Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04219/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2017	**On 7 November 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

[Y C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Mahfuz, Counsel instructed by Visa Direct
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of China born in September 2002. Her mother and father are in the UK and her two siblings are British citizens. When her mother and father left China the appellant remained behind in the care of her grandmother and legal guardian, QC. In October 2015 the appellant applied for entry clearance to join her parents in the UK. In a decision dated 13 January 2016 the Entry Clearance Officer (ECO) noted that the father came to the UK in 2009 and was granted discretionary leave to remain and did not have settled status. The ECO refused the appellant's application under paragraphs 297 and 301 of the Immigration Rules and

stated that this decision did not breach Article 8 ECHR because the appellant's case did not fall within Article 8(1). The appellant's appeal was heard on the papers by First-tier Tribunal (FtT) Judge O'Hagan. In a decision sent on 8 December 2016 he dismissed it. The judge was not satisfied that the appellant met the requirements of paragraph 297(i)(e) as it had not been demonstrated that the mother had had sole responsibility for her upbringing. At paragraph 12 the judge stated that "[t]he circumstances of the case point to the responsibility having been shared between three people, the appellant's mother, her father and her grandmother". The judge also concluded that the appellant had not shown serious and compelling family or other circumstances which made exclusion undesirable. At paragraphs 14 and 15 the judge wrote:

> "14. I considered whether there were serious and compelling family or other considerations which made be exclusion of the Appellant undesirable. Although I find that the Appellant's mother has not exercised sole responsibility, I see no reason to doubt that she has maintained an active concern for the daughter and an ongoing involvement in her life so far as she could from this country. That would, nonetheless, have been limited by distance and by circumstance. In terms of the attachment between them, I readily accept that the Appellant and her mother love each other, and that they have a relationship sustained by telephone and other online communication, as set out in the grounds of appeal, and that there have also been visits. From the grounds of appeal, I note that the last such visit was in 2013.
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> 15. Nonetheless, the fact that the Appellant's mother felt able to leave China, having made arrangements for the Appellant's care, and to settle in this country, does suggest that the attachment is not as strong as the grounds of appeal suggest. Having regard to the realities of the Appellant's life, I consider that her primary attachment will be likely to be to her grandmother who has been her primary carer. The points made in respect of the Appellant's relationship with her mother apply with equal force to the Appellant's brother and sister."

2. The judge went on to conclude that the appellant could not benefit from paragraph 301 as her father did not have settled status.

3. The grounds of appeal raised the following main points. It was submitted that the judge had erred:

- by failing to note that the mother makes all the key decisions for the child and hence exercised sole responsibility within the meaning of that term as analysed by the Upper Tribunal in **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049;**

- by contradicting himself on this matter;

- by considering that the appellant would not find it easy to adapt to life in the UK – "an issue for the family to face and not one for the [FtT judge] to consider";

- by assessing the grandmother's health without regard to the medical evidence that the appellant had provided to the ECO;

- by assessing that the appellant was not of an age where she needed the kind of care that a young child will need.

4. I am grateful to both representatives for their pertinent submissions.

5. I am not persuaded that the FtT judge erred in law.

6. In considering the issue of sole responsibility the judge correctly directed himself as to the applicable principles as set out in **TD**. He correctly noted that the evidence had limitations. In particular he was entitled to treat as relevant that the sponsor had chosen a paper determination, meaning that he had to determine the case "without the benefit of hearing directly from the sponsor". I also observe that the appellant's grounds of appeal against the ECO decision did not specifically argue that the mother had sole responsibility and indeed stated that "[I] still depend on my parents. I need the care and guidance from my parents". That is a description of shared responsibility. Bearing in mind the limited evidence and the appellant's own statement that she needed the care and guidance of both her parents, the judge was fully entitled to conclude at paragraph 12 that the appellant's was a case of shared responsibility (between mother, father and grandmother), not sole responsibility.

7. I discern no contradiction between that finding and the judge's statement at paragraph 14 that:

> "14. I considered whether there were serious and compelling family or other considerations which made be exclusion of the Appellant undesirable. Although I find that the Appellant's mother has not exercised sole responsibility, I see no reason to doubt that she has maintained an active concern for the daughter and an ongoing involvement in her life so far as she could from this country. That would, nonetheless, have been limited by distance and by circumstance. In terms of the attachment between them, I readily accept that the Appellant and her mother love each other, and that they have a relationship sustained by telephone and other online communication, as set out in the grounds of appeal, and that there have also been visits. From the grounds of appeal, I note that the last such visit was in 2013.

8. "Active concern" and "ongoing involvement" are not the same as the test set out in paragraph 297. The letter comprises (in the words of **TD** at paragraph 52(ix)): "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". Mr Mahfuz contended that "active concern" and "ongoing involvement" could in some circumstances constitute sole responsibility and the judge did not specify what he meant by these broad terms. However, read as a whole, particularly in the light of paragraph 12, it is clear that the judge intended

by these terms to identify a lesser level of involvement than that specified in **TD**.

9. I see nothing in the contention that the judge erred in treating as a relevant consideration that the appellant would likely find it difficult to adapt to life in the UK. The judge's assessment of this matter arose in the context of paragraph 297(i)(f) which requires there to be "serious and compelling family or other considerations which make exclusion undesirable and suitable arrangements have been made for the child's care". In that context it was entirely appropriate for the judge to consider whether the best interests and welfare of the appellant were served by exclusion or not. At paragraph 17 the judge stated:

> "It is convenient to address at the same time the first ground of appeal, which challenges the judge's reliance on the appellant's age. The judge cannot be criticised for attaching weight to the fact that the appellant was no longer a young child. The judge was not seeking to say that a 14 year old child no longer needs care, only that it would not involve the same level of dependency that exists in the care of a younger child."

10. I consider this assessment is free of legal error.

11. As regards the grandmother's health, I would observe first of all that the appellant has failed to demonstrate that the application she made to the ECO contained medical evidence regarding this lady's health. Quite properly, in the absence of any mention of such evidence in the application or in the ECO's decision, Mr Mahfuz did not pursue the argument that the judge erred in not having regard to it. I would also observe that even if the medical evidence that was adduced before me had been available to the FtT judge, it would have been of limited assistance, in that it relates to medical examination of the appellant's grandmother in December 2016, some ten-eleven months after the date of decision.

12. The appellant's skeleton argument also contained an allegation that the judge had applied "the wrong Immigration Rules". Sensibly Mr Mafuz abandoned this ground of appeal, since the skeleton itself then goes on to argue that the judge wrongly concluded that the requirements of paragraph 297 (the correct rule) were not met.

No anonymity direction is made.

Signed Date: 6 November 2017

H H Storey

Dr H H Storey
Judge of the Upper Tribunal