Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01399/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House (by remote means)	**Decision & Reasons Promulgated**
On 24th November 2020	**On 3rd December 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ERIKA TESORO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Not in attendance
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 30 June 2020, UTJ Lindsley found an error of law in the decision of First-tier Tribunal Judge Paul promulgated on 24 December 2018. A copy of that decision is appended to this one at Annex A.

2. Directions were issued by the Upper Tribunal on 24 August 2020 for the remake of this appeal to be heard by remote video means, albeit

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the Respondent indicated on 8 October 2020 that the appeal could be determined on the papers as no further submissions were to be made on her behalf. The appeal was however listed for remote oral hearing in the light of the need to take precautions against the spread of Covid-19 and on the basis that the appeal could be fairly and justly determine in this way. The hearing proceeded via remote Skype for Business with no apparent technical issues at the time.

3. At the hearing, the Respondent was represented but no one had joined the Skype invite on behalf of the Appellant when the meeting was opened at 10am, at the listed start time of 10:30am or shortly thereafter when I commenced the hearing; or at anytime in between. In the circumstances of the case where the Respondent had already indicated no further submissions would be made, I asked Mr Melvin if the appeal was opposed given the findings from the First-tier Tribunal and the Upper Tribunal that the Appellant met the requirements for a grant of entry clearance under paragraph 301 of the Immigration Rules and there appeared to be no countervailing public interest matters to mitigate against allowing the appeal on Article 8 grounds.

4. Mr Melvin indicated the Respondent's agreement that the appeal should be allowed on the basis of the findings made that the Appellant met the requirements of the Immigration Rules and in the absence of any other public interest factors which would adversely affect the Appellant in the proportionality balancing exercise.

5. On this basis, I indicated that the appeal would be allowed on human rights grounds with a written decision to follow. In these circumstances, I did not request that any further inquiries were made of the Appellant or her representatives as to their attendance at the hearing as no submissions were required on her behalf.

6. After the conclusion of the oral hearing, the Appellant's solicitors contacted the Upper Tribunal, stating that they were still held in a lobby for the Skype hearing and asked about the current situation. There had been no indication of this at the time of the hearing to myself, my clerk or Mr Melvin. On the basis that the appeal was to be allowed in favour of the Appellant, I did not consider any further action was required in relation to the hearing other than asking that the Appellant's solicitors be updated as to the above with the indication that this written decision would follow.

Findings and reasons

7. There is no longer any dispute in this appeal that the Appellant meets the requirements of paragraph 301 of the Immigration Rules for a grant of entry clearance and in those circumstances, there is no public interest in refusing her application for entry clearance. No other matters which could be adverse to the Appellant in the proportionality balancing exercise were raised or relied upon by the

Respondent and I find that there are none. As a result, I find that there is a disproportionate interference with the Appellant's right to respect for family life contrary to Article 8 of the European Convention on Human Rights and her appeal is therefore allowed on human rights grounds.

Notice of Decision

As in the decision promulgated on 30 June 2020, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The decision of the First-tier Tribunal is set aside and remade as follows.

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed G Jackson Date 24th November 2020

Upper Tribunal Judge Jackson

Annex A: Decision on Error of Law

DECISION AND REASONS

Introduction

1. The appellant is a citizen of the Philippines born on 28th January 2001. She applied for entry clearance to come to the UK as the child of a person with limited leave to remain in the UK on 26th September 2018 when she was 17 years old. The application for entry clearance as a dependent child was refused on 24th December 2018. Her appeal against that decision was dismissed on human rights grounds by First-tier Tribunal Judge NM Paul in a determination promulgated on the 16th October 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge Landes on 10th February 2020 on all grounds on the basis that it is arguable that the First-tier Tribunal erred in finding that the appellant did not succeed under paragraph 301 of the Immigration Rules and in proceeding in an arguably unfair way in relying on an issue (that the appellant was now 18 years old) which was not raised in the decision letter or at the hearing without giving the appellant an opportunity to make submissions.

3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by email on 7th April 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. An email was received from the appellant's solicitors dated 8th April 2020 in response to these directions stating that they wished to rely on the grounds of appeal, but nothing has been received from the respondent.

4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law. I find that it is appropriate to determine whether there is an error of law on the papers given that neither party has put forward any submissions objecting to proceeding in this way.

Submissions – Error of Law

5. In the grounds of appeal it is argued in summary that the First-tier Tribunal erred in law in finding that the appellant did not qualify under paragraph 301 of the Immigration Rules on the basis that she had now become 18 years old, and thus is an adult, even though at the time of application she had been a minor. This was said to be a

material error in light of the findings that the sponsor had sole responsibility for the appellant, and so can fulfil all the requirements of the Immigration Rule at paragraph 301, and given that paragraph 27 of the Immigration Rules states that an entry clearance application under this provision will be considered with reference to the age at the date of application where an applicant is under 18 years at the date of application but is 18 years at the date of decision. Further, it is argued, the reliance on the appellant being 18 years old made the hearing procedurally unfair as the sponsor was not given an opportunity to address the Tribunal on this matter which was not at any stage raised by the respondent and was not raised by the judge at the hearing. In addition, the First-tier Tribunal has also erred, it is argued, as it has not been recognised that the case law holds that there is no hard cut off when a child passes from being a minor to becoming an 18 year old adult.

6. There is no Rule 24 notice and no submissions are put forward by the respondent in relation to the issue of error of law in response to the directions.

Conclusions – Error of Law

7. The First-tier Tribunal concluded on the evidence that the sponsor, the appellant's mother, has sole responsibility for the appellant, see particularly paragraphs 15 and 16 of the decision. However, the First-tier Tribunal decides that this is not relevant as the appellant is no longer a child as she has now turned 18 years old, and decides that the appellant cannot succeed in her appeal without reference to the fact that she was entitled to succeed in her entry clearance application.

8. I find that this was a clear error of law as the proper approach lawful approach should have been to conclude that the appellant met the requirements of the Immigration Rules at paragraph 301 as she was a person seeking limited leave to enter with a view to settlement as the child of apparent given limited to leave to enter or remain with a view to settlement and her parent (who has limited leave with a view to settlement) has sole responsibility for her. This is because becoming 18 years old after making the application is not a bar to fulfilling the requirements of the Rules due to operation of paragraph 27 of the Immigration Rules. The respondent did not put any other matter in issue in the appellant not being able to meet the requirements of the Immigration Rules at paragraph 301 except that of sole responsibility. It was also, I find, procedurally unfair, not to have raised this issue with the appellant so that submissions could have been made to address the concern of the Judge.

9. As this is a human rights' appeal the fact that the appellant satisfies the Immigration Rules for entry is not the end of the appeal. Consideration must be given as to whether the refusal is a

proportionate interference with her right to respect for family life with her mother. But the fact that she qualifies for entry to the UK under the Immigration Rules means that there is no public interest in her not being allowed to enter to weigh against her right to respect for her family life relationship with her mother, which is found by the First-tier Tribunal in the decision to be a "very close maternal bond" and a "close family relationship". The decision is also irrational, and therefore errs in law, when, in the final paragraph 20 of the decision, it holds that there is no interference with the appellant's family life by denying her entry to the UK. Clearly not being able to live with her mother is an interference with her close family relationship.

10. I find that the above errors are material one, as not appreciating the lack of public interest in denying the appellant entry, as the Immigration Rules are the respondent's statement of what is in the public interest in immigration matters and the appellant meets the Immigration Rules, means that the proportionality exercise under Article 8 ECHR is not properly conducted.

11. I preserve the finding that the sponsor has sole responsibility for the appellant and thus that she fulfils the requirements of the Immigration Rules under paragraph 301, and the finding that she has a close family relationship with her mother. The remaking of the appeal will therefore consist of submissions on the proportionality of refusing to grant entry clearance under Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal but preserve the findings as set out at paragraph 11 above.

3. I adjourn the remaking of the appeal.

Directions - Remaking

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal might properly be held remotely, by Skype for Business, on a date to be fixed within the period **June to September 2020** or by way of written submissions.

2. **No later than 14 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email):

   (a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and

   (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

      (i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, the original appellant or an instructing solicitor; and

      (ii) dates to avoid in the period specified.

3. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions, including any that instead the matter can be resolved by written submissions, and will make any further directions considered necessary.

4. **If there is no objection to a remote hearing**, the following directions supersede any previous case management directions and shall apply.

   i. The parties shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.

   ii. The parties shall file with the Upper Tribunal and serve on each other (a) an electronic skeleton argument and (b) any rule 15(2A) notice to be relied upon within **28 days** of the date this notice is sent.

   iii. The appellant shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least **7 days before the hearing**.

5. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

6. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

7. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed Fiona Lindsley 10th June 2020
Upper Tribunal Judge Lindsley