



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15729/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2019

Decision & Reasons Promulgated
On 28 August 2019

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MISS S S
(ANONYMITY MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr P Jorro, Counsel instructed by Waterstone Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity direction. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any formal publication thereof shall directly or indirectly identify the appellant.
2. This is the appellant's appeal against the decision of First-tier Tribunal Judge Lucas promulgated 18 April 2019 dismissing her appeal against the decision of the Entry

Clearance Officer dated 30 October 2017 to refuse her entry clearance application made on 8 June 2017. The appellant's father and sponsor is N S, a British citizen.

3. First-tier Tribunal Judge Robertson granted permission to appeal on 30 May 2019 on the basis that Article 8 had not been considered and there needed to be a proportionality assessment outside the Rules. That judge also considered that the sole responsibility findings might be sustainable. With respect and for the reasons set out below, I disagree.
4. At the error of law hearing on 8.7.19, I found, for the reasons stated in my decision promulgated on 16.7.19, that there was an error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside and remade. I retained the remaking of the decision to myself in the Upper Tribunal. However, in the absence of an interpreter it was not possible to proceed immediately to remake the decision and thus the matter was adjourned with directions for a continuation hearing, which came back before me on 21.7.19.

The Error of Law

5. The decision is peculiarly drafted, with bullet points rather than numbered paragraphs, making it difficult to navigate and reference the decision. That is not in itself a material error. However, I am satisfied that the judge failed to adequately address the issue of sole responsibility and to engage adequately with the extent of the evidence submitted to the Tribunal.
6. At the error of law hearing, Mr Jarvis, representing the respondent, very fairly accepted that the judge had not entirely engaged with the evidence, in particular whether the evidence indicated that the mother had abdicated responsibility and more importantly whether the father had sole responsibility for the appellant. The judge's findings appear to be focused in an odd way. The judge accepted the evidence that the sponsor had a parental role, evidenced in part by a number of visits to the appellant, but concluded that the responsibility was shared with others. I found that the judge did not properly consider whether the father could have retained sole responsibility but delegated the day-to-day care to his brother, the appellant's uncle. The judge expressed a number of concerns about the factual history of the case and, on the penultimate page of the decision, stated that the factual scenario "did not add up," which was taken as to cast doubt on the validity of the claim. Included within that was the concern as to why the uncle could not continue to look after the appellant when he was also looking after and would continue to look after her siblings. It is clear the decision is not properly structured and does not adequately address the evidence and the relevant issues. I bear in mind that the burden is on the appellant, but on the facts of this case one might question what further evidence could have adduced to demonstrate that her father retained sole parental responsibility. Of course, it is a matter for a judge as to what weight to be given as to that evidence but in the relatively brief and poorly-structured decision the judge has not adequately engaged with that evidence or resolved all the crucial

issues, as I have explained above. In all the circumstances, I concluded that the decision could not stand and must be set aside to be remade.

Remaking of the Decision

7. I have today heard from the sponsor, through the Bengali interpreter. I have taken into account the oral evidence and submissions as well as the appellant's revised bundle sent under cover of letter dated 5.8.19. A further bundle, including a skeleton argument and case authorities, as well as a revised index, was served under cover of letter dated 16.8.19, and this has also been carefully considered. I have considered the evidence in the round, as a whole, before reaching any findings of fact or my conclusion in the appeal.
8. The application dated 31.5.17, when the appellant was 17 years of age, was for entry clearance pursuant to paragraph 297 of the Immigration Rules as the child of a parent settled in the UK. I bear in mind that the burden of proof in relation to meeting these requirements is on the appellant, on the balance of probabilities. However, as the only right of appeal is on human rights grounds, it is for the respondent to demonstrate that the decision is proportionate to the family and private life rights of the appellant and her sponsoring father in the UK, to the same standard of proof. Following Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC), whilst the ability to satisfy the Immigration Rules is not the question to be determined in article 8 appeals against refusal of entry clearance, it is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.
9. The application was refused on the basis that as the parents are still married the appellant's mother "bears a parental responsibility" towards her and thus the father does not have sole responsibility for her upbringing and welfare. It was said that it had not been demonstrated that the father regularly visits the appellant and provides for her financial needs and had not demonstrated that he had taken decision with regard to the appellant's education, welfare or health. Further, there was nothing to demonstrate that the monies forwarded by the father to his brother, the appellant's uncle, were used for the appellant's express needs. It appears to have been accepted in the refusal decision that since 2014 the appellant has been under the day to day care of her uncle. However, it was concluded that the uncle and not the appellant's father who had taken the important decisions about her upbringing since her mother stated in 2014 that she could not longer cope with her parental responsibilities towards the appellant and her three siblings.
10. The respondent also addressed the alternative avenue of serious and compelling family or other considerations which make exclusion of the child undesirable, pursuant to 297(f). In that regard, it was noted that she is in full-time education and has access to basic essentials and it was not demonstrated that her circumstances were difficult in any way. Neither did the respondent consider that there were any exceptional circumstances to justify granting entry clearance outside the Rules

pursuant to article 8 ECHR on the basis that to refuse to do so would have unjustifiably harsh consequences for the appellant or her family. Her best interests were also said to have been taken account of.

11. The appellant's father came to the UK in 2005 as a work permit holder, leaving his wife and children behind in Bangladesh. He became a naturalised British citizen in 2011. It is not dispute that until 2014 the mother and father shared parental responsibility and it was not asserted in the refusal decision that he has at any time abandoned his parental responsibility. If, as claimed, he was working to provide for his family in Bangladesh, that would be evidence going towards a continuing interest and responsibility for his wife and children. The appellant's case is that her mother has suffered from ill-health, as a result of which in 2014 she abdicated her parental responsibility for the appellant and her siblings, a claim supported by the mother's affidavit and the medical evidence which indicates she is suffering from liver and kidney disease. In consequence, the sponsoring father arranged for his brother, the appellant's uncle to take over day to day care of the appellant and her siblings, although it appears that the children continue to live in the same home as their mother. The evidence before the tribunal was that until 2017 the uncle also lived in the same house, but has now moved to a property 100 yards away.
12. The sponsor's evidence was not entirely clear but I found him honest and straightforward in those matters he could answer. He confirmed that he used to send money to his brother for looking after the sponsor's family in Bangladesh. He said that in 2017 he stopped sending money but when asked about 2017 remittals said that he now sends less. Elsewhere in his evidence he explained that he now sends money directly to the appellant. However, as he is ill and unable to work, he doesn't send as much as he used to. He is 54 years of age. He maintained that despite his reduced circumstances, he continues to support the appellant financially and would be able to adequate accommodate and maintain her in the UK, though those issues were not taken in the refusal decision.
13. There was some confusion whether the appellant was still in study or school as the sponsor suggested. The documents from the school suggest that she passed her final exams in 2017. However, the sponsor said that she is taking further study and wants to pursue a career as a teacher in the UK. He said he alone paid the £30 monthly school fees.
14. Mr Avery pursued whether things had changed since the application made in June 2017. The appellant is now 20 years of age and the father accepted that she looks after her younger siblings, saying that there was no one else to do so. She was unable to look after her mother, who sometimes lives with them and sometimes with her own brother, because of her studies. It was not explained who would look after the other children if the appellant came to the UK but that is not directly relevant to the issues in the appeal.
15. In summary, it is asserted that the father has maintained a sole parental responsibility from 2014 whilst delegating the day to day care and control to the

uncle. This is supported by documentary evidence, including the letter at C16 from the school indicating that in March 2014 the father met with the appellant's head teacher, explaining that he would be taking sole responsibility for her, and introduced his brother. It is confirmed that from time to time the sponsor maintained regular contact with her, through the appellant's mobile phone, to gather information about her instruction and study, and did so until she passed her final exam in February 2017. It is said that the uncle attended school meetings and makes contact on behalf of the father. On the sponsor's evidence, it appears that the uncle no longer plays the day to day care role he did from 2014. Given that the appellant is herself now 20 years of age may explain that.

16. That the father has made and continues to make remittances of money from the UK to his brother in Bangladesh is not in dispute. The respondent challenged whether the monies are actually expended for the appellant's benefit. On the evidence there would seem to be no other reason why he would send money other than the support of his family, to include the appellant.
17. The issue of sole responsibility was considered by the Upper Tribunal in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, where it was held to be a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he or she has abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. "The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life."
18. I am satisfied on the balance of probabilities, there being no evidence to the contrary, that even if the appellant continues to live in the same house as her mother, the mother has abandoned or abdicated her parental responsibility for the appellant, as well as for her siblings. In this regard, it is noteworthy that the refusal decision did not challenge that the uncle has had day to day care of the appellant since 2014.
19. I find that the evidence, taken as a whole, demonstrates to a degree at least satisfying the standard of proof of a balance of probabilities that the father had had sole responsibility for the appellant's upbringing, notwithstanding that the day to day care and control is delegated to her uncle. The claim is more than adequately supported by the oral evidence and documentary support. As I suggested in the error of law decision, it is difficult to see what more the appellant could adduce to demonstrate that she meets the requirements of the Rules.
20. As the appeal is on article 8 family life human rights grounds only, the ultimate issue is whether the decision to refuse entry clearance is proportionate, taking into account the degree to which the appellant has demonstrated that she meets the requirements of the Rules. This comes down to a balancing exercise between on the one hand the legitimate aim to protect the well-being of the UK through the enforcement of immigration control and on the other the family life rights of the appellant and her father in the UK, it having been established that article 8 is engaged on the facts of

this case. There is no other relevant public interest consideration and it is not in dispute that the father will be able to provide for maintenance and accommodation of the appellant on entry to the UK.

21. An issue arose at the hearing as to whether the tribunal was required to consider the circumstances at the date of decision, or whether because it is a human rights appeal I should take account of the appellant's present circumstances, where she is now 20 years of, probably looking after her siblings, and less dependent on the sponsor. I first note that paragraph 27 of the Immigration Rules provides that an application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision and entry clearance will not be refused solely on account of the applicant having reached the age of 18 between receipt of his application and the date of the decision on it, which is what happened in this case. I am also satisfied, notwithstanding Mr Avery's suggestion to the contrary, that the appeal on human rights grounds should also be decided on the basis of the circumstances at the date of decision. It is an appeal against the decision of the Entry Clearance Officer refusing entry clearance in 2017. I conclude that it would be unfair to say the least for the respondent to now rely on a change of circumstances when I am satisfied that the father did have sole responsibility at the date of decision. Mr Jorro made another point, suggesting that as the wording of 297 includes the phrase "has had," it must relate to the past and not necessarily the present. If that it is right, it may not matter how long the father had sole responsibility and whether or not he still had it at the date of application. I am not persuaded by this argument as if the father did not have sole responsibility at the date of application and decision and only had it at sometime in the past, it would make a nonsense of the purpose of the Rule. However, on the facts of this case the resolution of that argument is not determinative as I am satisfied that at the date of decision the father had sole responsibility between at least 2014 and the date of decision in 2017, and that he merely delegated the day to day care to his brother in Bangladesh, providing regular funds for the support of his family.
22. On the Razgar stepped approach, including the proportionality balancing exercise, and on an assessment of the evidence as a whole, I reach the clear conclusion that the decision refusing entry clearance created an interference with the family life established between the sponsor and the appellant so as to engage article 8. Whilst the decision was in pursuit of the legitimate aim of protecting the UK through immigration control, the application should have been allowed on the true determination of the facts of this case. That fact is highly relevant to the proportionality balancing exercise. It follows that even though circumstances may have changed in the lengthy intervening period, I am satisfied that the decision was clearly disproportionate to family life rights; the balance comes down firmly in the appellant's favour. Her application should have been granted.

Notice of Decision

23. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that it needs to be set aside

I set aside the decision.

I remake the decision in the appeal by allowing it.



Signed

Upper Tribunal Judge Pickup

Dated 21 August 2019

**To the Respondent
Fee Award**

In the light of my decision I make no fee award. The appellant has now adduced sufficient evidence to demonstrate quite clearly that the application should have been granted. However, much of that evidence post-dates the application and decision I am not satisfied that there can be any criticism of the respondent in refusing the application on the decision made on the available evidence.



Signed

Upper Tribunal Judge Pickup

Dated 21 August 2019