**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/10990/2017

**THE IMMIGRATION ACTS**

| **Heard at Manchester Civil Justice Centre** | **Decision & Reasons Promulgated** |
|---|---|
| **On 29th November 2018** | **On 24th January 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**SC**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, BEIJING**

Respondent

**Representation:**
For the Appellant: Ms S Ell (Counsel)
For the Respondent: Mr C Bates (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge McAll, promulgated on 20th June 2018, following a hearing at Manchester on 7th June 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## The Appellant

2. The Appellant is a male, a citizen of China, and was born on 11th July 2005. He appealed against the decision of the Respondent Secretary of State, dated 8th September 2017, refusing his application for leave to enter and remain in the UK, based on his relationship with his Sponsors, **XC** (his mother who was born on 2nd October 1980) and **HC** (his father who was born on 5th October 1981). His Sponsors are also citizens of China. The Respondent, however, was not satisfied that the Appellant had met the requirements of the Immigration Rules or that there were any exceptional circumstances that would justify the grant of entry clearance to the Appellant, for leave to remain outside of the Immigration Rules.

## The Appellant's Claim

3. The essence of the Appellant's claim is that his sponsoring parents, who came to the UK in 2001 and claimed asylum thereafter on the basis of being followers of the Falun Gong religion, had exercised sole responsibility for him. They could afford to support him. There were also serious and compelling circumstances which would lead to the Appellant's exclusion not being desirable, particularly as it was in the Appellant's best interests to be with his parents.

## The Judge's Findings

4. At the hearing before Judge McAll, the Appellant's representatives submitted that, the Appellant had enjoyed a family life with his parents when he was born, and it was only at the age of 3 to 4 months, on account of his suffering from a medical condition, that he was taken to China, otherwise he would have remained in the UK, where he had been born. There was medical evidence produced to support these claims. It is true that the Appellant was unable to apply to join his parents until 2017, but the reason for this was that the sponsoring parents were not settled, and had no discretionary leave to remain here, so that any application made would not have succeeded. The sponsoring parents also needed to demonstrate to the Respondent Secretary of State that they had a stable home and established work in the UK before there was a likelihood of a successful application. It was also true that the Appellant was being looked after by his grandparents, but they were now aging, and they were not in the best of health, and there was documentary evidence to this effect.

5. For his part, the Respondent Secretary of State argued that it was the sponsoring parents' decision in 2005 to be separated from their child, and this is how they have lived, and enjoyed their family life. In fact, there was nothing to prevent the family reuniting, should they wish to do so, if the sponsoring parents returned back to China to live with the Appellant there. Alternatively, the grandparents could continue to care for the Appellant as they have done since 2005. It was accepted that this was the first application made for the Appellant to come and join his parents in the UK since their separation in 2005, and the Appellant was now 12 years of age, but there was no necessity for the Appellant to come and live in the UK.

6. In his decision, the judge observed that, given that both sponsoring parents were already in the UK, the provisions of paragraphs 297 and 301 could not be met, relating to the Appellant joining "a parent" in the UK. The judge observed that the argument before him was that the sponsoring parents had exercised sole responsibility for the Appellant's upbringing and that the grandparents had had no say despite the fact that the Appellant had lived with them in China the whole of his life, a period of over twelve years. But, the judge held that, "I do not accept that claim" (paragraph 28).

7. The reason given by the judge was that the Appellant's sponsoring mother had given evidence before the judge that she had decided to separate from her child, when he was just 3 to 4 months old, on the basis of advice given to her by her mother that medical treatment was required, for which the Appellant child was sent to China. The judge explained that,

> "Once the child arrived in China, however, decisions taken regarding medical treatment will have been shared between by both the Sponsors and the grandparents and when a decision needed to be taken immediately then it would have been taken by the grandparents. The Sponsors trusted their family members in China to make the right decisions and given the separation and their predicament that would be only natural. I find that they shared decision making" (paragraph 29).

8. On this basis, the judge went on to conclude that,

> "Deciding the best schooling of the child would not be based solely upon what the Sponsors wanted for the Appellant, it would clearly necessitate them taking into account exactly what the grandparents would and could provide by way of day-to-day care" (paragraph 30).

9. Furthermore, when the grandmother was asked in China how often the Appellant saw his mother and father her response was, "the parents are in the UK, they never return to China to meet the child, but they meet online/virtual chat often" (see paragraph 31).

10. As to the suggestion that the grandparents could no longer provide for the Appellant's needs, because the grandmother has been diagnosed with diabetes and late stage uremia, all they had been able to say was that they find it "very hard" to take care of the Appellant, but it was not clear what this exactly meant (paragraph 32).

11. For all these reasons, the appeal was dismissed.

**Grounds of Application**

12. The grounds of application state that the judge had not considered the evidence with respect to the Appellant's two siblings. The judge had found (at paragraph 40) that,

> "Their two children IC and MC are Chinese nationals and whilst they have lived in the UK their entire lives they have strong family and cultural ties with China.

> I am satisfied that they will adapt to life in their country of nationality given their cultural and family ties there should the Appellants return back to China".

13. However, no reason was offered by the judge for these findings. No reference was made to the evidence provided in respect of these children's lives in the UK. No account was taken of the children's integration into life in the UK. IC was born on 16th February 2009 and was aged 9 years. MC was born on 21st December 2011 and was aged 6½ years.

14. Permission to appeal was granted on 3rd October 2018 on the basis that the judge arguably did not consider where the best interests of IC and MC lay and arguably did not arrive at findings of fact in this respect. The Appellant's bundle of documents (at page 87) confirmed that IC was aged 9 years and attended All Saints Catholic Primary School. The judge ought to have considered the remaining children's best interests by first making proper assessment on those best interests and then considering whether such interests were outweighed by other public interest considerations.

**The Hearing**

15. At the hearing before me on 29th November 2018, Mr Ell, appearing on behalf of the Appellant, stated that the judge had concluded (at paragraph 40), on the basis of maintaining the status quo, that the decision of the Entry Clearance Officer was not disproportionate. However, he had failed to give proper regard to where the other two children were residing, namely, in the UK. He had failed to give proper regard to where their best interests lay. He had failed to note that the middle child would now have been in the UK for seven years. These matters went to proportionality and affected the outcome in terms of the public interest considerations that came into play.

16. For his part, Mr Bates submitted that this was a Leave To Enter case. The judge had concluded that the status quo could be maintained. The two children in the UK would remain here, unless they choose to leave the United Kingdom, in circumstances where the parents did not have settled status. What they had was discretionary leave to remain until 19th March 2021. The judge did have regard to the best interests of the children, when he observed that, "it is almost always in the best interests of a child to be with their parents" (paragraph 38).

17. What he was stating at paragraph 40 was that it was a matter of choice for the parents, because should they decide to leave the United Kingdom then the judge's view was that, "I am satisfied that they would adapt to life in their country of nationality given their cultural and family ties ...". The children in the United Kingdom were not being removed. Rather, the one remaining child abroad is applying to come into the UK. Refusal simply maintains the status quo.

18. In reply, Mr Ell submitted that the plain fact remained that the children's best interests in the UK were not considered by the judge. It was not feasible for the

judge to say that the three children can all go and live in China, if the best interests of the two children in the UK, are to remain in this country.

**Error of Law**

19. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.

20. The judge's main conclusions are at paragraph 40. He considers the fact that the sponsoring parents have ties in China. He states, "their two children IC and MC are Chinese nationals and whilst they have lived in the UK *their entire lives* they have strong family and cultural ties with China". There is no consideration, however, of their best interests.

21. The judge simply proceeds to conclude, in relation to the sponsoring parents, that, "I am satisfied that they would continue to work hard in the UK or in China where they are permitted to remain and where they choose to live" (paragraph 40).

22. This is not a case where both sponsoring parents in the UK have "abdicated" their responsibility for the Appellant child in China. The evidence before the judge was that the Appellant child's grandmother had stated that, "the parents are in the UK, they never return to China to meet the child, but they meet online/virtual chat often" (see paragraph 31).

23. In **Nmaju**, the Court of Appeal stated that the parents' legal responsibility for the child under the appropriate legal system would be a relevant consideration in deciding sole responsibility.

24. In fact, Pill LJ in **NA (Bangladesh and Others) [2007] EWCA Civ 128**, said that the Tribunal should consider "as relevant the source and degree of financial support for the child and whether there was cogent evidence of genuine interest in and affection for the child by the sponsoring parent in the UK" (at paragraph 10).

25. In the instant case, the sponsoring parents have not been able to return to China, not because they did not wish to, but because they were not able to. In **Mundeba [2013] UKUT 88**, the Tribunal explained that the Section 55 consideration has to be looked at in terms of whether "there are unmet needs that should be catered for", and "whether are stable arrangements for the child's physical care".

26. If the grandparents are looking after the Appellant child in China, there must inevitably come a point in time when they could not indefinitely do so.

27. The judge did not give proper consideration to this (at paragraph 32).

28. Accordingly, these matters need to be reconsidered again in full by the Tribunal below.

**Notice of Decision**

29. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the First-tier Tribunal. I re-make the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge McAll, pursuant to Practice Statement 7.2(b) of the Practice Directions.

30. An anonymity direction is made.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

| Signed | Date |
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| Deputy Upper Tribunal Judge Juss | 11th January 2019 |