



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

Appeal Number: OA/15300/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 March 2015
Prepared 3 March 2015

Decision & Reasons Promulgated
On 12 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ENTRY CLEARANCE OFFICER - BOMBAY

and

**MISS VO
(ANONYMITY DIRECTION MADE)**

Appellant

Respondent

Representation:

For the Appellant: Ms C Kenny, Senior Home Office Presenting Officer
For the Respondent: Ms E Greenwood, Counsel instructed by G Singh Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the ECO and the Respondent is referred to as the Claimant.
2. The history of this matter is set out in a determination which I promulgated on 18 September 2014.

3. At that stage I found there was an error of law because the judge had not, with reference case law then in existence, considered whether or not Article 8 ECHR outside of the Rules was engaged. Since that decision the cases of MM (Lebanon) [2014] EWCA Civ. 985, SS (Congo) 2015 EWCA Civ. 387 [31-33] and Khalid and Singh [2015] EWCA Civ. 74 together with other case law have indicated that there is no threshold before consideration of Article 8 outside of the Rules and simply identify the kinds of factors that such words as 'exceptional circumstances' will be expected to be seen if it is going to be shown that a decision is disproportionate.
4. Issues had previously been considered under the Immigration Rules but it was common ground that the Claimant did not succeed under Appendix FM or other provisions of the Immigration Rules. In substance therefore the question was whether or not the Claimant could show at the date of the ECO's decision Article 8 ECHR rights were engaged. The ECO's decision was dated 20 June 2013.
5. The Claimant's Sponsor is a British national and it is fair to say that in deciding an error of law had been made there was no real challenge by the ECO against the judge's assessment of the credibility of the Claimant's mother (RM) and Sponsor, Mr JM, the husband of RM.
6. There is no issue that the Claimant is female, date of birth 17 February 2005 and is a citizen of India. It is clear that as a matter of law the Sponsor, who was the stepfather of the Claimant, was not in a recognised relationship so as to enable him to bring the Claimant into the United Kingdom as a relative of his. Similarly, his wife RM only had discretionary leave and therefore was unable to be the person for whom the Claimant could join.
7. Judge Chamberlain who dealt with the appeal in June 2014 found both the Claimant, the Sponsor and mother credible witnesses of fact, as I did.
8. It is correct to say as has previously been noted that there are some inconsistencies identified between oral evidence given and the documentary evidence but those did not form matters of significance and partly were attributable to the fact that neither the Sponsor nor RM are well-educated or have good English language skills.
9. Again, as previously noted, some of the documentation relating to the Claimant's schooling was by no means accurate but it seemed to me that may be the fault of others but they are not matters of weight which fundamentally go to the reliability of the account given. Thus, I too give little weight to a letter from the Claimant's school obtained by RM's sister, S, who in part appears to be without communication and reading skills so as to pick up on the mistakes that have been made.
10. On balance, even if the ECO has not been able to check the 'certificate of guardianship', I find, read as a whole with the entirety of the evidence, it is consistent therewith and the responsibilities had fallen upon RM who, with the assistance of her sister S, has provided day-to-day care in India.
11. It is clear that the Claimant has gone to school and the issues of schooling have been under the direction of RM. Similarly, the finances have again been through the Sponsor and the direction of RM.

12. It appears that when the sister, S, had taken on the obligation of caring for the Claimant it had been thought it was for a short duration; whilst RM got to the United Kingdom and settled here. It simply had not been contemplated by S that she, as a woman now aged some 35 years, should continue to be saddled with the general care for the Claimant. Rather the evidence points to the fact that it would be to the benefit of the Claimant to be reunited with her mother. It appears that RM's motive for coming to the United Kingdom was to be with the Sponsor and was always with the underlying intention to bring the Claimant to the United Kingdom when she could.
13. I therefore concluded that the relationship between RM and S was such that S was now seeking, as a woman who was unmarried, to make a life for herself free of the responsibilities of caring for the Claimant. Similarly I accepted the evidence from RM and the Sponsor that there is no other relative who would take on the day-to-day care of the Claimant. I agree with Judge Chamberlain that the Claimant now is at a formative and important stage where the direct care of her mother is significant. I also agree that the Sponsor's presence in employment in the United Kingdom, with the financial obligations which he has here, it is not a desirable object to relocate to India. I do not see that it would be reasonable to expect RM to be required to return to India. Nor do I accept there is any realism in a boarding school as an option because of the two short holidays before the long Indian summer holiday where the Claimant would not be able to stay in school and someone, unknown, would have to look after her. It does not seem to me that it is sensible when RM has employment, her employers will not agree to her returning for the shorter four week school holidays in the year nor is it particularly desirable, even if it is available as an option, for the Claimant to otherwise be required to stay in school for the rest of the year.
14. Considering this matter outside of the Rules I have of course applied the decision in Razgar [2004] UKHL 27 and Huang [2007] UKHL 11. I have looked at all the evidence in the round. The Claimant's mother and the Sponsor are both employed. I accept the Sponsor's evidence that his own relatives are based in the area where the Claimant lives but his brother is a lorry driver by occupation and his hours and obligations are different and unorganised to provide the care for the Claimant. I note that the Sponsor is self-employed with his own shop business and so taking periods of time off is not as easy as it once was.
15. It seems to me that at the age the Claimant is now, this is a time when she should be with her mother. Whilst in most cases there will be other family members in this case I accept the evidence that the Claimant cannot effectively be farmed out to other relatives to care for her and nor in the interests of her development is such a course desirable.
16. Maintaining contact by electronic means assuming they are available and not going to break down is of course a possibility but it really is not sufficient to meet the kind of care needed by the Claimant.
17. I take into account that the Sponsor earns about £25,000 and RM earns some £12,000, producing a total gross income of some £37,000 and, as is pointed out, the requirement for two parents plus one child for the purposes of appropriate financial provision is £24,500. In the circumstances it seems to me that there is the financial

wherewithal to make proper and adequate provision for the Appellant. Whilst I do not think as a fact making return visits is untenable it plainly makes no economic sense and makes the Claimant's mother more likely to be dependent upon the Sponsor. It is said that it is a relevant fact that because Ritaben, the mother, had failed an English language test and therefore only obtained discretionary leave to remain, that in order to properly provide by the Claimant the entire family would have to relocate to India and that that is a disproportionate outcome.

18. On balance it seems to me that this is the kind of case which illustrates the importance of the public interest and the need to give it proper weight. In the circumstances I do so but find that in this case the considerations that would normally militate against the Claimant's entry to the United Kingdom show that the prolonged separation between RM and the Claimant and its continuance is disproportionate.

NOTICE OF DECISION

18. The appeal under the Immigration Rules is dismissed.
19. The appeal is allowed on Article 8 ECHR grounds.
20. Given the age of the Claimant it seems to me that an anonymity order is necessary and appropriate.

DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Claimant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The appeal has succeeded because of the deeper and greater knowledge of the Claimant's circumstances and a more fuller expression and understanding of the continuing relationship between the Claimant and her mother and Sponsor. I do not find a fee award is appropriate.

Signed

Date 8 May 2015

Deputy Upper Tribunal Judge Davey