



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

Appeal Number: OA/10245/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre On 14 June 2016	Decision Promulgated On 29 July 2016	&	Reasons
--	---	--------------	----------------

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

**HUAY MING CHAI
(NO ANONYMITY ORDER)**

Appellant

and

ENTRY CLEARANCE OFFICER, MANILA

Respondent

Representation:

For the Appellant: Mr A Pipe, instructed by Lin & Co Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal against the decision and reasons statement of First-tier Tribunal Judge Cameron that was promulgated on 20 August 2015. Judge Cameron dismissed the appellant's appeal against the Entry Clearance Officer's decision of 18 August 2014 refusing the appellant entry clearance as a child.
2. In his submissions, Mr Pipe reminded me that the appeal below had been solely on the question of whether the refusal of entry clearance was a disproportionate interference in the appellant's family life rights. The

appellant had conceded that she could not meet the financial requirements of appendix FM to the immigration rules. The Presenting Officer had conceded that the appellant enjoyed family life with her mother and stepfather who live in the UK. The question for Judge Cameron was, therefore, whether the refusal of entry clearance amounted to a disproportionate interference with family life.

3. Mr Pipe argued that the judge erred in her assessment because rather than considering the positive obligation under article 8 of the human rights convention to maintain family life the judge had focused on maintaining the status quo. Mr Pipe submitted this approach was wrong in law because it resulted in key facts being ignored, such as the close relationship between the appellant and her stepbrother who lives in the UK.
4. In addition, or in the alternative, Mr Pipe argued that Judge Cameron had failed to identify the best interests of the appellant's stepbrother who is a British citizen living in the UK. Under article 8 of the human rights convention, the judge had to consider the effect excluding the appellant might have on all members of the family and therefore it was necessary for the judge to make findings of fact regarding the best interests of the stepbrother. It is trite law that failure to make relevant findings is a legal error in itself.
5. Mr Pipe's last argument was that at several points it would appear that the judge regarded the appellant as an adult. At the date of decision she was 17 years and 9 months old. Mr Pipe suggested that it was improper for the judge to treat her as an adult even though by the date of hearing she had turned 18. Although case law indicates there is no bright line as to when a child might no longer be dependent on their parents, there was no case law to suggest that a person under 18 could be treated as an adult.
6. Mr Mills responded to these issues and accepted there was no explicit consideration of the best interests of the appellant or her stepbrother despite this having to be a relevant factor (see TE (Jamaica)). Mr Mills sought to persuade me that Judge Cameron's reliance on the Court of Appeal's judgment in SS (Congo) meant it was open to me to find that it was implicit that the best interests of the children had been considered. Mr Mills also pointed out that it was clear from paragraph 53 that Judge Cameron regarded the appellant as being a child at the date of decision.
7. Mr Mills reminded me that family life rights cannot be used to circumvent the requirements of the immigration rules. At paragraphs 53 and 54 the judge properly considered the appellant's circumstances at the date of decision and those of her immediate family and at 57 found there was nothing compelling to outweigh the requirements of the immigration rules. As Mr Pipe had reminded me, the appellant had conceded that she could not meet the financial requirements of the immigration rules.
8. Mr Mills acknowledge that Judge Cameron did not expressly consider the impact exclusion of the appellant might have on her stepbrother or of the family not being together. He submitted that although this was a failure, it could not be material to the outcome given the guidance in SS (Congo).

9. Whilst discussing with both Mr Pipe and Mr Mills the competing arguments, Mr Mills acknowledged that it would not be reasonable to expect family life to be established in Malaysia. In other words, there was no argument that the appellant's family life could be maintained by her mother, stepfather and stepbrother moving to live with her. The question, therefore, in relation to the appellant's family life rights was limited to whether in all the circumstances it was proportionate to expect the family group to live separately.
10. Mr Pipe took me to the witness statements which were the only evidence before Judge Cameron relating to the best interests of the children. Although such evidence was limited, the failure of the judge to make any findings in connection with the evidence was a clear legal error. In particular, the judge failed to have regard to the clear wishes of the appellant to live with her family in the UK or the fact that the appellant had established a good relationship with her stepbrother. It was appropriate to expect the relationships to be maintained without living together.
11. Having considered the competing arguments and as I announced at the end of the hearing I find that Judge Cameron erred in law. There is no challenge to her findings in relation to the first four questions posed by the House of Lords in Razgar and those finding must stand. But it is evident that she failed to make relevant findings in relation to the appellant's personal and family circumstances. This undermines her proportionality assessment because she did not correctly carry out the balancing exercise. Although she made appropriate findings in relation to the public interest considerations expressed in s.117B of the 2002 Act (as amended) she did not make findings on key issues relating to the appellant's circumstances. She cannot, therefore, have had in mind all relevant factors when reaching her conclusion.
12. In reaching this conclusion I reject Mr Mills's submission that I could find that Judge Cameron had implicitly considered the best interests of the children. To do so would be to read into the decision and reasons statement findings which were not made. I have no power to so do.
13. As relevant findings on the available evidence were not made, the failure must be regarded as being potentially material to the outcome and for that reason I find it is necessary to set aside Judge Cameron's decision.
14. Mr Pipe and Mr Mills suggested that I remake the decision on the evidence provided to the First-tier Tribunal. As I indicated at the end of the hearing, I would consider whether that was possible but if it was not then I would remit the appeal to the First-tier Tribunal for findings to be made.
15. Having reviewed the evidence I have decided that it is not appropriate for the Upper Tribunal to remake the decision. It is clear that the arguments in this case have developed since the witness statements were made and it is not clear that those making the statements were aware of their significance. It is not in the interests of justice to limit the evidence to that previously submitted.
16. I remit the appeal to the First-tier Tribunal with the following directions.

17. It can be heard by any judge other than Judge Cameron.
18. The findings in relation to the first four Razgar questions are preserved.
19. The issues are limited to the proportionality exercise and it will be for the judge to make findings as to the nature of the family life (including the best interests of the children) as they were at the date of decision.
20. The parties are at liberty to provide any additional evidence in regard to this issue subject to all evidence being received by the First-tier Tribunal at least 14 calendar days before the re-hearing.

Decision

The decision and reasons statement of Judge Cameron contains an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal subject to the directions given in paragraphs 16 to 19 above.

Signed
2016

Date **29 July**

Judge McCarthy
Deputy Judge of the Upper Tribunal