



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/12096/2013

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 2 February 2015

Determination Promulgated  
On: 2 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MISS YUQING ZHENG  
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Toal of Counsel

For the Respondent: Ms R Peterson, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant born on 30 July 1999, a national of China appealed to the First-tier Tribunal against the decision of the respondent dated 13 May 2013 to refuse the appellant leave to enter the United Kingdom pursuant to paragraph 297 of HC 395 (as amended) and Article 8 of the European Convention on Human Rights.
2. A Judge of the First-tier Tribunal, Carroll dismissed the appellant's appeal pursuant to the Immigration Rules. Permission to appeal was at first refused by First-tier Tribunal Judge Grimmett on 20 August 2014 but Upper Tribunal Judge Perkins in a

decision dated 12 December 2014 granted the appellant permission to appeal. It was found to be arguable that the First-tier Tribunal Judge misdirected herself and applied the wrong test. The permission Judge stated that paragraphs 10 and 18 trouble him because “whilst a recent change in the alleged arrangements for the care of the child might raise suspicions about the credibility of an application, the Tribunal is still concerned about the arrangements for the child that actually exist at the date of decision. Arguably, the First-tier Tribunal has applied the wrong test”.

3. Thus the appeal came before me.

### **Decision of the first-tier Tribunal**

4. The First-tier Tribunal dismissed the appellant’s appeal, concluding that there is no evidence of any form of communication between the appellant and her mother, whether by letter, greetings card or by email and that there are no photographs. The Judge stated the following which I summarise. The appellant’s mother went to the United Kingdom in 2002 and returned to China in 2012. During this time the appellant had been living with her grandparents.
5. Taking into account the case of **TD (paragraph 297 (i) (e): (“full responsibility”) Yemen [2006] UK AIT 00049**, the issue of sole responsibility is a factual matter to be decided upon all the evidence. Because of abandonment of responsibility, issues 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 of the child’s upbringing, including making all the important decisions in the child’s life. The appellant’s father has played no part in the appellant’s life for many years. The evidence submitted however falls far short of establishing that the appellant’s mother has exercised full responsibility for the appellant’s upbringing in China. The only evidence relating to the appellant schooling is contained in the respondent’s bundle, is a certificate which certifies that the appellant is enrolled at school as at March 2013 and she was in class III grade 2. The power of attorney by the appellant’s mother giving the appellant’s grandfather day-to-day care for the appellant in China has been considered. The witness statement of Mr Marcou in which he states that the appellant’s grandparents are now quite elderly and finding it more and more difficult to care for the appellant. There are six money transfers to the appellant for a total of £760 in 2012 and 11 transfers totalling £1310 in 2013 and three transfers totalling £400 in 2014. There is no evidence in the form of a letter from the appellant submitted with the visa application form. Much of the evidence in the appellant’s bundle very substantially postdates the respondent’s decision under appeal. Considering all the evidence together there is very little evidence to support the claim that the appellant’s mother has had continuing control and direction of the appellant’s upbringing, including making all the important decisions in life since 2002. The evidence points to recent contact only. The appellant’s appeal was dismissed.

## Grounds of appeal

6. The grounds of appeal state the following which I summarise. In the appellant's bundle of documents there were a number of documents relating to the appellant's education. (Pages 31 to 38). These documents postdate the respondent's decision but the Judge does not make any findings with regard to the admissibility of this evidence when reaching her conclusion that the appellant has not provided documents of the appellant's education. The Judge erred in law in failing to have due regard to material before her at the hearing. In any event the evidence provided by the appellant at appeal was admissible evidence as it showed circumstances at the time of the respondent's decision and did not show new circumstances. The Judge therefore erred in her conclusion that the appellant's sponsor has not exercised full responsibility for the appellant's upbringing because they were no documents relating to the education of the appellant.
7. The appellant's bundle contained documents submitted to the respondent prior to the date of decision including various birthday and Christmas cards sent between the appellant and her mother. The judge therefore erred in her conclusion that there is no evidence of any form of communication, whether by letter, greeting card or by email. The appellant's bundle also contained documents submitted to the respondent including further family photographs. The Judge clearly failed to have regard to material evidence provided by the appellant to the respondent, both prior to the date of the respondent's decision and after the respondent's decision. All these documents were admissible as they demonstrate circumstances at the date of decision. The appellant sponsor has always maintained that she has been responsible financially for the appellant including the payment of her school fields. The inconsistencies raised by the Judge in respect of the grandfather paying fees or whether it came from the appellant's mother. The fact remains for the purposes of **TD**, the appellant's mother exercised full responsibility as she was responsible for payments for school fees which he did by sending funds from UK to China.
8. In respect of paragraph 17 of the determination the Judge states that there is an inconsistency with regard to the data provided as to when the appellant commenced school as the sponsor gave oral evidence to the effect that the appellant started in 2007 and a letter from the appellant at page 53 of the bundle states she started in 2008. This inconsistency does not go to the core of the issue in the appeal. As regard to the alleged inconsistency regarding access to the appellant's school's website and the lack of a computer at the appellant's mother's home address, there is no inconsistency with the appellant's mother's evidence. The appellant's mother does not require a computer at home to follow developments of the appellant's school on the school website which she does regularly.
9. The appellant's mother recently made a trip to China to visit the appellant so that they could spend the appellant's 15<sup>th</sup> birthday together. The appellant supplied further documentary evidence which was not available previously including a declaration of Ping Zheng dated 20 August 2014, National Certificate dated 20

August 2014, Chinese document certified by FSG law firm dated 8 August 2014, passport copy and boarding pass as evidence of the appellant's mother's trip to China.

10. The Judge did not properly consider the case of **TD** and the case of **Nmaju v SSHD [2001] INLR 26** as to the length of time which the parent concerned had sole responsibility. Paragraph 17 of the determination states that the evidence points to recent contact only.
11. The Judge makes no findings whatsoever with regard to whether there are indeed compelling family or other considerations which make the exclusion of the child undesirable and suitable arrangements have been made for the child's care.
12. The Judge has failed to fully consider the best interests of the appellant and her young stepbrother who resides in the United Kingdom. There is no assessment of the child's best interests under section 55 and therefore the determination is flawed and not in accordance with the established principles and case law. In the case of **R (oao Tinizaray) v SSHD (2011) EWCH 1850** with states that section 55 should be considered even if the child is not present in the United Kingdom.

#### **The hearing.**

13. After hearing arguments by the parties at the hearing as to whether there is an error of law in the determination, I found that the Judge materially erred in law in applying the wrong test and not taking into account all the evidence in the appeal.
14. The Judge found that the appellant's mother had sole responsibility for the appellant because there were no documents relating to the education of the appellant. This of course was not accurate because the appellant's bundle of documents before the Judge contained documents relating to the appellant's education although they postdate the decision of the respondent. The Judge also failed to take into account that the appellant had provided documents prior to the date of decision of various birthday cards and Christmas cards of communication between the appellant and her mother. The appellant's bundle also contained further documents given after the date of the respondent's decision which were not considered by the Judge and nor was there any reason given for why they were not considered.
15. Having considered the determination as a whole, I find Judge's consideration of the appellant's appeal in respect of the Immigration Rules has not been properly made and is materially flawed. I set aside the decision of the First-tier Tribunal in this entirety and remake the decision. I heard submissions from both parties which are set out in my Record of Proceedings.

#### **Remaking the decision**

16. I have considered all the evidence in the appeal including the appellant's bundle of

documents consisting of 264 pages. The essential facts are not in dispute in this appeal. The appellant's mother left the appellant in the care of his grandfather and she came to the United Kingdom. The appellant's mother is now a British citizen and also has a child from her current relationship in this country.

17. Paragraph 297 of the Rules is in these terms:

"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."

18. There is no dispute between the parties that the appellant is the minor children of her mother who is present and settled in the United Kingdom for the purposes of paragraph 297 of the Immigration Rules. The respondent has also not taken issue with the claim that the appellant can be maintained and accommodated in the United Kingdom by her mother without recourse to public funds. There is also no dispute that the appellant's father has not had any role in the appellant's life.

19. The first issue is whether the appellants' mother has had sole responsibility for the appellants' (paragraph 297 (i)(e)). The second issue is whether there is any serious and compelling family or other consideration making the exclusion of the appellant undesirable (paragraph 297(f)(i)).
20. I find that the appellant and her mother have maintained contact with each other and there is evidence in the form of letters greeting cards and photographs. There is also evidence that the appellant's mother has been paying her school fees. There is evidence of financial remittances from her to the appellant grandfather or to the appellant in person in China. There is evidence that the appellant's mother visited the appellant in China so they could spend her 15<sup>th</sup> birthday together.
21. Although some documents show recent contact, I take into account the case of **TD** and **Nmaju** referred to me by the appellant which makes it clear that there is no requirement under paragraph 297 (i) (e) as to the length of time for which the parent concerned had sole responsibility. I find that the appellant has had containing control and direction of the appellant's upbringing, including making all the important decisions in her life.
22. I find that it is established on a balance of probabilities that the appellant's mother has had sole responsibility for the appellant even though the grandfather was looking after the appellant on a day-to-day basis.
23. I next consider whether the appellant falls within the circumstances referred to in paragraph 297(i)(f) of the Immigration Rules, which would be applicable if '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.
24. I also find that the appellant has provided evidence that the appellant's grandfather is suffering from some serious medical conditions. I have also taken into account the letter from the appellant grandfather which states he is in poor health and can no longer after the appellant. The appellant has written a letter stating that she feels very sad and is eager to be together with her mother. I find that the appellant's grandfather can not look after the appellant in China due to his age and bad health and there is no reason for me to doubt this evidence.
25. I find that the appellant's mother came to this country for a better life but has never abandoned her child in China. I find that she has always maintained emotional ties with her daughter in China and has also financed her from the money earned in this country.
26. I therefore find that the appellant satisfies the Immigration Rules in the category that she seeks to enter the United Kingdom.

27. For the reasons given above, the determination of the First-tier Tribunal is set aside as it is infected by material error. I remake the decision and allow the appellant's appeal.

**DECISION**

Appeal allowed.

Signed by

Mrs S Chana  
A Deputy Judge of the Upper Tribunal

The 25<sup>th</sup> day of February 2015