



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

Appeal Numbers: OA/06525/2014
OA/06526/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2015**

**Decision & Reasons Promulgated
On 27 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**W H
W H E
(ANONYMITY DIRECTION MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER, BEIJING

Respondent

Representation:

For the Appellants: Mr H Kannangara, Counsel, instructed by Anglo Chinese Law Firm

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

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge M Eldridge (the Judge), promulgated on 27 April 2015, in which he dismissed the Appellants' appeal. That appeal was against the Respondent's decisions of 8 May 2014, refusing to grant entry clearance to join their parents in the United Kingdom.

2. The Appellants are Chinese nationals and sisters. The first Appellant was born on 4 May 2006 and the second on 24 July 2004. On 11 March 2014 applications for entry clearance were made for them to join their parents in the United Kingdom. At that time their father had Discretionary Leave to Remain in this country and their mother was a British citizen. The applications were considered under Paragraph 297 of the Immigration Rules and refused.

The decision of the Judge

3. At paragraph 13 of his decision the Judge make a number of findings on matters that he stated were either agreed or not in dispute. These findings include the following:
 - (a) Neither Appellant had visited the United Kingdom;
 - (b) They have two siblings in the United Kingdom who are British;
 - (c) Their mother obtained British citizenship in 2012;
 - (d) The father had Discretionary Leave to Remain;
 - (e) The Appellants had not lived with their parents at any stage;
 - (f) The Appellants had been brought up by their grandparents;
 - (g) Both Appellants attended school and were healthy;
 - (h) There is contact between the Appellants and their parents;
 - (i) There was a single visit by the United Kingdom family to see the Appellants in 2014.
4. In paragraphs 14 and 15 the Judge finds that the grandparents were able to continue caring for the Appellants and that the parents did not have sole responsibility for their upbringing. Paragraph 17 contains the conclusions that the appeal failed under Paragraph 297 due to the absence of sole responsibility and serious or compelling family circumstances. A submission that Paragraph 301 of the Rules applied was rejected in paragraphs 18-19 because the father did not have "leave with a view to settlement". Paragraph 21 states that private life is not engaged and that the appeals failed under Appendix FM to the Rules. Paragraphs 22-30 are dedicated to a consideration of Article 8 outside the Rules. After directing himself to relevant case-law, the Judge finds that the Appellants' mother and two British siblings had not lost their Chinese citizenship. Neither Appellant had lived for any real period with their parents. It is said that the best interests of the Appellants were not necessarily served by uprooting them from a settled life in China and bringing them to the United Kingdom. In addition, the Judge found that the Appellants' inability to meet the Rules counted against them in accordance with section 117B of the NIAA 2002. The Judge found that the family in this country could in fact go and live in China if they so chose.

The grounds of appeal

5. Ground 1 asserts that the Appellants' father did have "leave with a view to settlement" and the Judge was wrong to conclude otherwise. Ground 2 asserts that the Judge failed to consider the cases under Appendix FM to the Rules. Ground 3 asserts that the Judge made "several mistakes" as regards the facts of the cases. It is also said that there was not adequate assessment of the best interests of the British siblings. There was no assertion that the Respondent's decision was not in accordance with the law.
6. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 17 August 2015.

The hearing before me

7. In respect of Ground 1, I indicated to Mr Kannangara that Paragraph 301 of the Rules may not have been applicable in any event because of the effect of Paragraph A280(c) of the Rules. He had nothing to add on this point. However, he maintained the argument that the father had "leave with a view to settlement". In respect of Ground 2, Mr Kannangara accepted that the Appellants could not satisfy Appendix FM to the Rules. On the final Ground, it was said that the Judge had failed to assess the best interests of the two siblings in this country, and that the best interests of the Appellants themselves had not been adequately considered.
8. Mr Whitwell submitted that Paragraph 301 was not applicable because of Paragraph A280(c) and in any event the Discretionary Leave was not "with a view to settlement". As to Article 8 outside of the Rules, the Judge's findings were sustainable. He was entitled to find that the Appellants' best interests were not best served by coming to the United Kingdom.
9. In reply, Mr Kannangara asked me to note that family life and an interference with that life had been found by the Judge. In addition, the father still did not have settled status here and so any further entry clearance application would fail.

Decision on error of law

10. I have concluded that there are no material errors of law in the decision of the First-tier Tribunal.
11. There is no merit in Ground 1. First, Paragraph A280(c) of the Rules had the effect of precluding reliance upon Paragraph 301 in these cases. Paragraph A280(c) read, as at the date of decision and insofar as relevant:
 - (c) The following provisions of Part 8 continue to apply on or after 9 July 2012, and are not subject to any additional requirement listed in (b) above:
 - (i) to persons who have made an application before 9 July 2012 under Part 8 which was not decided as at 9 July 2012; and

(ii) to applications made by persons in the UK who have been granted entry clearance or limited leave to enter or remain under Part 8 before 9 July 2012 and where this is a requirement of Part 8, this leave to enter or limited leave to remain is extant:

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12. The Appellants had not made applications prior to 9 July 2012.
13. I appreciate that the phrase “with a view to settlement” is not defined, and I am unaware of case-law on the point. On the facts of this case the Judge was perfectly entitled to conclude that the Appellants’ father had not been granted leave “with a view to settlement”. The father was, as at the date of decision, only in his initial period of Discretionary Leave. This had two consequences: first, by its nature that leave was wholly outside of the Rules and any further grant was not to be assessed against criteria under the Rules which may lead to settlement. His position was more precarious in this sense, and a further grant subject to a wider range of factors; second, in order to be able to seek indefinite leave to remain the father still had to obtain a grant of a further three years Discretionary Leave. In light of this it is clear to me, as it was to the Judge, that to suggest that the father’s initial grant of leave was “with a view to settlement” was stretching the normal and common sense meaning of this term beyond reasonable boundaries.
14. Ground 2 was either disingenuous or simply carelessly drafted. The Judge did address Appendix FM. In addition, Mr Kannangara has expressly conceded that the Appellants could not satisfy its provisions.
15. As to Ground 3, I conclude that there are no material errors as regards the facts. Contrary to what is said in the written grounds, the Judge specifically found that the parents did not have sole responsibility for the Appellants’ upbringing. The reasons for this finding have not been challenged and they are clearly adequate in any event. The Judge also found that the mother and two United Kingdom-based siblings had not lost their Chinese citizenship. This finding appears to have been overlooked by the drafter of the grounds. The Judge was fully entitled to make the finding he did on this issue. Again, contrary to what is said in the grounds, the Judge did take adverse credibility points against the Appellants’ mother, both in respect of the grandparent’s alleged inability to continue caring and in relation to the question of who made the important decisions in the Appellants’ lives.
16. It is right that the Judge says in paragraph 28 that the family had never lived together. In fact the older Appellant lived with her mother for some two years before the latter left China, and the younger Appellant was with her mother for three or four months before going to live with her grandparents. However, one must read decisions as a whole, and I see from paragraph 27 that that Judge states that the Appellants had not lived

with their parents for “any real period”. He clearly had in mind that the fact that there had been a short period of family unity. In addition, on my reading of paragraph 28 the Judge was in reality referring to the family as a whole (including the two United Kingdom born siblings). It was of the course the case that they had never lived with the Appellants. There is no error here.

17. In my view there are no material errors in the Judge’s assessment of Article 8 outside of the Rules insofar as the Appellants’ own best interests are concerned. He directed himself properly to relevant cases, including Zoumbas [2013] UKSC 4 and Azimi-Moayed [2013] UKUT 197 (IAC). In respect of the latter, he specifically directs himself to the general principle that the best interests of children normally lie in being with both parents.
18. The Judge’s overall findings of fact are sound and cover relevant matters, including the settled and stable circumstances in which they were living, the disruption to their lives if removed from that setting, the absence of any real period of living together with their parents, and the ability of the United Kingdom-based family to move to China to affect reunification there. In addition, the Judge cited the decision of the Court of Appeal in Muse [2012] EWCA Civ 10, paragraph 23 of which states:

“The trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere.”
19. The Judge’s reliance upon Muse has not been addressed by the Appellant. Neither has the perfectly proper conclusion of the Judge that the Appellants’ inability to meet the Rules weighs heavily against them in the proportionality exercise.
20. Given the forgoing, the Judge was entitled to conclude that the best interests of these particular Appellants did not rest in coming to the United Kingdom to be reunited with their parents and, implicitly, being united for the first time with their siblings.
21. The Judge would have been equally entitled to have expressed the conclusion in an alternative way by stating that even if the best interests lay in being reunited with their parents (and united for the first time with their siblings), these interests were outweighed by the other factors set out in his decision.
22. The fact that the Judge found there to be family life and an interference caused by the Respondent’s decisions is beside the point. These findings cannot and do not lead to a conclusion that the assessment of proportionality is flawed.
23. There remains the narrow issue of the best interests of the two British siblings in the United Kingdom. Mr Kannangara urged me to conclude that the Judge did not deal with this, and that this constituted a material error

of law. It is right that the Judge does not expressly deal with this point in his decision (i.e. he has not provided a paragraph including the preamble, "I now consider the best interests of X and Y"). However, the Judge found that the United Kingdom family unit could go to China, a finding that has not in fact been challenged and was open to him. This clearly indicates that the Judge had in mind the position of the British siblings but nonetheless concluded that they could relocate without undue prejudice to their wellbeing. He also had in mind the fact that the British siblings had never lived with the Appellants. Assessing the Judge's in the round, I conclude that the best interests were implicitly considered and I see no error of law in relation to this point.

24. If I am wrong about that, and there was an error, it is not in my view a material one. Assessing materiality is an imprecise science. However, an error will only be material if it can properly be said that it could have made a difference to the outcome of the appeal. Here, the Judge's findings made and conclusions reached thereon are all sound. These present very significant hurdles to the success of a claim outside of the Rules. On the Judge's findings, there are no compelling circumstances, a factor which further decreases the prospects of success (see, for example, SS (Congo) [2015] EWCA Civ 387). There is a finding that the family could move to China. We know that British nationality is not a trump card, and the same is true of a child's best interests. Having read through the Appellants' bundle of evidence I see nothing to indicate a particular importance for the British siblings to live with the Appellants, beyond an opportunity to establish relationships in this country rather than in China. In all the circumstances, even if the Judge had expressly addressed the best interests of the British siblings, it could not have made a difference to the result.
25. Therefore, the Appellants' appeal to the Upper Tribunal fails, and the decision of the First-tier Tribunal stands.

Anonymity

26. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, 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 Appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellants from serious harm, having regard to the interests of justice and the principle of proportionality.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

Signed

Date: 21 October 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

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

Signed

Date: 21 October 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal