



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/11982/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 25th April 2016

Decision & Reasons Promulgated
On 17th May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

TL (VIETNAM)
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellant: Mr Thornhill, Solicitor, Thornhill Solicitors

For the Respondent: Mr Geoff Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Brunnen sitting at Manchester on 25 June 2015) whereby he dismissed, on financial grounds under the Rules and on Article 8 grounds outside the Rules, the appellant's appeal against the decision of an Entry Clearance Officer to refuse her entry clearance as a child under the age of 18 for the purposes of settlement with her mother, who is present and settled here. The First-tier Tribunal made an anonymity direction in favour of the appellant on account of her being a minor, and I consider it is appropriate that she should continue to be accorded anonymity for these proceedings in the Upper Tribunal.

Reasons for the Grant of Permission to Appeal

2. On 16 December 2015 First-tier Tribunal Judge Keane granted the appellant permission to appeal for the following reasons:
 2. The judge was concerned with appeal against a decision made by an Entry Clearance Officer. The appellant was aged twelve years at the date when the Entry Clearance Officer made his or her decision. However, if paragraph 62 of the judge's most meticulous and comprehensive decision is read with care he observed that the appellant was now aged thirteen years and the judge may have considered the applicability of the relevant Immigration Rules and to have resolved the Article 8 issue with that age in mind and not the appellant's age at the date when the respondent made the decision under appeal.
 3. Arguably the judge's decision might have been different if he had considered the appellant as a twelve year old girl and not as a thirteen year old girl. The judge's arguable error may have permeated his reasoning as a whole and but for such an arguable error of law the judge might have arrived at a different decision.

The Rule 24 Response

3. On 29 December 2015 John Parkinson of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, he submitted that the judge of the First-tier Tribunal had directed himself appropriately. He noted at paragraph [53] that no submissions were made in respect of Article 8, although the claim had not been expressly abandoned. The judge had considered the relevance of the appellant's age in respect of her need for support, given the medical condition of the sponsor's mother as outlined at paragraphs [60] and [61]. The judge was clearly considering the support that the appellant required in the light of the issues raised. It was absurd to suggest that an appellant who was 12½ years old at the date of decision was in any way materially less competent than one who was aged 13. Any error was simply not material, and the determination of the judge was not damaged to any significant degree.

The Hearing in the Upper Tribunal

4. At the hearing before me, Mr Thornhill took me through the relevant chronology. The appellant's date of birth was 9 February 2002. The date of application was 4 July 2014, and the date of decision was 28 August 2014. He agreed that the appellant was 12½ years old at the date of decision. The date of the hearing before Judge Brunnen was nearly a year later.
5. He submitted that the judge's error in referring to her age at the date of the hearing, as opposed to her age at the date of decision, was material as the sponsor had given evidence in her witness statement about a visit to Vietnam in the summer of 2014 when she had been able to discuss with her daughter the sensitive topic of her daughter entering puberty, whereas her daughter was not willing to discuss this topic with her grandmother (the sponsor's mother). He referred me to paragraph 6 of the witness statement made by the partner of the sponsor in the UK who said that

he spoke frequently to the appellant on the telephone, and it was clear to him that she was missing day-to-day contact with her parents.

6. With regard to the financial requirements, he submitted that this case was as a near miss as you could ever get. The financial requirements were in fact met, but the evidence relating to the partner's earnings was in the wrong format.
7. Mr Thornhill referred me to **Mundebe [2013] UKUT 88** on the topic of Section 55 and paragraph 297(i)(f) of the Rules.
8. Mr Harrison adopted the Rule 24 response settled by his colleague, and maintained that no material error was made out.

Discussion

9. The source of the judge's error can be traced back to the refusal of entry clearance which describes the appellant as now being 13 years old, when in fact she was aged 12½.
10. The primary ground of refusal was the Entry Clearance Officer's insistence that the appellant's grandmother had been primarily responsible for her upbringing in Vietnam. The Entry Clearance Officer said this conclusion was underpinned by the fact that her mother had decided to leave her at least five years ago. The Entry Clearance Officer also refused the application by reference to paragraph 297(i)(f). His reasoning was if the appellant was living in serious and compelling family or other circumstances, it would be reasonable to expect an application for settlement to join her mother in the United Kingdom to be made at the earliest opportunity. She attended school in Vietnam and lived with a large extended family. He was mindful that his mother said that her grandmother's health was failing, but he was also mindful that other children and adults, all of whom were close family members of the appellant, lived in the same property. Overall, he did not consider that her circumstances in Vietnam were exceptional in relation to those of other 13 year olds living there, and he was also reminded that her circumstances in Vietnam had not changed since her mother went to the United Kingdom.
11. In order to meet the financial requirements of the Rules, her sponsor needed a gross income of at least £22,400 per annum. The partner's tax documents showed that he had an income before tax of £20,458 from self-employment, running a nail bar. But she had failed to provide a number of specified documents relating to the partner's self-employment and income, and therefore the income of the partner could not be taken into account.
12. Both parties were legally represented before Judge Brunnen. At paragraph [10] of his subsequent decision, Judge Brunnen said as follows:

"Mr Thornhill made clear that the appellant does not seek to say that there are serious and compelling reasons that make her exclusion undesirable."

13. Mr Thornhill confirmed to me that this was correct. Mr Thornhill only sought to advance the case that the sponsor had had sole responsibility for the appellant's upbringing at the date of decision, and the judge was so persuaded.
14. The judge then proceeded to consider the financial evidence at some length. At paragraph [42] he found that, but for the missing SA300 or SA302 - which is mandatory evidence, the evidence concerning Mr Nguyen's self-employment would be satisfactory to establish within the relevant year that he had gross self-employed earnings of £18,000.10. The judge was satisfied that the sponsor earned £384.40 each month in the six months prior to the date of application, equivalent to an annual gross income of £4,612. If the sum was added to Mr Nguyen's profit of £18,010, the result would be £22,622, which would be sufficient to satisfy the requirement of £23,400. But owing to the lack of the SA300 or SA32, which was mandatory evidence, he could not take Mr Nguyen's earnings into account and therefore the appellant failed to satisfy the financial requirement.
15. The judge went on to address the Article 8 claim in paragraphs [53] to [64]. In his consideration, which ran to five pages, the judge cited a number of passages from **SS Congo [2015] EWCA Civ 387**, including the Court of Appeal's observations on near miss cases.
16. At paragraph [58] he said that, of all the relevant requirements of Appendix FM-SE, the SA300 or SA302 appeared to him to be the least important in establishing the earnings of the appellant's sponsor and stepfather. So he took this into account. However, he continued in paragraph [59], he was not satisfied that the best interests of the appellant pointed strongly in favour of entry clearance being granted. She was living in the household where she had lived all her life. There was nothing to suggest she was not well cared for and well provided for. She was being educated. Her mother was now able to make reasonably frequent visits to see her. There was nothing to suggest that she pined for her mother, or was unhappy living in the only home she had ever known.
17. The only factual concern for her present welfare and best interests was that it was said that her grandmother was now in poor health and finding it difficult to care for her. However, the judge did not gain the impression from the evidence of the sponsor that her mother's health was a serious problem for the appellant's welfare. The judge continued in paragraph [62]:

"I bear in mind that the appellant is now 13 years of age. No doubt she needs supervision and guidance but a girl of this age can generally be expected to manage all the activities of daily living without assistance and there is nothing to suggest that the appellant is any different."
18. The judge concluded in paragraph [63] that he was satisfied it was not contrary to the appellant's best interests to remain in her present circumstances in Vietnam. The judge went on to refer to paragraph [40] of **SS Congo** where the Court of Appeal held that the LTTE Rules maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. Judge Brunnen found that

the evidence in the case before him did not take it out of the ordinary run of cases. He found there were not compelling circumstances that were not sufficiently recognised by the Immigration Rules and which required the appellant to be granted entry clearance. He found that the near miss in respect of the evidence under Appendix FM-SE did not tip the balance in her favour. He found that the respondent's decision was proportionate.

19. I consider that in an exemplary judgment Judge Brunnen has given adequate reasons for dismissing the appellant's appeal under Article 8 ECHR, and that his approach is fully compliant with the approach endorsed by the Upper Tribunal in **Mundeba**.
20. I do not consider that the judge's error about the appellant's age at the date of decision is material. It did not, on analysis, permeate his reasoning as a whole, and he would not have arrived at a different decision if he had directed himself that the appellant was in fact aged 12½ at the date of decision, as opposed to being aged 13.
21. The evidence as to the mother discussing the signs of puberty with her daughter was relied on as demonstrating sole responsibility, not as showing that the emotional needs of the appellant were unmet as a result of her living with her grandmother and uncle, as opposed to living with her mother and stepfather. Furthermore, there is no substance to the argument advanced in paragraph 7 of the grounds of appeal that the First-tier Tribunal Judge failed to take such evidence into account. It was open to the judge to find, as he does at the end of paragraph [59], that there was nothing to suggest that the appellant was pining for her mother or was unhappy living in the only home she had ever known. The judge took into account all relevant considerations bearing on the question of proportionality, and made findings that were open to him on the evidence. Accordingly, no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed

Date

Deputy Upper Tribunal Judge Monson