



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

Appeal Number: HU/07347/2017

THE IMMIGRATION ACTS

Heard at Field House

On 10 April 2019

**Decision & Reasons
Promulgated
On 10 May 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**XIANGLONG HE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Nawaz of ACS Visas

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of China. He applied for entry clearance as a child dependant to join his father, a settled person in the United Kingdom. The application was refused on 1 June 2017, and the refusal was under paragraph 297(i)(e) and (f). The appellant appealed that decision to a Judge of the First-tier Tribunal. The judge dismissed the appeal. After a

hearing on 8 February 2019 I found errors of law in the judge's decision and directed that the appeal be reheard before the Upper Tribunal.

2. The decision-maker considered first the issue of sole responsibility. The appellant's father came to the United Kingdom in 2000, the year after the appellant was born. The decision-maker noted that the appellant's mother had been his primary carer for over sixteen years and that he had provided nothing to show that his father had legal custody of him.
3. The appellant's father had returned to China three times since 2010 in order to visit him. There was no evidence of this nor was there evidence of financial support being provided. There was no evidence that the appellant's father took important decisions about his upbringing for example where he lived, the choice of school and religious practice.
4. As regards the issue of serious and compelling family or other considerations making his exclusion undesirable, the decision-maker noted that the appellant's evidence was that his mother suffered from medical problems and was unable to provide the care provided and neglected his care needs. He provided a doctor's letter stating that his mother suffered from migraines three to four times a week. He had also said that his adult sister was in China and lived with them but would leave home to make her own life and was therefore unwilling to provide care where needed. The decision-maker was satisfied that the appellant's living arrangements in China could continue and was not satisfied that they could not continue and therefore found that that element of the Rules was also not made out. Nor had any exceptional circumstances been identified which might warrant a grant of entry clearance to the United Kingdom outside the Immigration Rules. The appeal was therefore dismissed.
5. In his submissions Mr Nawaz argued that, as regards sole responsibility, the appellant's father had been back to China five times since he obtained indefinite leave to remain in the United Kingdom in 2010 and he had been providing substantial financial support and evidence had been provided. In addition his father's partner in the United Kingdom welcomed the prospect of him coming to the United Kingdom. The requirements of the Rules on accommodation and maintenance were met. As regards important decisions concerning the appellant, his father was of course thousands of miles away but had made his wishes known and there had been decisions made by the mother not necessarily in the best interests of the child or the father.
6. As regards serious or compelling circumstances, the issue here was the mother's illness. At the time of the application she was suffering from migraines and there was a doctor's report saying she was not capable of looking after the appellant and he was more of a provider of care than the receiver. His sister had now moved out and he was the only one at home with his mother and was essentially her carer.

7. Her care had deteriorated. The medical evidence referred to liver disease and her being tested for carcinogens and Aids and liver disease and it would be unreasonable to expect her to provide the care necessary. It was in the appellant's best interests to come to the United Kingdom. Reliance was placed on what had been said in Hardward (00/TH/01522, 12 July 2000), where it was suggested that one of the key factors was the willingness and ability of the overseas adult to care for the child. That criterion was met. Mr Nawaz also referred to Mundeba [2013] UKUT 88 (IAC) where it was said that the focus should be on the child's best interests and Article 8(1). The Charter of Fundamental Rights was also important, noting the child's right to maintain on a regular basis direct contact with both parents unless this was contrary to his best interests. It was in the best interests of the appellant to be reunited with his father. His mother's ill-health needed to be considered. It was unclear how long she had to live. There had been different views as to the career he should follow. He had not made the grade for his chosen course and the home situation could not have helped. Likewise he had had behavioural problems at school and that was largely because his mother was not there to provide the care.
8. In his submissions Mr Tufan noted that the appellant was just short of his 18th birthday at the date of application. It was clear from the evidence that at that date the appellant's mother was suffering from recurring migraines and that was all. It was a common problem. The test was a high one as set out at paragraph 34 in Mundeba. The case came nowhere near the threshold. He was nearly 20 now. It was unclear whether his sister was living at home at the date of the application so she could assist with care.
9. By way of reply Mr Nawaz referred to paragraph 25 of his skeleton argument where it was said that the sister had not been living at home since March 2017. The burden had fallen on the appellant when he was under 18. He had been left alone to look after his mother. Migraines were serious and she was out of action for days at a time. He was left on his own. There was evidence now her suffering from additional illnesses. The high threshold was crossed.
10. I reserved my determination.
11. This is, of course, an Article 8 appeal, but it is of clear relevance to the proportionality evaluation to establish whether or not the claim can succeed under the relevant Immigration Rules.
12. Paragraph 297(1)(e) contains the following requirement:
 - “(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."

13. As regards the issue of sole responsibility, it is clear from the appellant's father's witness statement that he was not in a position to provide for his family in China with any monies since he was barely surviving himself. This was up to 2010 and subsequently he has been able to save money and send remittances to the children and has made five trips to China including the first one on October 2010 and up to February 2018. He had always asked his ex-partner to make sure the children went to good schools and had the opportunity to go on to university but she did not always listen to him and he believed his children's education suffered as a result. He had maintained contact with the family primarily for the sake of the children by telephone and later via the internet. In his last trip he noted that his son's relationship with his mother had broken down and that he blamed her for not permitting him to go on to higher education and there was constant tension between them. He had previously been expelled from school for bad behaviour. His education had been neglected by the mother and he had gone for vocational training with which he was never happy.
14. I do not consider this evidence is such as to satisfy the test of sole responsibility under paragraph 297(i)(e). Clearly the appellant's father has had some involvement in his life during the many years when they have been separated, but he has not been in a position to do much more really than give advice and keep in touch and provide some financial support since 2010. This falls some way short of the requirement of sole responsibility as set out in the Rule and accordingly the claim could not succeed in relation to that particular criterion of the Rules.
15. As regards the issue of serious and compelling family or other considerations, I note what was said in Mundebe at paragraph 34 that:
- "Serious" read with "compelling" together indicates that family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree in kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition may be."
16. There is also reference to paragraph 48 of TD [2006] UKAIT 00049 to the test being an onerous one.
17. There is medical evidence from the Changle City Hospital dated 27 January 2017 referring to the appellant's mother suffering frequent attacks of migraine in the recent two years and that the episodes happen on a

weekly basis and last for three to four days within each episode. Among other things she is advised not to look after children on her own and that she must have a carer during attacks. Otherwise there was a diagnosis of liver disease in a document from February 2018 and tests for carcinogens and Hepatitis B and Hepatitis B HBV test again in 2018. It would appear clear that Huizhu the appellant's mother, has liver problems as well as the migraines from which she suffers. But there is no medical report as to the impact of this on her life, and the only reference to that is in the inpatient discharge report of 27 January 2017 concerning her migraines.

18. It is not irrelevant I think to note that the appellant was nearly 18 at the time of the application, albeit Mr Nawaz is surely right to make the point that the Rules are the Rules and he was a child at the relevant time. But the need for care that would arise in the case of someone who is nearly 18 is clearly different from that which would apply in the case of a small child and that is relevant to consideration of the application of sub-paragraph (f) to the facts of this case. In essence, the medical evidence is that Huizhu suffers from liver disease and migraines. In her witness statement of 25 May 2018 she refers to being in very poor health and having very bad medical conditions and that she often goes to hospital and is currently taking medication and under treatment and she cannot look after the appellant and instead he often has to look after her.
19. This evidence is vague and unspecific. The test as noted above is one that sets a high threshold. The fact that the appellant's mother has the problems she has and that he has to look after her frequently is not in my view such as to give rise to a satisfaction of this provision of the Immigration Rules. Accordingly the appellant does not satisfy the requirements of the Immigration Rules.
20. This has clear implications for the Article 8 claim. Compelling circumstances must be shown in order for an Article 8 claim to succeed where the claim cannot succeed under the Immigration Rules. When one looks at the consideration as under section 117B of the Nationality, Immigration and Asylum Act 2002, I note that it is in the public interest that people seeking to enter the United Kingdom are able to speak English and there is no evidence in that regard. Also in the public interest such persons are financially independent, and the evidence of the sponsor is that he is able to meet the maintenance requirements of the Rules.
21. The proportionality evaluation has to take into account on the one hand the effect on the private and family life of the particular person and on the other hand the public interest. The effect of an adverse decision is to maintain the separation of the appellant and his father. But separation has existed for nearly all of the appellant's life barring the five visits to China the sponsor had made since 2010. There is no strong public interest operating in the appellant's favour bearing in mind that he has not satisfied the requirements of the Immigration Rules. As regards his best interests, he was born in China and has been brought up there and lived

with his mother throughout his life. His father has played a minimal role in his life only. I consider that his best interests lie in remaining with his mother in China.

22. Bringing these matters together, I consider that the Article 8 claim of the appellant cannot succeed and accordingly his appeal falls to be dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.



Signed

Date: 08 May 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date: 08 May 2019

Upper Tribunal Judge Allen