



**Upper Tribunal  
(Immigration and Asylum Chamber)  
OA/13929/2014**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Birmingham Employment  
Tribunal  
on 26 July 2017**

**Decision &  
promulgated  
on 16 October 2017**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**XIANYU YU  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER (BEIJING)**

Respondent

**Representation:**

For the Appellant: Mr M Sowerby instructed by Corbin & Hassan Solicitors  
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Nicholls promulgated on 23 December 2016 in which the Judge dismissed the appellant's appeal.

**Background**

2. The appellant is a national of the People's Republic of China born on 9 March 2000. When aged 14 the appellant applied for entry clearance

- to settle in the UK as the child of a person present and settled here, which was refused on 15 October 2014. The appellant appealed against that refusal.
3. The pre-hearing procedural history shows that on 8 September 2015 First-tier Tribunal Judge Talbot heard the appeal against the refusal which was dismissed under both the Immigration Rules and on Article 8 grounds. The appellant sought permission to appeal to the Upper Tribunal which was granted on 8 June 2016. On 2 August 2016 Deputy Upper Tribunal Judge Campbell found Judge Talbot had made a material error of law such that the decision of the First-tier Tribunal was set aside and the matter remitted.
  4. The case was listed before Judge Nicholls for the purposes of a further hearing before the First-tier Tribunal.
  5. The Judge notes that DNA profiling evidence was now available which established the near probability that the UK sponsor is the father of the appellant. As a result, the Presenting Officer confirmed the respondent did not challenge the paternity of the appellant but did dispute whether the application met the requirements of the Immigration Rules in force at the date of decision [3].
  6. The Judge considered the evidence provided before setting out findings of fact between [14 – 26] of the decision under challenge.
  7. At [16] the Judge states “I am not persuaded that the terms of paragraphs 297 and 301 of the Immigration Rules envisage a person in receipt of discretionary leave to remain in the UK as a person with leave to enter (with a view to settlement). The Judge noted that in this case the sponsor, the appellant’s father, was granted discretionary leave under the Legacy Program because his asylum claim was not properly decided and that the appellant’s mother was later granted discretionary leave under the Refugee Family Reunion policies.
  8. The Judge finds at [18] the grant of discretionary leave to the appellant’s mother does not qualify as a grant of leave “with a view to settlement” and that it had not been shown that the appellant’s application met the terms of either paragraph 297(i)(f) or paragraph 301(i)(a).
  9. The Judge then notes an alternative submission that as both the appellant’s parents have been in the UK together for some time they have together had sole responsibility for the appellant’s upbringing which met the alternative provision of paragraph 297(i)(e) or 301(i)(b), which was not accepted. The Judge’s reasoning is that it cannot be argued that two persons exercise sole responsibility together and, secondly, that the relevant provisions of the Immigration Rules referred to “one parent” who is either present and settled in the UK or being admitted to the UK for the purposes of settlement. The Judge finds this wording does not envisage two parents except where both are present and settled in the UK or being admitted together on the same occasion, in which case there is no additional condition for sole responsibility.
  10. At [19] the Judge continues after the above reasoning “*I have no reason to doubt the Appellant’s parents have remained in close touch with him and have been instrumental in arranging the important factors of his life, such as schooling and his general support.*

*Nevertheless, I find that the ordinary words of the Immigration Rules are not ambiguous in any sense, even though they are not required to be interpreted strictly as an act of Parliament, and that they do not cater for a situation where both parents remain involved in a child's life, making important decisions in providing fundamental support but one of those parents does not have leave to remain in the UK which either qualifies as settled or is clearly with a view to settlement".*

11. The Judge thereafter went on to consider article 8 ECHR outside the Rules before concluding that although the appellant's parents have been involved in the key decisions about him thus far, and provided financial support for both the appellant and his grandparents with whom he has lived in China, those factors do not constitute the sort of exceptional or compelling circumstances that required assessment of proportionality outside the terms of the Rules. The Judge accordingly found that the refusal of entry clearance was in accordance with the law and not a breach of the article 8 rights in light of any individual involved in this appeal.
12. Permission to appeal was sought on the appellant's behalf which was granted by another judge on the First-tier Tribunal in the briefest terms that the grounds are arguable for the reasons set out in the application.
13. There is no rule 24 response filed on behalf of the Secretary of State.

### **Error of law finding**

#### Submissions

14. It was submitted on the appellant's behalf, by Mr Sowerby, that he is currently 17 years of age and reaching adulthood (in terms of the way the same is assessed in the United Kingdom) next year. The appellant's father has indefinite leave to remain and the mother discretionary leave to December 2017. As this was a pre-July 2012 grant it was argued the appellant's mother will be entitled to indefinite leave to remain in December 2018.
15. Mr Sowerby also submitted the Judge erred in that paragraph 301(i)(a) of the Rules is satisfied on the basis the appellant's mother had a grant of discretionary leave prior to the changes to these provisions of the Rules which means her leave will continue to settlement. The appellant argues that the grant of leave to his mother is, therefore, for the purposes of settlement.
16. In relation to paragraph 297(1)(f), as this provision is silent regarding the other parent's status that is 'one parent' is settled, this is sufficient to satisfy the requirement of the rule. In this appeal, it is only the father who has settled status. It was also submitted on the appellant's behalf that paragraph 297 was not dealt with although in light of findings made by the Judge it should have been found that the appeal is allowed on this basis.
17. On behalf of the Secretary of State Mrs Aboni submitted no material error had been made in relation to paragraph 301 as it is accepted the appellants mother's discretionary leave is not on the 'route to settlement', that term being defined in the Rules as a person on either

- the prescribed 5 or 10 year routes which does not apply to the appellant's mother.
18. In relation to 297, in the alternative, it was submitted the appellant cannot succeed as the appellant's father does not have sole responsibility as it is shared between the parents. Sole responsibility is said to mean 'one parent'.
  19. It was accepted the First-tier Tribunal did not consider the question of compelling circumstances under paragraph 297 but it was submitted on the respondent's behalf that circumstances were not compelling as all the circumstances had been considered.
  20. At [23 - 24] of the decision under challenge, article 8 and all relevant circumstances were taken into account including the best interests of the child. Nothing was found that was detrimental to the appellant remaining in China. It was argued the failure to refer specifically to paragraph 297(i)(f) was not material as the Judge would not have reached a different conclusion in relation to whether there were compelling circumstances by reference to the Rules rather than article 8.
  21. In reply, Mr Sowerby submitted the 297(i)(f) question was in issue and submitted there are exceptional and compelling circumstances although this was not the main element. It was submitted that on the basis of findings made the Judge should have applied his mind to whether these conditions were satisfied which could lead to a different outcome. On that basis, any error is arguably material.

## Findings

22. Several rules are arguably relevant to this appeal. The first of which are asserted to be paragraph 279 and 301. These rules, at the date of decision (the relevant date), stated:

Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

- (a) both parents are present and settled in the United Kingdom; or
- (b) both parents are being admitted on the same occasion for settlement; or
- (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
- (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

- (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
- (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
- (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
- (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
- (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and
- (vii) does not fall for refusal under the general grounds for refusal.

Requirements for limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement

301. The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:

- (i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:
  - (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or
  - (b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or
  - (c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively; and  
 (iva) can, and will, be maintained adequately by the parent or parents without recourse to public funds; and  
 (ivb) does not qualify for limited leave to enter as a child of a parent or parents given limited leave to enter or remain as a refugee or beneficiary of humanitarian protection under paragraph 319R; and  
 (v) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom; and  
 (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

The test in paragraph 297 (i) (f) contains a number of interlinked elements. The specific wording requires an applicant to prove that they have one parent or a relative present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and (my emphasis) an ability to satisfy the other specified requirements.

23. The Judge considered the specific submissions but found the appellant had not made out that he had one parent or a relative present and settled in the United Kingdom or been admitted on the same occasion for settlement on the basis the appellant's father was granted discretionary leave under the Legacy Program and the appellant's mother was granted discretionary leave under the Refugee Family Reunion policies. The appellant's father was said by the appellant to have indefinite leave to remain at the relevant date. In the application for leave to enter the United Kingdom it is stated the appellant's father has permanent residence granted on 17 January 2014 which was therefore the situation existing at both the date of application and date of decision.
24. The primary requirement of the proof of a parent settled in the United Kingdom appears to have been satisfied.
25. If one considers the other requirements of paragraph 279; it was not submitted that other than 279(i)(f) were relevant. I find there is no legal error in the Judge concluding the other requirements could not be met. In particular, the finding by the Judge that 'sole responsibility' could not be exercised by two parents simultaneously is finding in accordance with the law.
26. Under 279(i)(f) the appellant was required to show he could meet the requirements of (ii - vii) of this rule. In that regard, it is not disputed the appellant is under the age of 18 and that the appellant at the relevant date was in education with no evidence he had formed an independent family unit. The accommodation in the United Kingdom occupied by his parents appears to be a two-bedroom flat in which the appellant's mother, father, and two younger siblings live. No issue

appears to have been taken with regard to the question of adequacy of accommodation or the issue of adequacy of available funds. In relation to whether the appellant could be maintained adequately by his father without recourse to public funds, the evidence indicates the father is employed and no issues relating to inability to maintain appear to arise. If the appellant succeeds he will be granted valid United Kingdom entry clearance in this capacity and it is not suggested his application would be refused under the general grounds of refusal set out in the Rules. The only issue therefore that needs to be considered further is the second aspect of 297(i)(f) which requires, in addition to a parent and relative being present and settled in the United Kingdom, there being serious and compelling family or other considerations which make exclusion of the child undesirable and that suitable arrangements have been made for the child's care.

27. The Judge considered the situation of the appellant in the decision under challenge. The Judge recognises this is a similar situation to the so called "stranded sibling" problem where an adult sibling may not settle in the UK with younger siblings and their parents thus being left alone in the original country of nationality. The Judge continues at [24] *"The Appellant is not, of course, an adult, nor is he living alone and I have no evidence to show that he would not continue to live with his grandparents for the foreseeable future. There is no confirmatory evidence to support the sponsor's claim that his education is not going well, much less is there any evidence to suggest that those difficulties may be due to his separation from his parents and siblings and that now moving him to the UK would help to promote his education and, thus, support his best interests. It was the Appellants parents who took the decision to leave him behind in China, not the actions of any official or other authority. It has long been recognised that instability is a detrimental factor in the continuing development of children and that the older they are, the more difficult it is for them to adjust and integrate. Ordinarily, his best interests would be served by him living with his parents but in view of the disruption that such a change would have at this time, I find that those best interests are not of such weight to show that they would unbalance the requirements of good immigration control"*.
28. The Judge notes that reliance was placed by the appellant upon the decision in *Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC) (Blake J)* in which the Tribunal held that (i) the exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require; (ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by...administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration"; (iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI

- invites Entry Clearance Officers to consider the statutory guidance issued under s.55.
29. The Judge was clearly aware of the need to properly consider the best interests of the child and it has not been shown the conclusions reached by the Judge are arguably irrational, perverse, or contrary to the evidence or infected by arguable legal error. The assertion in the ground seeking permission to appeal that the Judge failed to provide any reasons why the appellant's application did not meet the terms of paragraph 297(i)(f) is arguably incorrect. The reason the appellant failed under this provision is because the appellant had not made out that there were serious and compelling family or other considerations which make exclusion of the child undesirable. Whilst the Judge may have looked at the appellants situation in a section of the determination in which best interests of the appellant and human rights issues are considered, the factual analysis conducted by the Judge is the similar, under which ever heading it is placed. The Judge was clearly assessing whether there is anything about this appeal which, on the facts, made the appellant's exclusion undesirable. It is unlikely, for example, the respondent's decision not will be found to be proportionate in excluding a person if there was nothing that made exclusion from the UK undesirable. Based upon the individual's circumstances and the ability to prove or establish serious and compelling family or other considerations, the Judge acknowledges the impact of the decision will prevent the appellant joining the family in the United Kingdom; but finds the requirements of the Rules clearly specify that more than actual physical separation is required.
30. Now arguable legal error material to the decision to dismiss the appeal has been made out in relation to the assessment of paragraph 297(i)(f) of the Rules.
31. In relation to paragraph 301(i)(a), this required the appellant to establish that he is seeking leave to enter to accompany or join or remain with a parent or parents in the following circumstances:
- (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement.
32. It is not disputed, as found above, that the appellant's father is present and settled in the United Kingdom meaning that element of the rule is satisfied. There is, again, an additional requirement that the applicant also had to prove that the other parent, his mother, is being or has been given limited leave to enter or remain with a view to settlement. The Judge concluded that the nature of the leave granted to the appellant's mother, which was discretionary leave outside the Rules and a matter solely within the discretion of the respondent, does not satisfy this requirement. The Judge notes at [17] that discretionary leave may be terminated at any time with no guarantee that it would continue once it had reached its expiry date and that although the Asylum Policy instructions identify two potential situations where further leave would not be granted, it remains the case that a grant of



such leave is at all times discretionary. It was noted by the Judge that it was no accident that there was no right of appeal against a refusal to extend discretion unless it could be shown to be a breach of a right under the Refugee or Human Rights Convention. There was no evidence before the Judge that the appellant's mother had been granted leave to enter and or remain in the United Kingdom with a view to settlement.

33. I have considered whether there were any provisions of the Rules that would have allowed the appellant's mother to apply for a grant of leave to enter with a view to settlement in relation to which the appropriate provision appears to be paragraph 281 of the Rules which sets out the requirements for leave to enter the United Kingdom with a view to settlement as the spouse [or civil partner] of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement. Although it may be possible to secure settlement based upon passage of time following grants of discretionary leave, I do not find this is sufficient to satisfy the requirements of paragraph 301 as it is not specifically leave granted 'with a view to settlement'.
34. It is also recognised that in the circumstances of the parents of this appellant, and any other, in which one parent is settled and the other has only been granted discretionary leave outside the Rules, it is impossible for an applicant to succeed as the Rules make no provision for relief on these facts.
35. Article 8: the grounds of challenge attack the Judge's findings under the Rules rather than focusing upon article 8 ECHR which is not a criticism because the thrust of the decision relates to the ability of the appellant to succeed under the Immigration Rules. Before the Judge article 8 was mentioned and it is clear the Judge took into account the factual matrix relied upon and gives ample reasons supporting the conclusion that the evidence relied does not constitute the sort of exceptional or compelling circumstances that required the Judge to make an assessment of proportionality outside the terms of the Immigration Rules [25].
36. Whilst the Supreme Court have reinforced the fact the jurisdiction of the tribunals is an article 8 jurisdiction and not a jurisdiction limited to consideration under the Immigration Rules, this is clearly a finding by the Judge that the conclusions under the rules do not made out an arguable case for succeeding as the appellant failed to establish the existence of anything that made his exclusion undesirable. That assessment required a rounded assessment of the competing interests in the same way in which a proportionality exercise would. Indeed, if the matter had been considered as a freestanding article 8 assessment the provisions of section 117 of the 2002 Act would also have been relevant. It has not been shown that the decision would have been any different.
37. It is not made out the Judge erred in a manner material to the decision to dismiss the appeal either under the Immigration Rules or article 8 ECHR on the facts of this appeal. The decision of the First-tier Tribunal shall stand.

**Decision**

**38. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

**Anonymity**

39. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....  
Judge of the Upper Tribunal Hanson

Dated the 13 October 2017