Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20745/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2016	**On 15 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

WU, ERBING
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – BEIJING

Respondent

Representation:

For the Appellant: Mr M Adophy of Rana & Co, solicitors, agents for Saintta International Lawyers
For the Respondent: Ms Z Ahmad of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of the People's Republic of China (PRC), born on 8 May 1996. On 13 August 2013 he applied to the Respondent for entry clearance to join his father, Wu, Fu Hai who is his Sponsor and is a citizen of the PRC who on 26 February 2011 was granted indefinite leave to remain. On 17 October 2013 by a deed of change of name he changed his name to Wu, Wenfu.

2. The Respondent asserts and the Sponsor has not challenged that the Sponsor left the PRC in 1999 and that the Appellant's mother was granted entry clearance as a visitor in 2007. At about that time, 2007, the Appellant went to live with his paternal grandparents where he remains. The Appellant states he believes his mother is in the United Kingdom but neither he nor the Sponsor know where she is. There is no other material evidence about her in the Tribunal file and there is no evidence at all from her.

The ECO Decision

3. On 7 November 2013 the Respondent conducted a telephone interview with the Appellant and on the same day refused his application because the Appellant had not shown that his Sponsor had consistently supported him emotionally and financially since the Sponsor had left the PRC. Until 2007 the Appellant had been cared for by his mother and subsequently by his grandparents. The Respondent concluded the Sponsor had not had sole responsibility for the Appellant and therefore could not satisfy the requirement of paragraph 297(i)(e) of the Immigration Rules.

4. The Respondent further considered there were no serious or compelling family or other circumstances making the Appellant's exclusion from the United Kingdom undesirable so that he did not meet the requirements of paragraph 297(i)(f).

5. On 9 December 2013 the Appellant through Saintta International Lawyers lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds assert the Sponsor has had sole responsibility for the Appellant and that the Respondent had accepted the Sponsor had latterly established contact with him. The Respondent had been wrong in law to consider that the Appellant needed to show the Sponsor had had sole responsibility for the Appellant during his entire life. This was not in accordance with the determination in *TD (para 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049*. The grounds further asserted the Respondent had failed to take into account the best interests of the Appellant as a minor and had not followed the jurisprudence in *Mundeba (s.55 and para 297(i)(f)) DRC [2013] UKUT 00088 (IAC)*.

The First-tier Tribunal Proceedings

6. By a decision promulgated on 31 December 2015 Judge of the First-tier Tribunal Thorne dismissed the Appellant's appeal on all grounds. In

particular, he found that there was inadequate reliable independent evidence to show the Sponsor had had sole responsibility for the Appellant since 2007 and that there was scant evidence of financial support and no reliable independent evidence that he had played any part in the Appellant's upbringing since he had left the PRC in 1999. He found that the Appellant was in good health and had been attending school and there were no serious and compelling family or other considerations making his exclusion undesirable. He considered the Appellant's best interests and noting that the Appellant had grown up in the PRC and that continuity of residence was an important factor concluded it was in his best interests for his existing circumstances to be maintained.

7. On 2 June 2016 Judge of the First-tier Tribunal Osborne granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in considering that the Sponsor needed to show sole responsibility since 2007 and had treated the Appellant as a 19 year old adult. It was also arguable he had erred in his approach to the assessment of the Appellant's best interests as a child and that his conclusions on that issue were inadequately reasoned. Further he may have erred in his application of the factors referred to in Section 117B(2) of the 2002 Act because it was not applicable to child applicants. It was further arguable the Judge had erred in his consideration of the Sponsor's financial circumstances and the date at which those circumstances were to be assessed. Finally, it was arguable these matters had infected the Judge's assessment of the proportionality of the decision.

The Upper Tribunal Hearing

8. The Sponsor attended the hearing. Mr Adophy advised me the Sponsor had very little English and this was evident from his apparent failure to understand any part of my introduction of the Tribunal. He was not able to confirm his current address which Mr Adophy did for him. Both representatives agreed the only issues before the Tribunal were those expressly identified in the grant of permission to appeal. The Respondent had filed a notice under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 submitting that the Judge had correctly referred to the definition of "sole responsibility" at paragraph 23 of his decision and had given ample reasons to support his finding that the Sponsor had not had sole responsibility.

Submissions for the Appellant

9. Mr Adophy relied on his skeleton argument. This argued that the Judge had erred in doubting the Sponsor's credibility because he was a failed asylum seeker.

10. Although the Judge had correctly quoted the test for sole responsibility from *TD (Yemen)* he had erred in considering that the requirement of sole responsibility at all material times needed to be established. In particular, sole responsibility might have been of only a short duration. He further

argued that the Sponsor's control and direction of the Appellant's life were evidenced by sole financial contributions since 2007, a school certificate and the Sponsor's payment for the application leading to the decision under appeal and the legal costs and medical testing costs. It was the Sponsor who had decided the Appellant should live with the Sponsor's parents and that he should apply to come to the United Kingdom.

11. At interview the Appellant had stated he was seeking entry clearance so that he could come to live with his father. The Appellant would have considered the potential challenges that relocation to the United Kingdom would pose and there was no evidence to undermine the wishes of the Appellant and the Sponsor to be re-united in the United Kingdom. The Sponsor had no passport and had not seen the Appellant since the Appellant was aged 3. He could not return to the PRC and these amounted to serious and compelling circumstances making the exclusion of the Appellant undesirable.

12. The Judge's proportionality assessment under Article 8 was flawed because he had taken account of the fact that by the time of the hearing the Appellant was no longer a child and had similarly erred in considering the documents relating to the Sponsor's financial circumstances to be out of date. They were relevant to the date of the Respondent's decision which was the date at which the evidence needed to be assessed. Further, the Respondent had never challenged that the Sponsor was able to maintain and accommodate the Appellant in accordance with the Immigration Rules. Finally, the Judge had erred in applying Section 117B of the 2002 Act since it was not applicable to a minor.

Submissions for the Respondent

13. Ms Ahmad submitted that at paragraph 23 of the decision the Judge had correctly identified the "sole responsibility" test in *TD (Yemen)* and at paragraph 16 he had correctly identified the date at which the evidence was to be assessed and the criteria for its admissibility. At paragraph 28, he had made his findings as to sole responsibility on the basis that he took the Appellant's account at its highest (most favourable to him). The Judge had found that there was insufficient evidence the Sponsor had assumed sole responsibility and if he had erred in referring to sole responsibility throughout since 2007 that error was not material because the Judge had found that the Sponsor had not assumed sole responsibility at the date of the Respondent's decision as the Judge correctly stated at paragraph 29 of his decision. At paragraph 48 he had dealt with the appeal on the alternative basis that the Appellant should be considered as a minor and had proceeded to apply the jurisprudence of *Mundeba*. The Judge's treatment of Section 117B of the 2002 Act was otiose and therefore any error there might be in the fact the Judge had considered it was not material.

Response for the Appellant

14. Mr Adophy submitted that the tenor of the whole decision was that the Judge had treated the Appellant as an adult. He had not dealt with the Appellant's reply at interview that he wanted to come to the United Kingdom to live with his father. The Appellant was at an age when he made the application and was interviewed that he would have considered the challenges that relocation to the United Kingdom would present. The Judge had erred in considering Section 117B because it was not applicable to a child.

Consideration and Decision

15. I start by noting that at paragraph 16 dealing with the burden and standard of proof the Judge also dealt with and correctly stated the relevant date for assessment of the evidence.

16. The Judge quoted from the relevant parts of the determination in *TD (Yemen)* at paragraph 23 of his decision. At paragraph 24 he went on to say that the sole responsibility test had to be met at all material times. He did not specify at that stage what the "all material times" were. The word "all" qualifies the expression "material times" not just the word "times". At paragraph 28 he considered the role the Appellant's father had taken in his upbringing since 2007 when it was claimed his mother had left him with his paternal grandparents and had come to the United Kingdom and in the next paragraph he came to the conclusion that the Sponsor had not had sole responsibility for the Appellant at the date of the Respondent's decision. It is clear from paragraph 30 that the Judge appreciated the Appellant was at the date of the hearing over the age of 18 but nevertheless it was clear he considered him as a child because he went on to say in the same paragraph that he concluded that there were no serious and compelling family or other considerations making exclusion of the child undesirable.

17. Even if, as the Appellant asserts, there was some confusion because the Judge in his decision used different expressions to refer to the period during which he was assessing whether the Appellant's father had had sole responsibility for him, it is clear, particularly from paragraph 28, that the Judge was focusing on circumstances following from 2007 when the Appellant's mother had left him with his grandparents, circumstances which continued beyond the date of the Respondent's decision. I do not find with regard to the assessment of the position under the Immigration Rules, the Judge has made a material error of law such that his decision should be set aside.

18. I turn to the Judge's consideration of the claim based on the Appellant's best interests as a child with regard to section 55 of the UK Borders Act 2007 as applied in foreign cases by the jurisprudence in *Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC)*. The Judge explained at paragraph 31 that for the Appellant as a minor close to the attainment of his majority continuity of residence was an important factor. Coupled with the Judge's findings that the Appellant's father had not had sole

responsibility for him based on an insufficiency of evidence and lack of contact referred to in paragraphs 27 and 28, I find the Judge gave adequate reasons for his conclusion in paragraph 31 that maintenance of the Appellant's status quo would be in his best interests.

19. I turn to the challenges to the Judge's treatment of the Appellant's claim under Article 8 of the European Convention. The Judge dealt with the claim on the basis that the Appellant was still a minor, even if it was an alternative basis as he stated in paragraph 48. He relied, as he was entitled to, on his findings made at paragraph 31. His assessment of the proportionality of the decision to the legitimate objective of the maintenance of proper immigration control is contained in paragraph 60.

20. The Judge may be criticised for having taken into account irrelevant issues such as the lack of evidence of the Appellant's facility in English. However, there is nothing to show that the crucial finding made by the Judge at paragraph 60(vi) is not sound. On that basis coupled with the factors referred to in paragraphs 60(i) and 60(ii) together with the other aspects of the proportionality assessment at paragraphs 61-63 the Judge's conclusion is adequately supported and reasoned. The Appellant has not shown that the Judge made a material error of law such as to justify the setting aside of his decision. No differently constituted Tribunal would have reached any other conclusion. The decision shall therefore stand.

Anonymity

21. There was no request for an anonymity order and having considered the appeal find that none is warranted.

NOTICE OF DECISION

The First-tier Tribunal's decision did not contain any error of law sufficient to justify it being set aside in whole or in part and consequently it shall stand.

No anonymity direction is made.

Signed/Official Crest Date 14. vii. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal