



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

Appeal Number: OA/05902/2012

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 2 October 2013**

**Determination  
promulgated  
On 8 November 2013**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**LS**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, AMMAN**

Respondent

For the Appellant: Mr A Gibson, Advocate, instructed by Ethnic Minorities Law Centre, Glasgow

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

- 1) The appellant is a citizen of Syria, now aged 12. On 9 April 2012 she sought entry clearance to the UK as a Tier 1 (General) child dependant. A letter of the same date from the sponsor, the appellant's father, said that the application was based on his sole responsibility for her.
- 2) The Entry Clearance Officer refused the application by notice dated 11 April 2012. The Entry Clearance Officer was not satisfied of the relationship between the appellant and sponsor nor that sole responsibility had been demonstrated, the appellant having been in the care of her mother in Syria.

- 3) The appellant filed notice of appeal to the First-tier Tribunal, providing some further evidence. On 9 July 2012 an Entry Clearance Manager accepted that the appellant is the child of the sponsor, but maintained the decision on the basis that sole responsibility was not shown.
- 4) The following facts are undisputed. The appellant's parents divorced when she was aged 3 years and 3 months. Custody was awarded to her mother, in whose care she remained until consent was given to a transfer of custody on 18 March 2012. The sponsor has lived in the UK since 2005. At the time the entry clearance application was made, the appellant and sponsor were both in Amman. After refusal of the entry clearance application, the sponsor returned to the UK and the appellant returned to Syria. She and other family members relocated around Aleppo due to the civil war. On 2 August 2012, she relocated with her mother to the United Arab Emirates, where they remain.
- 5) First-tier Tribunal Judge Montgomery heard the appellant's appeal on 12 October 2012 and dismissed it by determination promulgated on 26 November 2012. The appellant was represented by Mr B Murphy of Ethnic Minorities Law Centre and the respondent by a Presenting Officer. The evidence and submissions focussed on "sole responsibility" within the meaning of the Immigration Rules. The judge noted that even if sole responsibility was not met, a child might qualify under the "exclusion undesirable" rule, but that had not been argued, the appellant having had "the benefit of very competent professional representation". She said that she therefore had only to resolve the questions of sole responsibility and of Article 8 of the ECHR. She concluded that the appellant failed to establish that the sponsor had sole responsibility for her, the weight of the evidence being that responsibility has been shared by both parents (paragraph 21). What was sought was not a reuniting of family life, but the creation of a different family life (paragraph 25). That was not necessarily in the best interests of the appellant. To the extent that the sponsor could be considered a "victim" of the decision that would not be disproportionate to the legitimate aims of immigration control (paragraph 28).
- 6) The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal, on these grounds:- refusal of entry clearance was (i) incompatible with the rights of the appellant and sponsor to family reunion and (ii) an unlawful denial of the father's legal right to custody; (iii) it was in the best interests of the child to give force to the arrangement reached between the parents as to custody, and in finding that the judge was not in imminent danger because she was in the UEA, the judge failed to have regard to evidence that she would be required to leave there imminently; (iv) the judge failed to consider the issue of "relevant, serious and compelling family or other considerations ... as at the date of decision", even although the applicant's representative did not argue the point, and it "would also have been within judicial knowledge that the situation in Aleppo ... in April 2012 was extremely dangerous."

- 7) On 8 January 2013 Designated First-tier Tribunal Judge Campbell refused permission to appeal, on the view that the judge was entitled to find this was not properly a case of family reunion; that the award of custody was considered, within a careful assessment of the circumstances of all family members; the judge took into account that the appellant and her mother were temporarily present in the UAE; and that the ground based on failure to consider “relevant, serious and compelling family or other considerations” was disingenuous, the judge having recorded that the appellant’s case was not advanced on that basis, and having in any event found that such considerations were not shown.
- 8) The appellant sought permission to appeal from the Upper Tribunal, on identical grounds. On 12 February 2013 Upper Tribunal Judge Warr granted permission, on the view that there might be error at paragraph 26 of the determination, although not as identified in the grounds. The First-tier Tribunal judge thought that in relation to the Immigration Rules she was required to consider the situation as at date of decision, but as to Article 8 could have regard to circumstances at the date of the hearing. However, the date of decision is the material date under the Rules and also under Article 8, in overseas cases.
- 9) Mr Gibson submitted that the error about the relevant date led the judge into the wrong decision. He said that she analysed the risk to the child as at 12 October 2012 rather than at 11 April 2012, and that if she had approached the case correctly, she would have appreciated the imminent danger to the appellant in Aleppo due to the very dangerous security situation. Mr Gibson accepted that as matters turned out, the appellant was taken to the United Arab Emirates with other family members for safety. We observed that the move might be seen as evidence of later circumstances with significant bearing on the situation as at the date of decision, ie there was the capacity to remove the appellant to safety. Mr Gibson argued nevertheless that there should have been a finding the appellant was in danger as at 11 April 2012. He said this was shown by the fact that her parents, although divorced, were jointly concerned for the safety of the child and to remove her from Aleppo.
- 10) We enquired what the evidence was before the First-tier Tribunal on the situation in Aleppo. The only evidence filed for the appellant was a short report by Human Rights Watch, dated 17 September 2012, headed “Syria: End Opposition use of Torture, Executions”, and the judge did refer to it (paragraph 4 of the determination). This document sets out concerns about armed opposition groups subjecting detainees to ill-treatment, torture and summary execution in locations including Aleppo. Mr Gibson accepted that has little application to this appellant, but he pointed out that the judge herself referred at paragraph 21 to twin bombings in Aleppo on 10 February 2012, signalling the start of escalating conflict in the area.

- 11) We found on file the judge's record of the oral submissions and the skeleton argument for the appellant. The arguments both oral and written were on the basis of sole responsibility, with very little reference to the security situation. The submissions were made on the basis that the appellant was in the UAE and were thoroughly confused as to whether they were based on circumstances at the date of application or on later developments.
- 12) Mr Gibson accepted that the judge was placed in difficulty by both representatives having focused incorrectly on the situation as at date of the hearing, not the date of decision. However, he submitted that the appellant's move to the UAE had not been contemplated until refusal of the application to bring her to the UK. The application was refused on 18 April 2012 and she appeared to have moved from Aleppo on 2 August 2012. That was not a long period for a family to prepare for a major move. Mr Gibson said that if the judge had directed herself properly, she would have looked at the situation in Aleppo and might have allowed the appeal, but he was unable to suggest that evidence by way of country background, human rights reports, UNHCR reports or otherwise leading to that conclusion had been adequately placed before her. He said again that the judge might have drawn an inference from the arrangements the family was attempting to make to get the appellant to the UK.
- 13) We observed at this stage that the father's statement dated 5 December 2012, on which the appellant relied in the First-tier Tribunal, is designed almost entirely to show that he had sole responsibility, and that no statement by her mother was provided. There was very little evidence by which the judge might have found that the security of the child was the primary motive for the application, even if that had been argued to her. We also observed that even if the judge had considered whether the appellant's security was at risk in Aleppo, the evidence was that the family was able to make other arrangements. In his statement the sponsor speaks of transferring money for the appellant's benefit to his brother in Aleppo, prior to the date of application, and the sponsor is in a good financial position.
- 14) Those were all the arguments for the appellant. We did not need to hear from the Presenting Officer. We formally reserved our determination.
- 15) The judge erred in law at paragraph 26, where she thought that as to Article 8 she was not restricted to looking at the situation as at the date of decision. Representatives did nothing to help the judge from falling into that error. Indeed, the representative for the appellant greatly encouraged it. It is not an error founded upon in the appellant's grounds of appeal to the Upper Tribunal; it did not affect the outcome; and so it does not lead us to set the decision aside.
- 16) The reasons given by the Designated Judge for refusing the first application for permission to appeal succinctly explain why the grounds are of no merit. The case was not argued in the First-tier Tribunal that "serious

and compelling family or other considerations” might permit the appeal to succeed. Even if it had been, no background evidence was presented which might have led to success. The one item of background evidence was of very little application to the appellant’s situation. The judge’s general knowledge of the situation in Syria did not require her to go any further of her own initiative, which a judge is rarely required to do.

17) The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal shall stand.

18) An anonymity order made by the First-tier Tribunal remains in place.

A handwritten signature in black ink, appearing to read "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

9 October 2013  
Judge of the Upper Tribunal