Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04442/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 May 2015	**On 11 May 2015**
Prepared 5 May 2015	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

MISS HAN LIN

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Miss S Lloyd, Counsel, instructed by MNS Solicitors

DECISION AND DIRECTIONS

1. The Entry Clearance Officer, Beijing, appeals with permission, against a decision of Judge of the First-tier Tribunal Aberese who, in a determination promulgated on 26 January 2015, allowed the appeal of Miss Han Lin

against the decision of the Entry Clearance Officer to refuse to grant entry clearance under the provisions of HC 395 (as amended).

2. Although the Entry Clearance Officer is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier Tribunal. Similarly I will refer to Miss Han Lin as the appellant as she was the appellant in the First-tier.

3. The appellant is a citizen of China, born on 23 May 1998, who applied for entry clearance under the provisions of paragraph 297 of the Rules to join her parents in Britain. Her father Minglong Lin is now British and her mother has discretionary leave to remain. Her mother, who arrived in Britain in December 2011 without leave, is not entitled to settlement in Britain as she has not passed the relevant English language test. She was granted an extension of stay in March 2014 which will expire on 9 March 2016. The appellant has a brother who was born in Britain and is a British citizen, as is her sister who was born in China but was granted leave to enter Britain. The appellant lives with her grandmother who was born on 19 September 1929.

4. The notice of refusal stated that the appellant was refused under the provisions of paragraph 297(i) (a) – (f) the Immigration Rules.

5. The judge noticed the evidence which was that the appellant's mother had not come to Britain legally and he made clear findings that the appellant's mother was not settled and that her father did not have sole responsibility for her. He therefore found that the appellant could not meet the requirements of the Immigration Rules.

6. However, at the end of paragraph 7 of the determination the judge Who twice incorrectly refers to the appellant's grandmother as her mother) stated:

> "The Tribunal also considered whether or not there were any compelling or compassionate circumstances which have been provided by the appellant in this appeal and the Tribunal finds that the appellant's situation in China is that she is looked after by her mother and that even though her mother is elderly that she is and has been able to look after her. The Tribunal is not persuaded by the evidence that the appellant's grandmother is no longer in a position to look after the appellant."

7. In the following paragraph the judge refered to the rights of the appellant under Article 8 of the ECHR before stating that it was accepted that the appellant had two siblings in Britain. The judge then wrote:

> "The Tribunal considered that in light of Section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the UK Border agency to carry out existing functions in a way that takes into account

the need to safeguard and to promote the welfare of children in the UK. The Tribunal finds that it would be in the best interests of the siblings in the UK for them to reside with the appellant in this country alongside with their parents so as the whole family is united and residing together."

8. The judge then made a brief reference to the determination of the Tribunal in **Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 000 (IAC**) and said that in that case the Tribunal had formed a view that the statutory duty under Section 55 of the UK Borders Act 2009 only applied to children within the UK but that the family considerations required an evaluation of a child's welfare including emotional needs, and the focus needed to be on the circumstances of the child in the light of his or her age, social background and developmental history and would involve enquiries as to whether there is evidence of neglect or abuse, whether their unmet needs should be catered for and whether there are stable arrangements for a child's physical care. The Tribunal had also gone on to say that the best interests of a child were usually best served by being with both or at least one of their parents. Continuity of residence was another factor and that a change in the place of residence where a child had grown up for a number of years when socially aware was important.

9. The judge stated that on balance it was in the best interests of the children that leave to enter was granted so as to allow all the children to reside with both parents. The appeal was therefore allowed under Article 8 of the ECHR.

10. The Entry Clearance Officer's grounds of appeal stated that the judge had failed to engage with the relevant balancing exercise and had not taken into account the public interest in immigration control, the fact that the appellant failed under the Immigration Rules, the role of the appellant's grandmother and the fact that her mother only had limited leave in Britain, all of which were relevant in the Article 8 assessment.

11. It was on that basis that the respondent was granted permission to appeal.

12. Miss Lloyd had prepared a Rule 24 response which argued that the judge had been correct to rely on the determination in **Mundeba** and that there was only an error of law when the judge had erred in considering the maternal grandmother's health rather than the welfare and the best interests of the appellant. She argued that the lack of consideration of the public interest test in this case was immaterial as if there had been a proper assessment of the provisions of paragraph 297(i)(f) the judge would not have been required to consider the public interest.

Discussion

13. I consider that there are material errors of law in the determination of the Judge of the First-tier Tribunal. While he was correct to dismiss the appeal

under paragraph 297 he makes no proper assessment of the rights of the appellant under Article 8 of the ECHR. The reality is that while Rule 297(i)(f) refers to serious and compelling and or family or other considerations which make the exclusion of the child undesirable, those circumstances are not identified and it would only be in identifying those circumstances that the judge would have been able to go on to find that there were circumstances which mean that the appellant should be granted entry clearance. The reality is that this appellant has lived in China all her life and has lived with her grandmother for many years. Under the provisions in **Mundeba** the judge should have taken into account that continuity of residence was a factor and that change in the place of residence where a child had grown up for a number of years whilst socially aware was important. Continuity of residence would mean that the appellant should remain with her grandmother. Moreover the judge completely ignores the requirements of the Nationality, Immigration and Asylum Act 2002 as amended which places weight on the maintenance of effective immigration control – that is clearly a reference to the issue of whether or not an applicant can succeed within the Rules and furthermore the issue of whether or not the appellant would be a burden on the British tax payers. The judge makes no reference to whether or not the appellant's father would be able to support her without recourse to public funds.

14. The judge quite simply does not set out any reasons as to why this appellant should be granted leave to enter outside the Rules but appears to have only considered the application of Section 55 of the 2009 Act, although it was unclear whether or not he is stating whether or not the provisions in that case refer to the appellant or to her siblings, certainly one of whom has never met the appellant.

15. The judge has simply not engaged with the relevant issues in an Article 8 assessment.

16. I am fortified in my opinion when I consider the judgment of the Court of Appeal in **SS (Congo) and Others [2015] EWCA Civ 387** where, at paragraph 40, Richards LJ emphasises that the Secretary of State has a greater margin of appreciation in entry clearance cases.

17. This is simply a case where a case has not been made out that there are such exceptional and compelling reasons for entry clearance to be granted.

18. I would add that I also place particular weight on the fact that there is nothing to indicate that the appellant's mother would qualify for indefinite leave to remain. If it were the case that her mother could so qualify then the appellant would have two parents settled in Britain and her situation would obviously be different as she would then qualify under the provisions of paragraph 297(i)(a) provided, of course, that the accommodation and maintenance requirements of the Rules were met.

19. In these circumstances I find that there are material errors of law in the determination of the Judge of the First-tier Tribunal and I set aside his decision. I direct that the appeal now proceeds to a further hearing, afresh, in the First-tier as I consider that the requirements of the Senior President's Practice Directions are met.

Decision

20. The decision of the First-tier Tribunal Judge is set aside.

Directions.

21. This appeal will proceed to a hearing afresh in the First-tier at Taylor House with a Mandarin interpreter. Time estimate 2 hours.

Signed Date

Upper Tribunal Judge McGeachy