO staff. The judge was making findings, as he was required to do, as it was contended that during that visit some admissions had been made to the effect that the Claimants' father was in the home.
20. The judge found the visit "not to be providing conclusive evidence that the father lived there". I do not find that the judge was reversing the burden of proof, but he was making a finding on an evidential matter, to the effect that it had not been proved that the Claimants' father lived with them. There was no need for the judge to make a reference to conclusive proof, but I do not find this to be a material error. The judge in paragraph 4 of the determination set out the correct burden and standard of proof, in that the burden is on the Appellants, and the standard is a balance of probabilities.
21. I therefore conclude that the second ground contained in the application for permission to appeal does not disclose a material error of law. In my view the grounds amount to a disagreement with the findings made by the Immigration Judge but they do not disclose an error of law. The judge considered all the evidence that was placed before him, and found the Sponsor to be a credible and reliable witness. The judge made findings that were open to him on the evidence and gave adequate reasons for those findings.

Decision

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

I do not set aside the decision. The appeal of the ECO is dismissed. The determination of the First-tier Tribunal stands.

Anonymity

I was not asked to make an anonymity order but because the Appellants are minors, it is appropriate that an anonymity order is made. Pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 no report of these proceedings shall directly or indirectly identify the Claimants or any members of their family. Failure to comply with this direction could lead to a contempt of court.

Signed

Date 24th November 2014

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The decision of the First-tier Tribunal stands not to make a fee award.

Signed

Date 24th November 2014

Deputy Upper Tribunal Judge M A Hall