



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

Appeal Number: HU/13310/2017

THE IMMIGRATION ACTS

Heard at Field House

On 5th February 2019

**Decision & Reasons
Promulgated
On 27th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

[N S]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Malaysia born on 21st March 2003. The Appellant first entered the UK with her mother and brother on 15th June 2007 as a visitor with leave valid for six months. On 26th October 2013 an application was submitted on the basis of family and private life with the Appellant as a dependant and this was refused on 17th December 2013. On 23rd February 2015 the Appellant voluntarily departed back to Malaysia with her mother and brother. However, she re-entered the UK again a visitor with leave granted for six months on 2nd November 2016. On 27th April 2017 the Appellant made a human rights claim for leave to remain in

the United Kingdom on the basis of her family life with her grandparents in the UK. That application was refused by Notice of Refusal dated 11th October 2017.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal O’Keeffe on 23rd July 2018 at Hatton Cross. By a decision and reasons promulgated on 30th July 2018 the Appellant’s appeal was dismissed.
3. Grounds of Appeal to the Upper Tribunal were lodged on 12th August 2018. Permission to appeal was refused by First-tier Tribunal Judge Saffer on 10th October 2018. Renewed Grounds of Appeal were lodged on 5th November 2018.
4. On 21st December 2018 Deputy Upper Tribunal Judge Grimes granted permission to appeal. Judge Grimes noted that the renewed grounds contended that the judge had erred in finding that the Appellant, a child, cannot rely on paragraph 276ADE(1)(iv) of the Immigration Rules where she had seven years’ residence in the UK before leaving and then returning to the UK. The issue raised was whether the phrase “has lived continuously in the UK” requires that the residence must have been immediately before the application. It is contended that the First-tier Tribunal Judge had not taken into account the Appellant’s residence between June 2007 and February 2016 in considering the application of this Rule and that that constituted an arguable error.
5. Judge Grimes considered the other grounds had less merit as the judge had highlighted the paucity of evidence before her and concluded that she had not been presented with a full picture of the Appellant’s current circumstances. However, permission was not refused on those grounds.
6. On 29th January 2019 the Secretary of State responded to the Grounds of Appeal under Rule 24. In opposing the appeal the Secretary of State contended that the First-tier Tribunal Judge had given cogent reasons for rejecting the purported “abandonment” of the Appellant and found that her best interests are to be reunited with her mother and brother in her country of nationality. It is contended in the Rule 24 response that the First-tier Tribunal Judge was clearly aware of the relevant considerations endorsed by the Supreme Court in *KO (Nigeria)* and had assessed the facts of the Appellant’s case in light of these. Further, it was contended that it was clear that irrespective of whether the Appellant had seven years’ continual residence immediately pre-application, or earlier, the First-tier Tribunal Judge had applied a “reasonableness” test in concluding that “it is entirely reasonable to require her to return to Malaysia”. Having done so, the First-tier Tribunal Judge appropriately went on to consider exceptional circumstances applying the “unjustifiably harsh” test and it is submitted that there is no material error disclosed in the decision.
7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier

Tribunal Judge. The Appellant appears by her instructed Counsel, Mr Kannangara. The Secretary of State appears by her Home Office Presenting Officer, Mr Melvin.

The Rule

8. The relevant Rule here for due consideration is paragraph 276ADE(1)(iv) which states that an appeal under private life can be allowed if an applicant is:-

“(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK.”

Submission/Discussion

9. Mr Kannangara relies on the Grounds of Appeal, particularly the grounds to the Upper Tribunal and submits that the question in this case is whether the Appellant can rely on Immigration Rule 276ADE if she has left the UK after completing seven years of residence and returns to the UK. He submits that the judge had failed to consider the question and refused to engage with the argument and that that constitutes an error of law. He submits that the Appellant was brought back to the UK in 2016 by her grandmother and that the judge failed to consider the previous period in the UK and that it should be considered with the reasonableness assessment. It is his contention that the judge specifically failed to find that the Appellant had any significant life in the UK and had minimised the life established in the UK. He contends that the judge had failed to put weight on the fact that the child had nobody to receive her in Malaysia if returned and that she was living a stable life in the UK.
10. He accepts that the Appellant left the UK in 2015 but that it was necessary for her grandmother to return her and had the judge looked at the period prior to her leaving, then he contends that she would have made a different assessment of the case. He emphasises that the Appellant's mother does not want her back but the mother's partner was happy to take the Appellant's brother. His appeal was consequently withdrawn. He asked me to remit the matter back to the First-tier Tribunal for rehearing.
11. Mr Melvin points out that the family overstayed in 2007 and only returned to Malaysia when their appeal rights had been exhausted. The Appellant was then granted a visit visa and again overstayed and I am asked to take this into account. He submits it is very difficult to see how the Appellant could succeed under 276ADE against this historical background and submits that the judge has looked at everything. He submits that there is no material error of law under the Rules and submits that there are no compelling circumstances outside the Rules, pointing out that there are family members of the Appellant in Malaysia and that the judge had not

been accepting of the family members' evidence produced before her. He submits that the judge was entitled to make the findings that she did and that there are no merits in the appeal.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. It is difficult in this instant case to see how the submissions made on the Appellant's behalf amount to anything other than disagreement with the findings of the First-tier Tribunal Judge. The history of this matter is very fully set out in a detailed, well directed decision by the First-tier Tribunal Judge. The judge has detailed the evidence that she heard. It is clear that she was aware of the Appellant's previous immigration history and took that into account, as well as having regard to the welfare of the Appellant in accordance with the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009.
15. She noted that the core of the Appellant's case was that she had been abandoned by her mother and she gave full consideration to all the facts that were presented to her.

16. The decision is set out in a logical and reasoned manner and gives consideration firstly to the Rules. She was aware of the Appellant's immigration history, albeit that I acknowledge that that would have been at the instigation of the Appellant's mother.
17. At paragraphs 27 and 28 the judge has in considerable detail gone on to consider the Appellant's best interests and as to how she could continue to enjoy family life with her grandparents. The judge found that refusing the Appellant's application was a proportionate measure and a fair balance of the competing interests and that it was entirely reasonable to require her to return to Malaysia where her immediate family resides. The judge found that there were no exceptional circumstances in the Appellant's case which rendered refusal a breach of Article 8.
18. The judge has given a very detailed and thorough analysis based on the evidence that was before her. She was aware that the Appellant's mother does not want the Appellant but that in itself alone does not constitute a basis for allowing an appeal. The judge has considered all of the facts and given full and thorough reasons for reaching her conclusions. In such circumstances, the submissions made by the Appellant's legal representatives amount to little more than disagreement in an attempt to reargue the case. The decision discloses no material error of law and is dismissed.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No application is made for a fee award and none is made.

Signed

Date 21 March 2019

Deputy Upper Tribunal Judge D N Harris