



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/04560/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> February 2015

Decision & Reasons Promulgated  
On 13<sup>th</sup> March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MISS SASHA RENE FINCH  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr. G. Hodgetts of Counsel  
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of New Zealand born on 11<sup>th</sup> January 1996 and is therefore aged 19 years. She appeals against a decision of the Respondent dated 20<sup>th</sup> March 2014 to refuse her application for entry clearance as the child dependant of a representative of overseas business pursuant to paragraph 197 of the Immigration

Rules. Her appeal was allowed at first instance by First-tier Tribunal Judge Perry sitting at Hatton Cross on 21<sup>st</sup> October 2014 under Article 8. The Respondent appeals with leave against that decision but for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant submitted her application online on 24<sup>th</sup> February 2014 when she was already over 18. She wished to join her parents in the United Kingdom. Her father, Mr Finch's application as a sole representative for a business entity "Beef and Lamb New Zealand" (which is owned outright by the New Zealand Sheep and Beef Farmers Association) was granted by the Respondent and her mother Mrs Finch's application was granted in line with that as his dependant.

### **Immigration Law and Rules relevant to the Appellant**

3. Paragraph 197 sets out the requirements for limited leave to enter the United Kingdom as the child of a parent who himself has limited leave to remain in the United Kingdom. The child must be under the age of 18 (sub paragraph (ii)) and not leading an independent life, is unmarried and not a civil partner and has not formed an independent family unit (iii) and can be accommodated and maintained without recourse to public funds (iv) and will not stay beyond any period of leave granted to a parent (v). The burden of establishing that the requirements of the paragraph are met rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. The Appellant has also claimed that the refusal of the application breaches this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention. The burden and standard of proof of establishing this equates with the burden and standard of proof under the Immigration Rules.

### **The Respondent's Decision**

4. The Respondent refused the application stating:

"You have applied for entry clearance to come to the United Kingdom as the dependant of your father who is to be the sole representative in the UK of Beef and Lamb New Zealand. Your date of birth is 11<sup>th</sup> January 1996 and therefore you are over 18 at the time of your application. In the light of the above I am not satisfied that you are under the age of 18 or have current leave to enter or remain in this capacity as required by paragraph 197(ii)."

5. The Appellant's appealed against this decision arguing that she was entirely dependent on her parents and had no independent means or any accommodation of her own. She was unemployed. The question of age was an arbitrary figure, it did not demonstrate that she had the maturity and wherewithal to live on her own without her parents. She was not a settled individual living an autonomous lifestyle. Her existence was inextricably linked with her parents.
6. Under work permit Rules, dependent applicants over the age of 18 are entitled to a concession if they can demonstrate that they are entirely dependent on the main

applicant and not intending to lead an independent life. There was internal guidance to entry clearance staff in handling applications that as a concession outside the Rules Entry Clearance Officers had the discretion to issue entry clearance to children over the age of 18 provided that the work permit holder is an intra-company transferee who has been posted to the UK by his or her employer and the applicant is genuinely dependent on the work permit holder. It was argued that this provision should also be used for those applicants who apply for a sole representative visa (as Mr Finch had done) since they are transferring by their overseas employer to set up operations in the UK. A review by the Entry Clearance Manager did not accept that the decision to refuse the requested visa breached Article 8.

### **The Proceedings at First Instance**

7. The Judge was told that the Appellant's father's application for a sponsorship licence was not approved until 4<sup>th</sup> February 2014. The delay was due to Mr Finch receiving a compliance visit from the UK sponsorship compliance team to ensure that the UK office of New Zealand Beef and Lamb had in place adequate human resources systems to employ overseas nationals. The Judge heard evidence from the Appellant's mother and submissions from the representatives. It was conceded that the Appellant could not satisfy paragraph 197(ii) as she had turned 18 by the time she made her application, but the decision breached Article 8.
8. Beef and Lamb New Zealand initially sought to bring the Appellant's father to the UK via an application under Tier 2. The application needed to be started with an application for a Tier 2 Sponsor licence which began in November 2013. Had the application for the Tier 2 Sponsor licence been dealt with correctly and in a timely fashion, the Appellant's application as a dependant of a Tier 2 applicant (her father) would have been made before the Appellant attained the age of 18 years. This was not possible as the Tier 2 approval to her father was only finally granted on 4<sup>th</sup> February. It was contended that the Home Office's initial refusal of the Tier 2 application on 29<sup>th</sup> November 2013 was wrong. Had the application been granted at that stage a Tier 2 dependent's application could have been made prior to the Appellant's 18<sup>th</sup> birthday.
9. The Judge found that the appeal failed under paragraph 197(ii). There was no discretion which could be exercised on appeal as the wording of the paragraph made it clear that the requirements "are to be met". The Judge thereafter went on to consider Article 8. He found that there were two principle issues to be considered. The first related to efforts by the Appellant's father to obtain leave to enter under the UK sponsorship licence, the second issue, the age of the Appellant and her dependency on her family. The reason for the initial refusal on 29<sup>th</sup> November 2013 to grant a UK sponsorship licence to Beef and Lamb New Zealand was that the Home Office stated they were unable to ascertain the percentage shareholding of Beef and Lamb New Zealand between the UK offices and the overseas address. In fact there was no division of shares. Beef and Lamb New Zealand was owned outright by the New Zealand Sheep and Beef Farmers. If the Respondent had properly read the evidence contained with the application for the UK sponsorship

licence the UK offices should have been approved as clear evidence was submitted showing the link between the two overseas offices.

10. Had this application not been wrongly refused it would not have been necessary for the Appellant's father to proceed with an application under the sole representative visa category. Beef and Lamb New Zealand would have been granted their sponsorship licence and they would have been able to sponsor the Appellant's father and in turn he would have been able to bring his daughter in under the age of 18. The Judge felt this was a point but not a strong point. The primary obligation was upon the applicant for a sponsorship licence to make their case to the Home Office and to make the links in the case being presented. It was not for the Home Office to scrutinise the application for evidence of such links. The main responsibility lay with Beef and Lamb New Zealand and New Zealand Sheep and Beef Farmers to show the links between the two entities, but the responsibility was not on the Home Office to enter into correspondence about the apparent vagueness of the link between the two entities in advance of a decision being made.
11. The Judge continued at paragraph 46:

“That said in considering the issue of what is proportionate in terms of the **Razgar** test it is reasonable for the father to contend that the thrust of the application was to show links between the two organisations and the substantial documentation that was attached to the application for the UK sponsorship licence stands in support of such contention”.
12. The second issue, namely the question of dependency, brought together two linked matters. The timing of the UK sponsorship licence application and the age of the Appellant. The UK sponsorship licence application was submitted on 26<sup>th</sup> November 2013 and refused three days later on 29<sup>th</sup> November 2013. A further application was made almost a month later on 22<sup>nd</sup> December 2013 and was finally approved on 4<sup>th</sup> February 2014. The delay was due to the compliance visit. Only this human resources issue delayed the second application. That was relevant to the issue of proportionality. The Appellant's father had made all reasonable despatch, both in relation to the submission of the documents on the second occasion to the Home Office Sponsor Management Unit, and secondly, when it became apparent that the Appellant's 18<sup>th</sup> birthday would affect her status, steps were taken to apply under Rule 197(ii).
13. The Appellant's parents had delayed their arrival in the United Kingdom to stay in New Zealand whilst she put in an application for a Tier 5 Youth Mobility Scheme visa (which was approved and I was told the Appellant has since entered the United Kingdom under that visa). The Appellant felt that the whole process of applying for entry clearance had taken an emotional toll upon her and she did not attend to give evidence at the hearing. Her present employers would not give her time off to attend the hearing. The Judge found that although the Appellant was aged more than 18 she was financially and emotionally dependent upon her parents. This meant that

the issue to be determined was whether the interference was proportionate to the legitimate end being sought.

14. The Judge concluded at paragraph 51:

“I am satisfied and so find that the father made quite reasonable and conscientious efforts to meet the requirements of the information to be provided in support of his application for a UK sponsorship licence. Whilst accepting that he fell short of establishing the necessary outright share ownership of the two organisations he nevertheless made thorough and well-intentioned attempts to meet the requirements of the licence qualification. I am also satisfied and so find that the Appellant is a dependant of her parents, both in financial and economic terms, and finally the period of 25 days between the Appellant’s 18<sup>th</sup> birthday and the approval of the second UK sponsorship licence is insufficiently significant to make her refusal to enter the UK proportionate. Taking these matters together I find that it would be disproportionate to the legitimate public end that is sought to refuse her entry to the UK”.

He allowed the appeal.

### **The Onward Appeal**

15. The Respondent appealed against that decision arguing that the Appellant’s application was governed by the provisions of Part 8 of the Immigration Rules as enunciated in Appendix FM. By finding that the period of 25 days between the Appellant’s 18<sup>th</sup> birthday and the approval of the second UK sponsorship licence application was insufficiently significant to make the refusal proportionate, the Judge was in effect relying on a near-miss argument. That had been rejected in the case of **Patel [2013] UKSC 72**. “A near-miss under the Rules cannot provide substance to a human rights case which is otherwise lacking in merit”.
16. The application for permission to appeal came on the papers before First-tier Tribunal Judge Chambers on 18<sup>th</sup> November 2014. In granting permission to appeal he wrote:
- “The grounds seeking permission contend the Judge erred in not first considering Appendix FM, not giving reasons for considering Article 8 and in finding the Appellant was just 25 days out of time in making her application before her 18<sup>th</sup> birthday, in effect relying on a near-miss. The grounds are arguable”.
17. Following the grant of permission the Tribunal issued directions that the parties should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence, including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision, can be so considered at that hearing.

18. The Appellant's representatives filed a skeleton argument ahead of the hearing before me which argued that the determination of the First-tier disclosed no error of law. The second application for sponsorship was also made before the Appellant attained the age of 18 years and was successful, but it was only decided and approved (after a delay) on 4<sup>th</sup> February, that is after the Appellant's 18<sup>th</sup> birthday. The Judge had looked at the extent to which paragraph 197 was satisfied. Section E-ECDR (entry clearance as a dependent relative) of Appendix FM could not apply to the Appellant since her father was neither British nor had indefinite leave to remain or refugee status.
19. Where the Immigration Rules did not provide a complete code for assessing Article 8 applications, the proportionality test would be more at large guided by the **Huang** test and the UK and Strasbourg case law (**MM [2014] EWCA Civ 985**). In this case the proportionality assessment was more at large. There was no requirement to search for all potential Immigration Rules to use as a yardstick by which to test the proportionality of the refusal of entry clearance. It sufficed to consider the Rules under which the application was made and refused. Paragraph 197 was thus only a starting point for consideration of Article 8. The Rules were the beginning and not the end of the matter. The mere fact that one Tribunal had reached what might seem an unusually generous view of the facts of a particular case did not mean that it had made an error of law. One had to consider the overall impact on the individuals concerned when balanced against the state's interest. This was what the First-tier Tribunal had done.
20. The First-tier decision could not be interpreted as adopting a near-miss approach. The Tribunal had made reference to a range of factors which it had taken into account in assessing the proportionality. The Judge had said "Taking these matters together I find that it would be disproportionate to the legitimate public end that is sought to refuse her entry to the United Kingdom". The Judge had considered the history of the application prior to the Appellant's 18<sup>th</sup> birthday, had taken into account the legitimate aim of protecting the economic interests of the state, the impact and emotional toll of refusal on the Appellant and the only basis of refusal was the age issue. Thus the case was distinguishable from **Haleemudeen**. The Tribunal had not allowed the appeal on account of a narrow margin, but had pointed out correctly that the state's interests by imposing an age restriction was not damaged by the Appellant tipping over the relevant age limit on the facts of the particular case and that the Appellant retained the same level of dependency, both before and after her 18<sup>th</sup> birthday. The purpose of paragraph 197 was to facilitate family cohesion of those who the Immigration Rules deemed economically attractive to the United Kingdom by not excluding family members who were emotionally and financially dependent on the principle. A failure to allow dependency under paragraph 197 could dissuade principles from being economically active in this country to the United Kingdom's benefit. On the facts of this case the economic wellbeing of the United Kingdom was just as much protected as it would have been if the Appellant had been under the age of 18.

## The Hearing Before Me

21. For the Respondent it was argued that the relevant date for the Article 8 assessment was the date of decision of the Entry Clearance Officer which was 20<sup>th</sup> March 2014. The Judge had made no reference to the requirements of the Rules such as Appendix FM which he had misunderstood. That had flawed his proportionality exercise. Adult dependent relatives could enter the United Kingdom, for example in medical or care cases. These were rare cases and did not apply here. Adult entry could only be permitted where there were compelling circumstances. There was no lacuna in the Rules. The Respondent did not anticipate that an adult dependent relative would enter in anything other than extreme circumstances. The Judge could not use Article 8 to make a free-ranging assessment. The Immigration Rules were more than just a starting point. The Judge had taken matters as a near-miss. What the Judge had done was to use Article 8 to rewrite the Rules. The Appellant's application for a Tier 5 visa was successful and the Appellant was able to obtain it and use it to enter the United Kingdom.
22. At this point I queried with Counsel for the Appellant why if that was the case the Appellant was pursuing her opposition to the Respondent's appeal against Judge Perry's decision. The Appellant's argument was that she made her application under paragraph 197, and if that had been successful the family would have been kept together and the Appellant would have been granted three years' leave to remain in line with her parents. She would then be able to enter university to study, but at the present time could not obtain a degree because no course would accept her. She thus had practical reasons for pursuing her entry clearance application.
23. In reply the Presenting Officer argued that the appeal had become an artificial exercise. Article 8 was not designed to enable people to choose where to carry on their family life. The separation of parent and child in this case would be a result of their choice. Paragraph 197 did not sit in isolation but was now within Appendix FM. One had to ask what was the interference caused by the Respondent's decision in this case.
24. In response for the Appellant Counsel relied on his skeleton argument which I have summarised above. The purpose of the paragraph was to facilitate the admission of economic reactive people by admitting their family members. Section ECDR of Appendix FM was far removed from the facts of this case. That was to facilitate sick relatives. It was not concerned with facilitating whole family groups. The Judge was right to focus on the Rules as the starting point for his proportionality exercise. It had not been argued at the hearing at first instance that it was a core concept of Article 8 that one could not choose where to enjoy family life. The delay in finally granting the sponsorship licence application was outside the control of the Appellant and her family. The paragraph 197 application had been made thereafter because that had a relevant criteria. That had taken the history into account. The Judge had looked at the facts of the case that the Appellant was part of the family and taken into account the toll that the process had had on the Appellant.

25. The Presenting Officer argued that the fact that the Appellant's case came nowhere near to the criteria set out in section ECDR did not help the Appellant. **Haleemudeen** was a binding authority on the Tribunal. There was no concession of what the public interest was. The application made for the sponsorship licence had been made very close to the Appellant's 18<sup>th</sup> birthday. There was nothing to guarantee that it would be considered before the Appellant attained the age of 18 years.
26. As it was intended that this should be a rolled-up hearing in the event that I found an error of law, I asked Counsel for the Appellant whether there was any further evidence that the Appellant would wish to call in the event that an error of law was found. Counsel replied that there would be no further evidence as reliance was placed on the findings made by Judge Perry at first instance. The Respondent's main complaint in this case was that the Judge had not mentioned Appendix FM, but it was difficult to see how that was relevant. All matters should be considered in the round.

### Findings

27. The Appellant could not satisfy the Rules in this case as she had submitted her application for entry clearance under paragraph 197 after she had attained the age of 18 years. Whilst I appreciate the argument that there had been delay by the Respondent in considering the application, it is also fair to point out that the Appellant's father had in any event been cutting things rather fine by making the application for the sponsorship licence in November, two months before the Appellant was due to become 18. There can of course be no such thing as a near-miss argument as the Supreme Court made clear in **Patel**, nor was it particularly helpful to consider a concession for a different kind of visa entrant, namely the work permit holder dependants. The issue simply was whether the Appellant could succeed outside the Immigration Rules under Article 8.
28. It was always going to be difficult for the Appellant to succeed under Article 8 since the reason for the separation was the fact that the Appellant's father, accompanied by his wife, the Appellant's mother, wished to come to the United Kingdom so that the father could be the sole representative for a commercial organisation, Beef and Lamb New Zealand. The disruption caused to family life was caused by the decision of the parents to come to this country and to leave their daughter behind.
29. The significance of paragraph 197 is that the Rules recognise that economically active applicants will be discouraged from making an application to come to the United Kingdom if they cannot bring their dependants with them. In a sense therefore the Appellant could be said to have lodged her application under paragraph 197 not because it stood any chance of success, clearly it did not because she was already over 18, but in order to draw attention to the underlying principles of paragraph 197 which should then translate into an application under Article 8.
30. The starting point for an Article 8 assessment must be that the Appellant cannot succeed under the Rules and is therefore seeking leave to enter the United Kingdom



outside the Rules. That is a powerful factor to be weighed in the balance and indeed in many cases it is the end of the exercise. In this case the Article 8 application was more nuanced. I accept the Appellant's point that the Judge did not allow this appeal on a near-miss basis. He could not have done so, but had he done so that would have been a clear error of law and would have led to the decision being set aside. As has been said in other cases the dependency of a child does not necessarily end at the age of 18. In this case the Judge was clearly impressed by evidence that this Appellant had a very strong dependency on her parents and he set out with care the evidence that justified that conclusion. The argument therefore was not that the Appellant had only just attained the age of 18 years and therefore paragraph 197 should apply, but rather that the principles which underlay paragraph 197 were relevant when considering an application outside the Rules. It is only exceptionally that an application under Article 8 outside the Immigration Rules will succeed. That has been made clear since the House of Lords decision in **Huang**. The question before me was whether the Judge was right in law to find that this was one such case? The mere fact that his decision might be characterised as generous does not of itself make it wrong in law as the Appellant's skeleton argument makes clear.

31. The Appellant's argument, in part at least, is that the principles underpinning paragraph 197 are just as applicable under Article 8 whether or not the applicant is either side of the aged 18 requirement. If under 18 the applicant succeeds under the Rules. If over 18 an applicant must show (as the Appellant in this case did) that there is a strong dependency on her parents, such that the legitimate aim of immigration control would mean that the interference in the Appellant's private and family life was disproportionate.
32. If the Judge had formed the view that the Appellant was a more robust individual than was presented in the evidence, then the case for showing an emotional and financial dependency would be significantly lessened. It was clear that the Appellant could not meet any of the provisions of Appendix FM for entry clearance as a dependent relative and has not sought to argue that. Nor could she meet paragraph 197, but I find that the Judge did give adequate reasons for explaining why this appeal should succeed outside the Rules.
33. As was pointed out the assessment of Article 8 had to be based on factors at the date of decision, not the date of hearing. The fact therefore that the Appellant had subsequently been granted entry clearance under Tier 5 and had entered the United Kingdom was not relevant to the Article 8 assessment. It was thus not an academic exercise for the Appellant to pursue her appeal against the Respondent's decision. There are in fact certain benefits to the Appellant if she succeeds under Article 8 rather than continues with her Tier 5 visa, but those were not matters of relevance to the Judge at first instance and as I am dealing with an error of law I do not consider that they are relevant to my decision either.
34. Since hearing this case the Upper Tribunal has given further guidance on the approach to Article 8 outside the Rules where (as in this case) the provisions of

section 117 of the Nationality, Immigration and Asylum Act 2002 apply. In the case of Dube [2015] UKUT 00090 the Upper Tribunal stated:

“... (e) sections 117A-117D do not represent any kind of radical departure from or “override” of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in Razgar [2004] UKHL 27. Sections 117A-117D are essentially a further elaboration of Razgar’s question 5 which is essentially about proportionality and justifiability.

(2) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form. “

35. In this case I find that although the Judge did not specifically refer himself to section 117A to D of the 2002 Act he did carry out the balancing exercise with due regard to the public interest and I find made no material error of law in doing so.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to allow the Appellant’s appeal against the Respondent’s decision to refuse entry clearance.

Respondent’s appeal against the decision of the First-tier Tribunal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 3rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

**TO THE RESPONDENT**  
**FEE AWARD**

The Judge made a fee award of £140. As I have upheld his decision I uphold the fee award

Signed this 3rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft