



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

Case Number: UI-2022-002399

UI-2022-002400

First-tier Tribunal number: HU/02426/2021

HU/02428/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2023**

**Decision & Reasons Promulgated
On 28 February 2023**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

Between

**HA VY TRAN
HA THUY TRAN
(No anonymity directions made)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr P Nath of Counsel instructed by David Wylde & Co Solicitors

For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS: ERROR OF LAW

1. In these linked cases the Appellants challenge the decision of First-tier Tribunal Judge O'Malley promulgated on 22 February 2022 dismissing their respective appeals against refusals of entry clearance to join their mother,

Ms Luyen Thi Luong ('the Sponsor'), who is settled in the UK having first come here in February 2010.

2. The Appellants, citizens of Vietnam, are minors, presently aged 16 and 15 years respectively.
3. On 20 January 2021 they each made applications for entry clearance further to paragraph 297 of the Immigration Rules for indefinite leave to enter the UK as the child of a settled parent - treated as human rights claims. The applications were refused for reasons set out in 'reasons for refusal' letters ('RFRLs') dated 12 March 2021. The RFRLs are a matter of record on file, and are adequately summarised at paragraph 5 of Decision of the First-tier Tribunal: it is unnecessary to repeat those reasons here.
4. The Appellants appealed to the IAC.
5. The First-tier Tribunal Judge made a number of findings of primary fact broadly favourable to the Sponsor and the Appellants' cases - in particular accepting that the sponsor has provided financial support since 2017, with evidence of transfers from June 2020 (which the Judge accepted were intended to support the Appellants and their grandparents (paragraph 27)), and that the Sponsor is engaged with the school of Thuy and the treating physician of Thuy (paragraphs 28-29). There was no suggestion in the Judge's reasoning that the Appellants' father had any continuing role or responsibility in their lives.
6. However, the Judge was not satisfied that it had been shown that further funds had been delivered in person during visits by the Sponsor to Vietnam in 2018 and 2019.
7. The Judge went on to conclude that she was not satisfied it had been shown that the Sponsor exercised 'sole responsibility' for the Appellants (paragraph 297(i)(e)), or that there were otherwise serious and compelling family or other considerations making exclusion undesirable (paragraph 297(i)(f)). Such findings informed the Judge's conclusion that the Respondent's decisions were proportionate in balancing the public interest in maintaining effective immigration control against the individual Article 8 rights of the Appellants and Sponsor.
8. In reaching the adverse conclusion on 'sole responsibility' the Judge in substance relied upon two matters:
 - (i) The Sponsor had only had any control of her finances "*relatively recently*", and had for some time prior been reliant on her parents for her own support, which the Judge determined was "*an element which I find points towards a shared responsibility for the appellants*" (paragraph 23).
 - (ii) The history of grandparental care whilst the Sponsor was in the UK (i.e. from 2010): e.g. see "*... responsibility adopted by the grandparents for the care of their grandchild*" (paragraph 30), provision of a home and financial maintenance (paragraph 31), and "*I find that, overall, the evidence of the care of the appellant between*

the grandparents and the sponsor is evidence of shared responsibility rather than the sponsor's sole responsibility" (paragraph 34).

9. We note, with reference to the guidance to be found in the cases of **TD (paragraph 297(i)(e)) Yemen [2006] UKAIT 00049** and **DN v SSHD [2017] CSOH 144** (helpfully cited in the Appellants' Grounds of Appeal) that the provision of care by others will be an inevitability in such cases, and as such is not reliably determinative of the issue of sole responsibility: for example see **TD** at paragraph 49 - "*day-to-day care of the child will necessarily be undertaken by others*", and at paragraph 50 - "*The fact that day-to-day decision-making for a child - such as "getting the child to school safely and on time, or putting the child to bed, or seeing what it has for breakfast, or that it cleans its teeth, or has enough clothing and so forth"... - rests with the carers abroad is not conclusive of the issue of 'sole responsibility'".*
10. It is perhaps in part these paragraphs that Mr Nath had in mind when seeking to amend the Grounds of Appeal to include a pleading that the First-tier Tribunal Judge "*has failed to fully consider the test for sole responsibility*" (paragraph 33 of Mr Nath's Skeleton Argument). Ms Ahmed observed that the application for amendment came extremely late, but acknowledged that it did not occasion her any specific difficulties. In the circumstances we permitted the amendment to the Grounds. However, in the event, it is unnecessary for us to reach any firm conclusion in this regard.
11. In our judgement there is a fundamental difficulty in the First-tier Tribunal Judge's approach to the evidence such that the decisions must be set aside for error of law.
12. The Judge reached a conclusion to the effect that responsibility for the Appellants was in substance in part congruent with the provision of day-to-day care and in part congruent with financial resource in the early stages of the children's life - and thereby rested in substantial if not exclusive part with their grandparents - and that any shift with the sponsor's increasing financial independence did not extinguish an element of the responsibility that vested in the grandparents.
13. However, this ran contrary to the Sponsor's evidence.
14. No reason is given for finding a lack of credibility on the part of the Sponsor in this regard. The only aspect of the Sponsor's testimony that was expressly found not to be proven was the taking of funds to Vietnam during visits - and such conclusion was seemingly reached on the basis of an absence of documentary evidence rather than an adverse assessment of the Sponsor's credibility generally (paragraphs 24-26).
15. Moreover, it is to be noted that the Sponsor was not cross-examined on her testimony before the First-tier Tribunal because the Respondent did not provide a representative.

16. Further – and in terms of the challenge before us, crucially – the Judge’s conclusion that the grandparents had assumed a degree of parental responsibility usurping the sole responsibility of the Sponsor, and that such shared responsibility had not been “expunged” (paragraph 34), ran contrary to the written evidence of the grandparents and the Appellants.
17. Whilst it is to be acknowledged that the Judge referred to the existence of such evidence (paragraph 17), there is no analysis of it and no findings made on it.
18. The apparent failure to demonstrate reasoned consideration of the evidence of the grandparents was the primary basis for First-tier Tribunal Judge Barker granting permission to appeal on 11 May 2022:

“3. In her decision and reasons, but for a brief reference at paragraph 17, the Judge does not comment on the evidence provided in the statements from the Appellants’ grandparents. Whilst this may nonetheless have been considered by the Judge, the Judge arguably erred by failing to provide adequate reasons for disregarding this evidence, as it seems she must have done in light of her ultimate findings, when considering the question of sole responsibility of the children.

4. In the absence of any specific findings in relation to this material evidence, it is arguable that the Judge has not taken it into account, or has not given adequate reasons for her findings relating to it.”

19. With the assistance of the representatives we looked carefully at the written evidence of both sets of grandparents (both in the form of letters and witness statements), and the written evidence of the Appellants. All consistently referred to the Sponsor as having ultimate responsibility for decision-making relating to her children. By way of example, the Appellants’ statements spoke as to the liaison of the Sponsor with their schools.
20. Whilst we acknowledge Ms Ahmed’s observation that it is not necessary for a First-tier Tribunal Judge to set out or recite, or give reasons in respect of, every aspect of evidence, we do not accept that the Appellants’ own testimonies in their own appeals could be characterised as no more than their ‘opinion’, or was not otherwise of such core significance that it required to be addressed directly. Nor do we accept that the testimony of the grandparents could in substance be rejected without more by way of direct analysis.
21. In the circumstances we conclude that the failure of the ‘Decision & Reasons’ of the First-tier Tribunal to demonstrate reasoned engagement with the evidence of the Appellants and their grandparents as to the extent of the Sponsor’s responsibility for shaping and directing the lives of her children amounted to a material error of law such that the decisions of the First-tier Tribunal cannot stand.

22. It was common ground before us – and we agree – that the re-making of the decisions in the appeals should be undertaken by the First-tier Tribunal.

Notices of Decisions

23. The decisions of the First-tier Tribunal contained a material error of law and are set aside.

24. The decisions in the appeals are to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge O'Malley, with all issues at large.

Signed: I A Lewis
Deputy Upper Tribunal Judge I A Lewis

Date: **20 January 2023**