



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00941/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 May 2018

Decision & Reasons Promulgated
On 25 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUHIN MAHMOOD ADEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms B Jones, Counsel, instructed by Forward and Yussuf Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Meah (the judge), promulgated on 28 November 2017, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision of 1 December 2015, refusing to grant entry clearance to the Appellant under paragraph 297 of the immigration rules.
2. The Appellant was born in 1999 and was seventeen years old when the entry clearance application was made in October 2015. She is a Somali national who at all material times has been residing in Ethiopia. The application was made on the basis that the Appellant wished to join her aunt (the sponsor) in the United Kingdom. The

entry clearance officer refused the application on four bases: first, that the relationship between the Appellant and the sponsor was not accepted; second, that the sponsor had not shown that she had sole responsibility for the Appellant; third, that there were no serious and compelling family or other considerations in the case; fourth, that the sponsor was not able to adequately maintain the Appellant in this country.

The relevant rules

3. Paragraph 27 of the rules stated at all material times:

An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FM solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it.

4. Paragraph 297, reads, insofar as is relevant in this case:

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:

...

(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; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds;

The judge's decision

5. The judge accepted the relationship between the Appellant and the sponsor, that being niece and aunt [17]. Despite what turned out to be an inadvisable concession by the Appellant's representative (not Ms Jones) that the Appellant could not meet the requirements of the rules because she had attained the age of eighteen as at the date of hearing, the judge nonetheless went on to consider paragraph 297(i)(e) and (f), recognising that satisfaction of the rules would serve as a "weighty factor" in the proportionality assessment to be carried out under Article 8 [16]. It was accepted that the sponsor could maintain the Appellant [18]. I will assume that the same applied to accommodation.
6. Having quoted from TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, the judge makes reference to the sponsor's evidence that she had taken over care of the Appellant since the latter was three years old. Contact between the two had been lost between 2009 and July 2015. The evidence from the sponsor was that she had been in regular contact with the Appellant since that time and had been sending money to her in Ethiopia. The judge says the following at [21]:

"This however is insufficient to show that she has had sole responsibility for the Appellant since July 2015. The evidence before me simply does not support such a contention and I cannot accept the sponsor's word alone on this critical aspect of the claim."
7. The judge then turns to the issue of whether there were serious and compelling family or other considerations such that the Appellant's exclusion from the United Kingdom would be undesirable. He notes the absence of any evidence to support the sponsor's assertion that the family with whom the Appellant had been living was about to travel to the United States [22]. At [23] the judge observes that the Appellant was, as at the hearing before him, over the age of eighteen and that on the sponsor's own evidence, she was living in Ethiopia legally and attending a college there. It is said that there were no other issues raised which went to show serious or compelling circumstances. At [24] the judge does states that the Appellant was unable to satisfy paragraph 297(ii) because she was now an adult.
8. Article 8 in its wider context is then considered. Following what might respectfully be described as an unnecessarily lengthy citation from case law, the judge again notes the fact that the Appellant was now an adult. On the evidence before him he finds that the Appellant had successfully fended for herself between 2009 and 2015 [32-34]. He concludes that she had been leading an independent life for a number of years. The financial support provided by the sponsor was not a factor which took the relationship between her and the Appellant beyond what would ordinarily be expected between adult relatives [35]. Rather confusingly, there is an apparent acceptance of the existence of family life just prior to the passages which I have set out. Then, finally, the judge refers to section 117B of the Nationality, Immigration and Asylum Act 2002. He notes the fact that the Appellant could not meet the requirements of the rules, observes once again that the relationship with the sponsor did not apparently meet the Kugathas test, and then dismisses the appeal.

The grounds of appeal and grant of permission

9. The grounds of appeal (which were not drafted by Ms Jones) assert that the judge failed to appreciate that exceptional circumstances were present in this case. There are rather vague references to Article 8 and section 6 of the Human Rights Act 1998. It is possible to discern an argument that the judge erred in treating the Appellant as an adult in respect of the paragraph 297 issue (see paragraphs 2 and 4).
10. Permission to appeal was granted by first-tier Tribunal Hollingworth on 8 March 2018. With all due respect, his grant of permission expands fairly significantly on the actual grounds of appeal put forward. For my part, I struggle at points to see how the observations contained in the grant relate to the grounds.

The hearing before me

11. Ms Jones submitted that the judge erred by failing to treat the Appellant as a child when considering paragraph 297. She agreed that the Appellant's majority as at the date of hearing was relevant to the wider Article 8 assessment. It was submitted that the judge had erred in relation to the sponsor's evidence on sole responsibility. Insufficient reasons been given for apparently rejecting her evidence. Ms Jones then submitted that although paragraph 297(i)(e) could not be satisfied because the sponsor was not a parent, the question of sole responsibility was highly relevant to paragraph 297(i)(f).
12. Mr Clarke submitted that the judge had provided adequate reasons throughout. He submitted that the evidence before the judge was itself insufficient, with particular reference to the sponsor's witness statement at pages 4 and 5 the Appellant's bundle. There was a lack of evidence overall. It was clear from the decision that the judge was not satisfied that serious and compelling circumstances had existed at any time. Mr Clarke submitted that the test under 297(i)(f) was deliberately different from that under the preceding subparagraph. In relation to the existence of family life, it was submitted that even if it did exist, the Appellant could not have shown that any interference would have engaged Article 8, or that the refusal of entry clearance was disproportionate.
13. In reply, Ms Jones accepted there was no evidence relating to the claimed departure of the family to the United States. She submitted that the fact that the Appellant was an orphan and that the sponsor had had sole responsibility for her were enough to show serious and compelling considerations. Even though the Appellant was over eighteen as at the date of hearing, these compelling circumstances persisted.
14. At the end of the hearing I reserved my decision.

Decision on error of law

15. Having given this case very careful thought I conclude that there are no material errors of law such that I should exercise my discretion under section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 and set the judges decision aside.

16. With respect to the judge, his decision is not a model of clarity. Having said that, I must of course read it sensibly, holistically, and in light the evidence that was actually before him.

Article 8 in the context of the relevant rules

17. There is no reference in the decision to paragraph 27 of the rules. This provision has the effect of continuing to treat a child applicant as a minor notwithstanding their attainment of majority prior to the decision or appeal being heard. It is clear that paragraph 27 applied in this case, and that the Appellant's representative had been wrong to make the concession he did. It is also the case that the judge himself appears to have moved between treating the Appellant as a child when looking at paragraph 297 (see [16]) and then treating her as an adult (see [23] and [24]).
18. Taking matters as a whole I satisfied that the judge did in fact tolerably consider the Appellant circumstances under paragraph 297 as if she had been still a child, and that the overall conclusions reached are tenable. Alternatively, any errors in approach are not material, given the state of the evidence before the judge. My reasons for these two conclusions are as follows.
19. First, paragraph 297(i)(e) was not in fact applicable to this case because the sponsor was not a parent, but a relative. The judge was wrong to have considered the provision at all. It also follows from this that the Appellant could not have satisfied the rules on the basis of the sole responsibility test alone.
20. Second, it is right that at [21] the judge seems to have rejected aspects of the sponsor's evidence simply because it was not corroborated. On the face of it, that is an erroneous approach, although adverse inferences can potentially be drawn from the absence of reasonably obtainable corroborative evidence. Having said that, the actual evidence before the judge was pretty minimal, consisting of very brief references in a witness statement and some oral evidence.
21. Third, Ms Jones has submitted that the sponsor did in fact have sole responsibility for the Appellant and this, coupled with the Appellant's status as an orphan, was sufficient to meet the high threshold under paragraph 297(i)(f).
22. I disagree. Leaving aside for the moment the fact that paragraph 297(i)(e) could not apply in this case because of the relationship between the Appellant and the sponsor, and even assuming that the sponsor's evidence about her role in the Appellant's life (as set out in [20] and [21]) should have been accepted, it did not follow that paragraph 297(i)(f) would have been satisfied. The wording of the various provisions under paragraph 297 is clear. In particular, there is a deliberate demarcation between cases involving a parent (paragraph 297(i)(e)) and those involving either a parent or a relative (paragraph 297(i)(f)): the sole responsibility test applies to the former, but not the latter. As far as I am aware, the *vires* of this particular rule has never been challenged, and there is no assertion before me that the difference in treatment is unlawful. It follows that even if a sole responsibility test could be met simply as a matter of fact, this would not, *in and of itself*, permit a person such as the Appellant to succeed under paragraph 297(i)(f).

23. Having said that, the underlying factual basis applicable to an assessment of the sole responsibility test would have relevance to an assessment of whether there were serious and compelling family or other considerations in a case. Even if the sponsor's evidence about her input into the Appellant's life from July 2015 had been accepted, this would not in my view have led to the judge to conclude that paragraph 297(i)(f) was satisfied. As is made clear in paragraph 48 of TD, the test is an onerous one. I cannot see that the fact of the Appellant being an orphan, the sponsor providing financial support (which included the payment of school fees), and communications on the telephone and a single visit to Ethiopia, could have been sufficient to meet that test. What other potentially serious and compelling considerations were disclosed by the evidence before the judge? The claim by the sponsor that the Appellant's carers were to be leaving Ethiopia for the United States was (and still is) completely unsupported by any other evidence. In my view the judge was entitled to take the absence of what would reasonably be regarded as readily obtainable supporting evidence into account (see [22]. There is nothing in the evidence to show that a plausible explanation for the lack of evidence was provided). It is unclear when this claimed departure was to have taken place, but that in my view came down to the paucity of the evidence on the Appellant's side rather than any error by the judge. The judge quite rightly took into account what he found to be the Appellant's legal residence in Ethiopia (see [23]). In this regard I appreciate that reference is made in that paragraph to the Appellant being over eighteen. However, there is nothing to suggest that the Appellant's residence was not also legal in the period running up to the attainment of majority. Again, it appears to have been a lack of any clarity emanating from the Appellant's side. The judge found that the Appellant was in education, and he noted that there was nothing to suggest any other significant adverse circumstances in the case. As with other matters, I can see no evidence before the judge indicating that this state of affairs did not pertain to the period leading up to and after the entry clearance application, and before she reached her eighteenth birthday.
24. Bringing all of the above together, and notwithstanding certain identifiable errors by the judge, I am satisfied that the overall conclusion that there were no serious and compelling other considerations in relation to paragraph 297(i)(f) was one to which the judge was entitled to reach. Therefore, ignoring what is erroneously said in [24], the Appellant was unable to satisfy the rules.

Article 8 in its wider context

25. I turn to the judge's consideration of Article 8 in its wider context. On this issue, the judge was correct in assessing the situation as at the date of hearing, a time when the Appellant was an adult (albeit only by some three months). He was entitled, indeed bound, to take account of the important fact that the Appellant could not meet the requirements of the rules (see [38]). The judge was entitled to find that the Appellant circumstances were fairly stable, that she has in many respects been living an independent life, and that financial support from the sponsor could continue (see [30], [32] and [34]-[36]).

26. The judge's treatment of whether there was family life or not is somewhat confused, as alluded to previously in my decision. However in my view one can cut through this and approach the judge's assessment on the basis that he did find there to be family life, albeit on a limited basis. That is a conclusion to which he was fully entitled to reach, given the evidence before him.
27. Once the family life issue is seen in this light, the other factual matters found by the judge are considered, and the significant point that the rules were not met brought into play, the judge was fully entitled to conclude that the Appellant could not succeed under Article 8. This is so whether the claim is said to have failed at the second or fifth of the Razgar steps.

Summary

28. Despite certain problems with the judge's decision, the overall conclusions reached are sustainable. There are no material errors of law. The Appellant's appeal to the Upper Tribunal must be dismissed and the decision of the First-tier Tribunal stands.

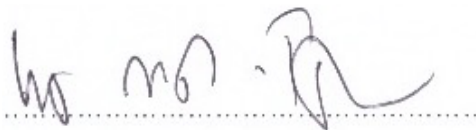
Anonymity

29. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make no anonymity order. One was not made by the First-tier Tribunal and there has been no request to me for an order. The Appellant is now an adult and I see no reason to make an order of my own volition.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.



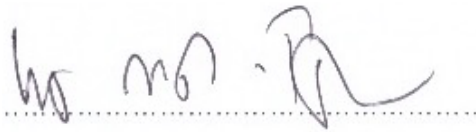
Signed
H B Norton-Taylor

Date: 23 May 2018

Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

A handwritten signature in black ink, appearing to read 'H B Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 23 May 2018

Judge H B Norton-Taylor

Deputy Judge of the Upper Tribunal