



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07810/2013

THE IMMIGRATION ACTS

Delivered orally at Field House
On 7 February 2014

Determination Promulgated
On 14 February 2014

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MARY NIELLE RUEDA MACALANDA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of the Philippines, born on 10 June 1995 appeals against the decision of the Respondent dated 28 February 2013 refusing to her, entry clearance for settlement as the child of a parent or parents given limited

leave to enter or remain in the United Kingdom with a view to settlement under paragraph 301 of HC 395 of the Immigration Rules (as amended).

2. The Appellant's appeal was determined on the papers by First-tier Tribunal Judge V A Cox who in a determination promulgated on 19 November 2013 dismissed the appeal of the Appellant on both immigration and human rights grounds.
3. The Appellant's application for leave to appeal that decision was successful and in granting permission to appeal First-tier Tribunal Judge Brunnen had this to say insofar as it is relevant to the present appeal:

“2. The grounds on which permission to appeal is sought contend that the Judge erred in law in that she (1) failed to apply the correct burden and standard of proof; (2) failed to consider the Appellant's best interests; (3) failed to take account of material evidence; (4) failed to give reasons for a central finding of fact; (5) misdirected herself by finding that Article 8 was not engaged because of the long separation of the Appellant from her father; (6) assessed proportionality by reference to the wrong point of law.”

4. Thus the appeal came before me on 7 February 2014 where my first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.
5. For the purposes of this determination it will suffice if I concentrate on item 3 of the grounds upon which permission was granted, namely the contention that the First-tier Judge failed to take account of material evidence.
6. Although I was presented with substantial and clearly argued grounds on the part of Mr Richardson, following EK V ECO (Colombia) [2006] EWCA Civ 926 I do not have to determine each point raised. My task is to decide if the determination of the First-tier Tribunal is right in law and for the reasons to which I will shortly refer and as indeed most helpfully conceded by Mr Walker, it is not.
7. The guidance of their Lordships in EK whilst given in terms of the reconsideration process applicable to the previous jurisdiction of the Immigration Asylum Tribunal still has relevance today. They held that it was not necessary at the first stage of reconsideration to go through each of the grounds of appeal and decide whether the error of law asserted could be made out. It was enough if one of the grounds disclosed an error of law. The “second” stage of the reconsideration might then encompass all of the issues raised in the original appeal.
8. In the present case there was before the First-tier Judge a voluminous bundle of documents prepared by the Respondent and in fairness to the Judge that bundle was not as one would normally expect numbered, and indexed and as indeed I found in conjunction with Mr Richardson in the course of the hearing before me, in consequence it was difficult to locate relevant documents within that bundle for proper consideration.

9. Nonetheless, that bundle contained amongst other things, a full statement from the Sponsor dated and signed by him on 24 November 2012.
10. The bundle also contained medical certificates in relation to the current health (albeit as at the date of decision) of the Appellant's maternal grandparents with whom she had been formerly living.
11. I do not intend to go through the whole of the Sponsor's statement but it is highly relevant to identify that throughout that statement, the Sponsor provided details of the way in which he had considered himself to be the person with sole responsibility for his daughter's welfare. I give some examples, some of which were indeed most helpfully identified for me by Mr Richardson in the course of the hearing;

"I decided to enrol her to the same school where she attended her elementary years because it is near the house of her grandparents where we used to live before. During her school years, I have acted again as her sole guardian because her mother was working abroad... I am also responsible in checking and signing all the waivers for school field trips and other outdoor activities relate to her studies...

I have asked Myra's parents to look after Mary Nielle because my daughter was on her final year in High School and it would be difficult for her to transfer to another school. I told my daughter to finish her studies in the same school and stay with her grandparents in Quezon City for the meantime...before I let the Philippines I accompanied her to some universities in Quezon City to enquire about course admissions.

Even though I am here in the UK, me and my daughter discuss things concerning her studies, social life, etc. just like the old days but now we usually communicate through Skype, e-mails and phone calls. (Please see phone cards, e-mail and Skype communication records DOC.5). My daughter and I send e-mails 4-5 times a week... we took advantage of the free service on Skype, that is why we have a lot of chances discussing important things such as her education, health conditions, financial needs, problems and many more...

I told her to move in the boarding house so she can concentrate more on her studies. During my holiday to the Philippines (June-July 1912), I personally inspected the boarding house just to ensure the safety and well-being of my daughter. I chose this one for her because the place was nice, clean and very near to her school... I accompanied her to see a dentist for a dental check-up which I usually do when she was still younger...

I have instructed my daughter to visit and stay with my mother... I told my mother to tell Mary Nielle to come to Muntinlupa City and see her every month for her to get the money...

I decided to set (the money transfer receipts) up this way so I can monitor and control the spending activities of my daughter. My financial obligation to my daughter commenced from birth up to present. I am the one responsible for her school tuition

fees, budget for food, dental/medical check-up, clothing etc. I started sending money to her through my mother by money transfer when I left Philippines to the UK last September 2010...." (Emphasis added)

12. As Mr Richardson rightly pointed out in his opening submissions to me, it was apparent from the determination of the First-tier Judge that he had not considered this statement at all. Indeed, having checked the determination of the First-tier Judge there is at paragraph 6 a reference at 6(e) to the fact that the Judge had considered "an undated witness statement from Daniel Macalanda".
13. It is right to say that within the Respondent's bundle there appeared a document which was described as a "notice of appeal" and dated 25 March 2013. Although it sets out the grounds of appeal it does appear to be somewhat in the form of a statement. Nonetheless the details of that "statement" are not referred to in the determination. In any event there is also the dated statement o which I have above referred. That latter statement was clearly an important and material piece of evidence in terms of determining the central issue in this appeal namely as to whether the Appellant to the requisite standard of proof had demonstrated that her father, the Sponsor, had sole responsibility for her.
14. At this stage in the hearing before me, Mr Walker most helpfully and realistically informed me that having considered the material above referred, he was satisfied that this was a most important piece of evidence that the First-tier Judge appeared to have ignored. In fairness Mr Richardson had accepted that whether it was evidence determinative of the appeal was another issue but it was plainly positive and relevant evidence that the First-tier Judge had simply failed to take into account.
15. Mr Walker continued:

"This was evidence for the First-tier Judge that went to the crux of the issue as to whether the Sponsor had sole responsibility for the Appellant in her schooling and upbringing yet he had made adverse findings when the evidence appeared to point the other way. The Respondent thus accepts that the failure of the First-tier Judge to take proper account if any, of this important evidence amounts to a material error of law."
16. I would agree with Mr Walker for like reason and indeed the matter does not end there, because elsewhere in the determination the First-tier Judge concluded that there was no satisfactory, if any, evidence as to the health of the Appellant's maternal grandparents, when in fact there was evidence as to their medical condition in the form of two documents within the Respondent's bundle that the First-tier Judge would appear to have overlooked.
17. Mr Walker informed me that given that this was an appeal against an Entry Clearance Officer's decision he was not in a position to consider whether or not to concede the appeal but he was in agreement with Mr Richardson who had submitted that the errors identified demonstrated that the interests of justice warranted that a

further consideration of this appeal required that it should be heard afresh before the First-tier Tribunal and I agreed with that proposal for like reason.

18. I also agreed with the parties that in light of the material errors of law identified none of the First-tier Tribunal Judge's findings should in the circumstances, be preserved.
19. In consequence of my findings, it follows that there has been no satisfactory hearing of the substance of this appeal at all. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. In such circumstances Section 12(2) of the TCEA 2007 requires us to remit the case to the First-tier or re-make it ourselves. For the reasons that I have given above and with the agreement of the parties, I have concluded that the decision should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge V A Cox to determine the appeal afresh, with all issues at large, at Hatton Cross. I am satisfied that there are highly compelling factors, falling within paragraph 7.2(b) of the Senior President's Practice Statement that the decision should not be re-made by the Upper Tribunal. It is clearly in the interests of justice that the appeal of the Appellant be heard afresh in the First-tier Tribunal.
20. For that purpose and so as to ensure the expedition of the hearing in the interests of justice, I have arranged for the matter to be listed at Hatton Cross for substantive hearing with a time estimate of three hours. I understand that the Sponsor will give oral evidence at that hearing but that there will be no requirement for an interpreter for this purpose.

Decision

21. The First-tier Tribunal erred in law such that their decision in the present appeal should be set aside. I remit the re-making of the appeal to the First-tier Tribunal at Hatton Cross to be heard before a First-tier Tribunal Judge other than First-tier Tribunal V A Cox.
22. No anonymity direction has been made.

Signed

Date 14 February 2014

Upper Tribunal Judge Goldstein