



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Numbers: HU/01520/2020  
HU/01521/2020**

**THE IMMIGRATION ACTS**

**Heard at Field House via Microsoft Decision & Reasons  
Teams Promulgated  
On the 30<sup>th</sup> September 2021 On the 10<sup>th</sup> November 2021**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**GONGHUI LIN  
GONGREN LIN  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr S Vokes, instructed by Corbin & Hassan

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are nationals of China. They appealed to the First-tier Tribunal against the respondent's decision of 20 December 2019 refusing their applications for entry clearance as the child dependants of their mother, the sponsor, Chen Hangqin.

2. Having considered the evidence in the context of, in particular, the guidance on sole responsibility set out by the Upper Tribunal in TD (Yemen) [2006] UKAIT 0049, the judge concluded that the sponsor shared responsibility for the appellants with their grandparents and the application was therefore correctly refused. The judge did not accept either that there were serious and compelling family or other considerations making exclusion of the child undesirable as set out in paragraph 297(i)(f) of HC 395 nor did he conclude that the claim could succeed on Article 8 grounds.
3. The appellants sought and were granted permission to appeal on the basis that the judge, although he had set out the right test, had not applied it correctly to his findings and as a consequence had materially erred in law.
4. There was effective agreement between the representatives as to the judge's decision and the proposed outcome, and I agree entirely with the criticisms of the decision and that proposed outcome.
5. The judge, as I say, set out clearly what the Upper Tribunal said about sole responsibility in TD (Yemen), emphasising: "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".
6. The sponsor left China in March 2004 when the appellants were 1 year old (they are twins) and did not return to China until January 2011 when she had been granted indefinite leave to remain in the United Kingdom. She and the father of the appellants divorced in 2013 and in a signed declaration he said that his ex-wife owned the custody of the children under the divorce agreement, that her parents had been helping to take care of the children after his ex-wife left China in 2004 and that he had rarely visited the children after he had got his ex-wife's consent due to his poor health and infectious diseases.
7. The judge accepted that there was nothing negative about the absence of an official court document setting out the arrangements for the children, in light of the sponsor's explanation that in China a court order was only required when the parties could not agree. The judge further noted that the sponsor had full custody rights over the appellants. Her evidence was that she left her children with her parents and she had always remained in touch with the children and made all the important decisions relating to them by herself. The evidence of the children in the form of letters from them both essentially bore this out. The first appellant said that all the important things in her childhood and her school life were decided by her mother and she contacted the grandparents and her through internet, telephone almost every day and the second appellant said that all the decisions including his studies and his living expenses in his life were made by his mother.

8. At paragraph 30 of his decision the judge said that having considered the evidence given by the sponsor, he concluded that her evidence was consistent with the other evidence in the appeal and she did not seek to mislead or embellish difficult parts of her evidence.
9. He went on at paragraph 32 to conclude that it was more likely that the sponsor did not exercise sole responsibility for the children. She had left them at a very young age in the care of her parents and though he did not criticise her for that, the reality was that she had been absent from their lives for almost all their childhood except via long-distance communication and annual visits from 2011 onwards. He said that she may have retained direction over their lives from afar but he found from her and their own evidence that she had shared responsibility with her parents for the appellants. He said that whilst she may provide funds for the benefit of the appellants, the grandparents were the ones who had had to utilise the funds to house, clothe, feed etc. the appellants from a very young age.
10. As Mr Vokes pointed out, that will almost inevitably be the case in any such situation where a parent claims to have had sole responsibility for children living in another country who are looked after by relatives or friends. Inevitably in this case, the grandparents would have had to use the money provided by the sponsor to house, clothe and feed the children from a very young age and that says nothing of any materiality about sole responsibility.
11. The judge went on to say, at paragraph 33, that it was so inherently unlikely that the sponsor could have retained exclusive responsibility for decision-making, control and obligation towards the children without them becoming shared that the Tribunal would need overwhelming evidence of a high level of control by the sponsor from overseas and that was not the case here. He said that the evidence was that the appellants were cared for and raised by their grandparents and this, he found, reflected the reality that the grandparents had shared responsibility for the appellants with the sponsor.
12. The main difficulty with this paragraph of the judge's decision is that it sets the burden on the appellants and through them the sponsor to a level which is well beyond that which the law requires. The evidence requires the issue of shared responsibility to be made out on a balance of probabilities only, and it is clear that the judge erred in this regard.
13. Having concluded that there are material errors of law in the judge's decision, I canvassed with the representatives what in their view the proper outcome was. They were in agreement, and again I endorse this agreement, that the decision could be remade by me in light of the fact that there was no challenge to the judge's statement of the law but rather as to how he had interpreted it in light of the findings he made on the evidence.

14. It seems to me clear, bearing in mind the guidance in TD (Yemen), that the test of whether the parent has continuing control and direction over the child's upbringing including making all the important decisions in the child's life is made out in this case. The judge accepted the sponsor's evidence and made no adverse findings about the children's evidence. It is, in my view, sufficiently clear from that evidence that the role of the grandparents is limited to the day-to-day care of the children as inevitably would have to be the case, but the important decisions about the children's lives are made by the sponsor and have been being so made for some time. It cannot properly be said that there is shared responsibility in this case. The responsibility of the grandparents is the lesser one of, as I say, the day-to-day running of their lives but in the context of the important decisions having been made by the sponsor. As a consequence, the requirements of paragraph 297 with regard to sole responsibility are made out in this case, and it follows therefore that both of these appeals are allowed on human rights grounds.

**Notice of Decision**

The appeals are allowed on human rights grounds.

No anonymity direction is made.



Signed

Date 7 October 2021

Upper Tribunal Judge Allen