Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08768/2013
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THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 24th July 2014	**On: 13th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Beijing

Appellant

and

Master Zhijie Lin
Miss Zhimin Lin
(no anonymity order made)

Respondent

For the Appellant: Mr Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms Hashmi, Counsel instructed by Anglo Chinese Law Firm Ltd

DETERMINATION AND REASONS

1. The Respondents are both minors who are nationals of China. On the 19th May 2014 the First-tier Tribunal (Judge MA Khan) allowed their appeals against the Entry Clearance Officer's decision to refuse to grant them entry clearance as the children of persons present and settled in the United Kingdom.

2. The applications were made on the 30th January 2013 when Ms Lin had just turned 17 and Master Lin was 14. Mr Bramble agreed that this matter must be decided on the basis that Ms Lin was a minor at the date of application, albeit that she has now turned

18. The applications were for the children to come to the UK to live with their mother, a British national, and their father, who has discretionary leave to remain.

3. The applications were refused on the 7th March 2013 with reference to paragraph 297 of the Rules, the provision relating to a child seeking leave to settle in the UK with a parent who is settled here. The ECO did not accept that the sponsors were in fact the biological parents of the applicants; that matter has now been resolved by the production of DNA evidence. The refusal notice further made reference to paragraph 297(i) of the Rules. That sub-section contains six alternative routes (a)-(f) by which a child can assert that the rule applies:

> 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:
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> (a) both parents are present and settled in the United Kingdom; or
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> (b) both parents are being admitted on the same occasion for settlement; or
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> (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;

4. None of these provisions applied to the applicants in this case. The children were not seeking to join one parent the UK nor was their father dead. Nor could their mother claim to have had sole responsibility. They were seeking to join both parents who continue to have parental responsibility over them. Those provisions in 297 that envisage the child's parents being in a subsisting relationship only do so in the context of one parent being outside the UK and seeking entry for the purpose of settlement. Oddly, there is no provision for the scenario presented in this case, where both parents are already in the UK but only one has settled status.

5. It was that apparent *lacuna* in the Rules that greatly troubled Judge Khan when the matter came before him in the First-tier Tribunal. He was satisfied that all of the other

requirements of paragraph 297 were met (indeed these were never put in issue) and allowed the appeal under paragraph 297 of the Rules on the basis that the Appellants met either sub-paragraph (i)(a) – both parents settled in the UK, or (c) - one parent here and the other being admitted for settlement:

> "I find that it is a mere technicality that the father has limited leave, for all intents and purposes he has been granted his discretionary leave under Article 8 of the ECHR with a view to settlement as a spouse"

6. He went on refer to the provision in Appendix FM relating to the admission of children to join a parent who has limited leave to remain in the UK. Since the ECO had "not raised the financial circumstances in this matter" he proceeded on the assumption that the financial circumstances are met and allowed the appeal under this alternative head.

Error of Law

7. The ECO now submits that there was no basis in law for allowing the appeal outright with reference to paragraph 297. I would agree. The situation of the Respondents' parents does not fit into any of the alternative scenarios clearly set out at sub-paragraph (i)(a)-(f). It cannot be said, as a matter of law, that their father is settled in the UK since he only has discretionary leave. Paragraph 6 of the Immigration Rules defines "settled" as meaning:

> a) is free from any restriction on the period for which he may remain save that a person entitled to an exemption under Section 8 of the Immigration Act 1971 (otherwise than as a member of the home forces) is not to be regarded as settled in the United Kingdom except in so far as Section 8(5A) so provides; and
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> (b) is either:
>
> (i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or
>
> (ii) despite having entered or remained in breach of the immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident.

8. Nor can it be said, as a matter of fact, that he is "being admitted for settlement" on the same occasion as his children. That is because he is already here and there is no guarantee that a grant of discretionary leave will automatically lead to settlement (although Judge Khan is quite correct to suppose that in this case that is likely to be the eventual outcome). The appeal could not therefore, be allowed with reference to paragraph 297.

9. Judge Khan goes on to allow the appeal with reference to E-ECC 1.6 of Appendix FM. This relates to applications for entry clearance from children seeking to join one parent

in the UK who has only limited leave to remain. This does not contain such a restrictive list as paragraph 297(i):

> E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be applying, or have applied, for entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and
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> (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
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> (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or
>
> (c) 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.

10. On the face of it the children could gain entry to the UK under this provision. Whilst the ECO does not contest that this paragraph might be applicable to the Respondents it is submitted that as this was not a matter that had been entertained by the original decision-maker it was not for the Judge to simply allow the appeal outright. That was because no analysis had been made of the documentary evidence supplied as to finances. I find that the Respondent is right. An acceptance that the sponsors could "adequately" maintain their children is not the same as a finding that they met the financial requirements under Appendix FM. Had the Tribunal file contained all of the relevant evidence it could have been open to Judge Khan, or indeed me, to conduct that analysis. Unfortunately much of the original material supplied in support of the applications was not available; because maintenance was not in issue under paragraph 281 neither the Respondents nor the ECO had included it in their bundles.

11. The determination of the First-tier Tribunal is set aside. There was no basis in law for allowing it under 297. Whilst the decision of the ECO was flawed for failure to consider paragraph E-ECC – and indeed Article 8 – the Tribunal did not have sufficient evidence before it to allow it outright under this paragraph of the Rules. I set the decision aside and re-make it by allowing the appeals as "not in accordance with the law".

12. I add this. It is extremely unfortunate that in a case involving children being separated from their parents the ECO has issued a decision that has manifestly failed to consider alternative provisions under which entry could be granted. Consideration was not given to Appendix FM, nor to Article 8. For that reason the decision was not in accordance with the law and the appeal is allowed. When the ECO reconsiders this matter he will no doubt wish to have regard to:

    a) The considerable delay that has been caused thus far, always regrettable but particularly so in the case of children;

b) The fact that the applications would have been allowed with reference to paragraph 297 but for the *lacuna* in 297(i) which would appear to have absolutely no basis in logic or policy. It would seem that these applicants have been disadvantaged by the fact that their father is alive and well and their parents are still together;

c) Exercising his discretion to request further evidence if for any reason it is found that the evidence thus far submitted is found deficient with reference to Appendix FM-SE etc.

13. It would be my strong recommendation that entry clearance is granted to the Respondents, but it is a matter for the ECO.

Decisions

14. The decision of the First-tier Tribunal contains error of laws and it is set aside.

15. I remake the decision by allowing the appeals as "not in accordance with the law".

16. I make no direction as to anonymity.

Deputy Upper Tribunal Judge Bruce
24th July 2014