



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

Appeal Numbers: OA/12188/2013
OA/12189/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 19 November 2014**

**Decision & Reasons
Promulgated
On 11 March 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**MR BACH VIET NGUYEN
MS HONG NHUNG NGUYEN
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER - HANOI

Respondent

Representation:

For the Appellants: Mr Davison
For the Respondent: Mr Jarvis

DECISION AND REASONS

1. The Appellants are citizens of Vietnam born in 1996 and 2000. They are brother and sister. They applied for entry clearance with a view to settlement as the children of a parent given limited leave to enter or remain with a view to settlement.
2. The applications were refused under paragraph 301 of the Immigration Rules on 2 May 2013.

3. The immigration history of their mother, the Sponsor, is not in dispute. She entered the UK illegally in 2005. She did not regulate her immigration status for seven years. In August 2011 she married a British citizen. In April 2013 she was granted limited leave to remain as a spouse until 2015. In July 2011 she gave birth to a daughter by her husband. Once she had been given limited leave to remain and was able to travel she, in July 2012 visited Vietnam. On 10 October 2012 the Appellants made their applications for settlement.
4. The basis of the refusal by the Respondent was that the Appellants had lived from a young age in the home of their maternal grandmother. They are in full time education and live in the home of close family members with access to modern amenities. The fact that they had waited some six years before making the application indicated that they were not living in serious and compelling circumstances which made exclusion undesirable.
5. It was noted from an interview that their grandmother attends parent/teacher meetings and it is she who consents to them taking part in school excursions without consultation with their mother.
6. The Respondent noted a claim that their mother calls every day and that she supports them financially by sending money each month and she has also visited twice.
7. The Respondent concluded that the evidence did not show that the grandmother had abdicated any responsibility for the Appellants and was merely acting at the direction of their mother. It was concluded that it had not been shown that their mother had sole responsibility for them.
8. The decision was refused under paragraph 301(i)(b) 'sole responsibility' and (i)(c) 'serious and compelling family or other considerations which make exclusion of the children undesirable', and on adequacy of accommodation.
9. They appealed.
10. Following a hearing at Taylor House on 8 August 2014 Judge of the First-tier Tribunal dismissed the appeals under the Immigration Rules and on human rights grounds. It appears that (i) (b) and (i) (c) were the only issues before him.
11. The judge's findings on sole responsibility are at paragraph 8ff. In summary, he found that while the Sponsor called her children daily, sent money monthly and visited occasionally it was the grandmother who had day-to-day responsibility. It was she who attended parent/ teacher meetings and who consented to the taking part in school excursions. It was she who allows the children to go out. It is with her permission and without any consultation with the mother.
12. The mother, indeed, has very little to do with the children '*except to send money and phone them regularly*' [8]. When on a few occasions she has been to Vietnam whilst she takes them out the mother '*did not say in*

evidence that .. she goes to the schools where the children attend and asks how they are getting along or spends any time with their homework or anything of the sort' [8].

13. The grandmother's interview evidence was that it is she '*who attends parent/teacher meetings...(and)...who consents to the Appellants taking part in any excursions without consulting with the Sponsor mother [8].*' It is the grandmother who is '*responsible for looking after the children on a daily basis such as feeding, washing them, meeting all their demands, in living and studying*' [8]. It is the grandmother '*who actually looks after the children and there is no particular direction given by the Sponsor in that regard*'. He continued: '*the reality is that (the grandmother) is the carer of the children as she candidly said so, and at best the Sponsor can be said to have shared responsibility but not sole responsibility for the care of the Appellants*' [8].
14. The judge went on (at [10]): '*It was the grandmother who was taking all the interests in so far as the schooling of the children is concerned, who dealt with the school and children's studies and to whom the school reports were sent, who attended parents meetings and she took full responsibility in that regard. She also attends to the children's social needs and any medical issues they may have*'. ... '*Also the Sponsor in her evidence accepted that if the children are not well they turn to their grandmother. It was the grandmother who stated to the ECO that the Sponsor 'does not take any such responsibility towards the children in terms of their welfare, education and social issues because she has no time ...'* [10]. Further, '*save for spending some time together in Vietnam and having a good time, and sending money to the children via her mother, and also telephoning the children and seeing them when she goes to Vietnam, she does not do anything else in reality and the day-to-day guidance about education is conducted by the grandmother*' [10].
15. On sole responsibility the judge concluded (at [17]) that '*The evidence of the Sponsor as to having sole responsibility contradicts the evidence of the grandmother*'. The judge did not find the Sponsor to be a credible witness.
16. The judge also considered serious and compelling family or other circumstances requiring the entry of the Appellants. She found (at [6]) that the Sponsor married a UK national in August 2011 but it was not until '*well over a year later that the Appellants applied for entry clearance*'. Such, the judge considered, did not give the '*impression that the Sponsor was very concerned that the children should come over at the earliest opportunity ...*'. Indeed, the '*timing of the entry clearance application demonstrates that they are not living in serious and compelling circumstances in their country which makes their exclusion from the UK undesirable*'. The Appellants are in '*full time education in Vietnam and live at home with close family members with access to all modern amenities* [7].

17. The judge also considered the best interests of the children. He found that the children have a *'stable environment, have all their friends and other relatives in Vietnam, all their school friends there, and live at home and are well looked after by their grandmother ... There is no medical evidence of such compelling and serious nature to show that the grandmother is so ill that the children's best interests are to be served by leaving Vietnam'* [18].
18. The judge noted that the Sponsor came to the UK in 2005 illegally, leaving her children behind, the younger child being only five years old. The Sponsor *'considered looking after her children ... as being less important than coming to the UK as an illegal entrant'* [20]. Once here she waited some seven years before bringing herself to the attention of the authorities by which time she had formed a new family unit and had a child by her new spouse. The judge in light of the evidence did not believe that the Sponsor *'considered being reunited with her children to be her overriding objective or that she considered their best interests would be served by being with her'* [20]. The judge concluded on this matter by accepting that the mother *'has maintained an interest in the Appellants' lives'* and has visited and assisted with their finances but he was satisfied in this case that *'responsibilities for the Appellants has been at best shared between the maternal grandmother and the mother Sponsor'* [21].
19. In considering Article 8 the judge found that the Sponsor had left her children soon after divorce from their father leaving them in the care of their grandmother; there was no evidence that their father does not want anything to do with them and does not see them; the children have lived their entire life in Vietnam in the same home and have become socially aware with friends they have bonded with. There was also nothing to show that their living conditions in Vietnam are anything other than equal with their peers, and given the additional financial support they are sent from the UK, *'possibly even somewhat better than that of their peers'* [23]. Family life with their mother had been conducted at a distance, not through necessity but because of their mother's choice to leave them in the care of others while she came to the UK. The current status quo could prevail. There is nothing to prevent the Appellants seeking entry clearance to visit the family here or for their mother and stepfather going to Vietnam to see them. There were no exceptional or compelling circumstances. It was not disproportionate to refuse entry clearance.
20. At the error of law hearing before me Mr Davison sought to rely on the grounds. On the issue of sole responsibility the judge failed to assess all the evidence. The evidence was that the Sponsor was in touch with the Appellants' carer, their grandmother, often. The judge had not properly considered the crucial question of who it was who made the important decisions in the Appellants' lives. The judge erred in failing to look more closely on this issue at the evidence of the Sponsor and the grandmother's statement.
21. There were also flaws in the consideration of serious and compelling circumstances. The judge was wrong to find that there was delay by the

Sponsor in seeking to bring the Appellants to the UK and that such showed a lack of concern by her and also as a consequence a lack of serious and compelling circumstances. The Sponsor was married in August 2011 but not granted leave as a result of the marriage until April 2012. She visited the Appellants in July 2012 and the application was made in October 2012. The perceived delay did not exist. Such infected the judge's assessment. Further, the judge failed properly to assess the grandmother's evidence as to her inability through age and ill health to care for the children.

22. In reply, Mr Jarvis submitted that the judge's decision was sustainable. He has sought to apply the guidance given in **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**. Whilst he may have concentrated on the day-to-day responsibilities of the grandmother that was a proper starting point. He had given sound reasons having considered the material evidence that such showed shared responsibility not sole responsibility.
23. The judge had also reached a conclusion on the evidence on the issue of serious and compelling circumstances which on that evidence he was entitled to reach. The grounds on both matters amounted to mere disagreement with the negative outcome. There was no material error of law.
24. In considering this matter the relevant case law as the judge noted is **TD**. He noted that sole responsibility is a factual matter to be decided on the evidence. That case stated (at [52ix]): *'The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not responsibility is shared and so not "sole".'*
25. In this case the judge did look at the day-to-day responsibilities and found that these were in the hands of the grandmother, such included that the grandmother attended parent/teacher meetings and has day-to-day care.
26. It is not disputed that he was entitled to reach such a conclusion. The grounds are correct in stating that such on their own will not determine that responsibility is shared.
27. I do not however accept that he limited himself to reaching his conclusion on day-to-day responsibility and did not consider whether the Sponsor has continuing control and direction of the children's upbringing and was making all the important decisions.
28. In that regard the judge noted in her favour that she is in contact with them often and sends money. However he found factors against the parent having sole responsibility particularly in the core area of their education.
29. In that regard he found that it was the grandmother who consents to the Appellants taking part in school excursions. He added that such was *'without consultation with the Sponsor mother'*. The grounds criticise that

finding as the grandmother did not say such in her interview. The question (Q38) was 'who consents for the applicant to join a school excursion?'. The reply is '*It's me*'. In my judgment the judge was entitled on the evidence to reach the conclusion he did.

30. The other point taken in the grounds on this matter is that the judge was wrong to find that because the first Appellant enrolled by himself in a place where he can study English, such '*shows he can take responsibility*' (at [8]). On that matter the judge in my view did not take account of the evidence that the Sponsor had spoken to him and told him what to do in terms of locating a place where he could study English. Such was an error as he failed to take account of evidence which did in that one particular instance indicate a role by the Sponsor.
31. However I do not consider it to be a material error. The judge in respect of the children's education looked at it in the round and found that the responsibility fell on the grandmother. He noted the Sponsor's oral evidence in that regard that she had '*no time*' to do so, and that when she goes to Vietnam she and the children have a '*good time*' going out together. The judge considered that such evidence was supported by that of the grandmother at interview which resulted in his finding that it is the grandmother who looks after the children and '*there is no particular direction given by the Sponsor in that regard.*' [8]. He clearly had in mind such a question as Q45: '*When the mother returns to Vietnam does she visit the applicants' school and meet with their teachers?*' to which the answer was made '*No, she's busy*'. He clearly had taken into account the interview answers Q33-45 about the children's schooling including that it was the grandmother who chose the schooling (Q33). He did not believe the Sponsor's evidence that she helps the children with their homework on the telephone. It was contrary to what the grandmother said at interview.
32. In my judgment whilst the judge did make findings on the day-to-day care he has gone beyond that and reached findings that the grandmother made many of the important decisions in the Appellants' lives. He was entitled to make these findings on the evidence before him. His conclusion that the Sponsor did not have continuing control and direction of the children's upbringing including making '*all the important decisions*' in the children's lives but that responsibility is shared between the Sponsor and the grandmother is sustainable.
33. As for serious and compelling circumstances the grounds submit that the judge erred in finding (at [6]) that there was delay of over a year following her marriage to a British citizen before the Sponsor sought to get her children to the UK and that such indicated a lack of concern which in turn was not indicative of serious and compelling family circumstances.
34. The judge noted at [20] that the Sponsor came to the UK illegally leaving her children behind and that she '*considered looking after her children... as being less important than coming to the UK as an illegal entrant*'. And that '*even once she was here she did not go about regularising her stay here in the UK at the earliest opportunity, and so putting herself in a*

position where she might be reunited with her children, but waited for about seven years before bringing herself to the attention of the Home Office..' Such indicated to the judge that their best interests were not to be with her. Such a finding was open to him on the evidence.

35. It appears that the judge failed to note that the Sponsor was not granted leave as a result of marriage in 2011 until April 2012, thus the period until the applications was about six months.
36. I do not find that to be a material error. The judge as well as noting the seven years absence from her children before she regularised her position which did not suggest serious and compelling circumstances, found further factors which led him to conclude that there were no serious and compelling circumstances. He found (at [7]) that the Appellants are in full time education and live at home with close family and access to all modern amenities; and at [18] that they have a '*stable environment*', have all their friends and other relations in Vietnam; that they are '*well looked after by their grandmother*'.
37. These are findings on the evidence that the judge was entitled to reach.
38. It was submitted that he failed to take account of the interview in which the grandmother said she was 80 years of age, and weak and could not give much support.
39. The judge noted that at the hearing it was accepted that the grandmother was in fact 74 years of age. He found that whilst she may be '*somewhat elderly*' she was nonetheless in '*reasonably good health*'. He noted that the grandmother had started looking after the children when she was 67 years of age when the Sponsor left them with the grandmother to come to the UK as an illegal entrant continuing as such for some seven years before bringing herself to the attention of the authorities. The judge noted as the only medical evidence a note stating that she suffers from spinal problems for which she receives medication. There was also evidence of some medication for irregular heart beat in 2012.
40. I see no merit in the claim in the grounds that the judge in finding that the older child, approaching 18 years of age can help look after his younger sister, indicated that the grandmother needs help and that there are no stable arrangements for the children's care. The evidence as properly found by the judge was to the contrary, namely, that the arrangements were stable.
41. The findings in respect of the grandmother's health and abilities were ones that were open to the judge on the evidence before him. He was entitled to conclude that there were no compelling or compassionate circumstances.
42. For the reasons stated I see no material error of law in the First-tier Judge's findings and conclusion and his decision stands.

Decision

The decision of the First-tier Tribunal shows no material error of law and the decision dismissing the appeals shall stand.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway