Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02754/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MISS Y C
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr C Lamb of Counsel, AP Solicitors
For the Respondent: Mr D Mills, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. As the appellant is a minor pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others,

all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a citizen of China who was born on [ ] 1997. She initially applied for entry clearance to join the sponsor in the UK in November 2013 when she applied with her mother and younger brother. That application was refused on 14 February 2014 on the basis that her parents were not in a subsisting relationship and did not meet the financial requirements under Appendix FM. The appellant appealed against that decision as a dependant of her mother and that appeal was dismissed on 13 November 2014.

3. On 27 April 2015 the appellant applied for entry clearance to join her father, [YL], who is a British national and is the appellant's sponsor. On 13 July 2015 the Entry Clearance Officer refused the appellant's application on the basis that it was not accepted that the account of the appellant's circumstances were as claimed, that the sponsor had sole responsibility for the appellant's upbringing or that there were serious and compelling family or other considerations to make exclusion from the UK undesirable.

The appeal to the First-tier Tribunal

4. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 18 October 2016 First-tier Tribunal Judge R G Walters dismissed the appellant's appeal.

5. The appellant applied for permission to appeal to the Upper Tribunal and on 6 September 2017 First-tier Tribunal Judge Farrelly granted the appellant permission to appeal.

The hearing before the Upper Tribunal

6. The appellant's case, as set out in the grounds of appeal and as amplified by Mr Lam at the hearing, are firstly that the judge did not consider correctly the test as set out in the case of **TD (Yemen) [2006]** which is whether the sponsor has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. The decision of the First-tier Tribunal fails to make any findings on whether the appellant has been supported by the sponsor and appeared to base findings on the issue of sole responsibility mainly on the fact that the sponsor did not know the content of the appellant's upcoming degree course. This is irrational for a number of reasons; the sponsor is a lay person who has no specialist knowledge of spatial informatics and digitalised technology, the appellant only started the course in September so it would not be reasonable to expect the sponsor to be familiar with the course structure unlike other conventional subjects such as law or medicine, the sponsor categorically stated that he helped the appellant choose the university from six which she was thinking of applying for. This demonstrates that the sponsor had a strong input into the appellant's decision in her choice of universities. It is unreasonable to expect the

sponsor alone, without the input of the appellant, to make the decision about the university given the age of the appellant and the level of education. In paragraphs 16 and 17 of the sponsor's witness statement he confirmed that it was he who made the decision for the appellant to live in another property. When making a finding on this in paragraphs 16 and 17 Judge Walters did not accurately reflect the evidence of the sponsor in full.

7. Ground 2 is that the judge's conclusion, based on the sponsor's answers as to what the appellant was good at, is irrational. In paragraph 40 the judge indicated he would expect the sponsor to know all four subjects. The question in re-examination was not what subjects the appellant got an A grade in school, rather the question was what subject was the appellant good at. It is entirely possible for the appellant to have been better at one or more subjects even though they are all grade As.

8. Ground 3 is that the judge expected documentary evidence to be produced from the appellant's mother to the effect that she is willing to give up visitation rights and for the appellant to come to the UK. There is no legal requirement for the sponsor to seek approval from his ex-wife for the appellant to come to the UK and given the fact that there is no contact between the mother and the appellant it is irrational to expect the appellant to have such a document. The sponsor has sole responsibility over the upbringing of the appellant, custody has already been awarded to him and it is the sponsor's decision alone for the appellant to come to the UK.

9. Ground 4 is that the judge concluded that the appellant's upbringing was presently shared between the appellant's sponsor and the appellant's grandmother. The appellant's grandmother is acting only as her guardian. It is not in dispute that some of the day-to-day responsibility may be shared with the grandmother but the major decisions are made by the sponsor. Judge Walters did not make such a distinction as mentioned, he simply said the appellant's upbringing is presently shared. The judge failed to take into account the fact that the appellant is financially supporting the appellant. Judge Walter's conclusion is at odds with the principles of **TD (Yemen)**, reference is made to paragraphs 52, 57, 58 and 59.

10. Ground 5 asserts that the judge did not undertake a proper assessment on proportionality. The judge had made many findings, some of them favourable, some not to the appellant. It was wholly unclear as to what findings the judge relied on to dismiss the appellant's appeal on Article 8 private and family life. Further, he did not explain in clear and brief terms his reasons.

11. In oral submissions Mr Lamb submitted that at paragraph 4 the fact that the sponsor was not able to answer comprehensively questions regarding the course should be considered against the background that this is an extremely complex course, the appellant is a lay person and that the appellant in her statement said she had discussed the course with her father. With regard to shared responsibility he submitted that the judge

agreed that there was shared responsibility however the role of the grandmother is to see to the appellant's daily needs. He referred to TD (Yemen) and the principles set out at paragraphs 52, 53 and 57. The judge did not distinguish between meeting the appellant's daily needs and requirements. In TD (Yemen) it was held that there will be shared care where there is absence. The judge has not made any findings with regard to the grandmother's witness statement where she says at paragraph 4 that she is only acting as a guardian, the sponsor sends her money and that the sponsor remains responsible for the major decisions. He referred to paragraph 39 of the decision and submitted the judge was expecting a document from the mother to give consent for the appellant to go to the UK. However there is no legal requirement in the divorce settlement for the mother to give consent. If the mother wants to visit the appellant that is up to her, however the appellant has not seen her mother since 2014 that was confirmed in the appellant's witness statement. The judge did not take into consideration the age of the appellant when making decisions about university courses and which university to go to. The judge failed to take into account the financial aspect of the father supporting the daughter. He acknowledged that by itself this is not determinative but should be taken into account.

12. Mr Mills submitted that this case must be considered in the context of the previous appeal. In the 2014 decision Judge Hodgkinson found the sponsor was deliberately untruthful. The fact that the sponsor previously lied to the Tribunal was relevant when assessing his evidence. He submitted that the judge was not saying that there was a requirement for a legal document giving consent for the appellant to come to the UK but given the factual history the judge found that it seemed surprising that there was nothing from the appellant's mother. At paragraph 7 the judge is quoting the Entry Clearance Officer's decision, the Entry Clearance Officer had expressly disputed that within days of her previous appeal, having been brought up by the appellant for seven years, the mother suddenly relinquished control and care of her daughter. In that context it is surprising that there is nothing from the parent who had been the main carer for the child up until that stage and in a few short weeks gave her up. He referred to paragraph 40 and said that there was a general lack of knowledge and vagueness and the judge was only using the lack of knowledge about the degree course, the judge sets out for example. The judge said that if the appellant has sole responsibility the judge does not find because the grandmother had shared care that the sponsor does not have sole responsibility. This goes far beyond that, the judge found that the appellant does not seem to know what his daughter is doing.

13. In reply Mr Lamb submitted that **Devaseelan [2004] UKIAT 000282** only deals with asylum claims. This previous decision did not deal with sole responsibility and things have moved on. He submitted that this was not a situation where the mother was looking after the daughter. There were lots of problems and arguments and the relationship broke down and the appellant has not seen her mother since 2014. He submitted that the sponsor went back to China on a number of occasions to make sure that

things were going smoothly. He spent two months in China organising accommodation. This was a strong indication that the sponsor made decisions about his daughter. Mr Lamb submitted that the sponsor did not claim sole responsibility until comparatively recently, custody was only granted to the sponsor on 28 November 2014. It would be unreasonable given the age of the appellant at the time of choosing the course that the sponsor would make the sole decision for her choice of university and subject. Excessive weight was placed by the judge on this perceived reason i.e. the lack of very specific knowledge about her course.

Discussion

14. The judge took as the starting point the previous decision of Immigration Judge Hodgkinson promulgated on 14 November 2014. The judge correctly had regard to this decision - see **B (Pakistan) 2003 UKIAT 00053**.

15. From paragraphs 11 to 36 the judge set out the evidence from the sponsor, the appellant and her grandmother in some detail. The judge also took into account the divorce agreement. Having set out all this evidence the judge then set out at paragraph 40:

> "40. Having considered all the evidence, I concluded that the Appellant's upbringing is presently shared between the Sponsor and the Appellant's grandmother. I did not accept that the Sponsor has been involved in the major decisions of the Appellant's life. For example, I found it probable that she chose her university herself with minimal input from the Sponsor. He was certainly extremely vague about the content of her degree course and why Shanghai Ocean University was a particularly good university. I would also have expected him to know all four subjects at which the Appellant had succeeded in gaining an 'A' grade at school."

16. This paragraph contains the reasoning and findings of the judge. I do not accept the assertion that the judge did not consider correctly the test as set out in the case of **TD (Yemen) [2006]**. In that case, as set out in the headnote:

> *"Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".*

17. It is clear that what the judge was considering in paragraph 40 is whether the sponsor has 'continuing control and direction' over the appellant's

upbringing. That is why the judge considered who made the decisions about which university. I do not accept that the judge's reference to shared care between the grandmother and sponsor indicates that the judge did not consider 'sole responsibility' correctly.

18. The judge has referred to 4 examples as to why he has reached his conclusion – these are examples. A judge does not have to set out every detail of the evidence that is accepted or rejected as long as the reasoning is sufficient to demonstrate why the judge arrived at the conclusion reached. The judge had the benefit of seeing and hearing the sponsor give evidence and found him to be extremely vague about the content of the appellant's university course and why the university was chosen. Although I accept that this appears to be a highly specialised course the threshold for a finding that a judge's conclusion is irrational is an extremely high one and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible **Edwards - v - Bairstow [1956] AC 14**. However, I do accept that the judge appears to have erred when considering the evidence regarding what the appellant is good at at school. The judge records:

> 36. The sponsor was asked in re-examination what subjects the appellant was good at, at school, and replied that she had received an "A" grade in History and politics. I noted, however, that the Appellant's school results at p.33 shows that she also received an "A" grade in Geography and Information Technology.

19. The sponsor was not asked what subjects the appellant achieved an A grade in. That particular finding of the judge does appear to be irrational based on the evidence. If that were the only irrational finding this would be insufficient to amount to a material error of law in this case.

20. With regard to proportionality the judge set out at paragraph 48:

> "48. On the question of proportionality, I had regard to my previous findings. Having considered all the evidence, I found the interference is proportionate to the legitimate public end sought to be achieved."

21. It is not at all clear how the previous findings were balanced in undertaking the proportionality exercise. The judge accepted that there was family life between the appellant and sponsor but does not appear to have considered the effect on their family life of refusal of entry clearance or if he has done so has not set out any reasoning in that regard. Whilst a judge does not have to repeat findings made where they are clearly relevant to consideration of proportionality, in this case the findings were in relation to whether or not the sponsor had sole responsibility for the appellant. The appellant was a minor at the date of the hearing before the First-tier Tribunal. Whilst there do not appear to be any welfare issues the judge has not set out what factors he has taken into account in weighing the interference in family life in the balance when concluding that such interference was proportionate. This is a material error of law.

22. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

23. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

24. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Hatton Cross before any judge other than Judge R G Walters pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

Decision

The appeal of the appellant against the decision of the First-tier Tribunal is allowed. The case is remitted to the First-tier Tribunal at Hatton Cross before any judge other than Judge R G Walters

Signed P M Ramshaw Date 22 January 2018

Deputy Upper Tribunal Judge Ramshaw