



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-005751
On appeal from: HU/08616/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 April 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

RAHUL SUNDAS
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance or representation

For the Respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

Heard at Field House on 17 March 2023

DECISION AND REASONS

Introduction

1. The appellant challenges the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 9 November 2020 to refused him entry clearance pursuant to paragraph 297 of the Immigration Rules HC 395 (as amended), to join his mother, who has indefinite leave to remain in the UK.
2. The appellant is a citizen of Nepal. He was born on 9 January 2002, and this application was made on 8 January 2020, the final day of his minority.

3. For the reasons set out in this decision, I have come to the conclusion that this appeal should be allowed.

Procedural matters

4. **Mode of hearing.** The hearing today took place face to face.
5. **Adjournment request.** On the morning of the hearing, the appellant's representatives, Diplock Solicitors, sent the Upper Tribunal an emailed adjournment request. They said that on the evening of the 16 March 2023, the day before the hearing, the appellant had felt seriously unwell and was advised to isolate by the NHS. They attached an NHS isolation note for 10 days, beginning on 16 March 2023.
6. I directed that the appeal would not be adjourned: the appeal was listed for an error of law hearing for which oral evidence from the appellant would not be required. If an error of law was found, the appeal could be relisted for remaking when the appellant had recovered.
7. The solicitors then responded: "Due to her ill health, the client was unable to book Counsel to represent her, so she requests that she is allowed another opportunity to provide representation and attend herself".
8. I asked the clerks to enquire whether Diplock Solicitors are still acting. If so, it is beyond belief that an illness which came on yesterday evening would have prevented the appellant from arranging representation at the hearing today. Her solicitors, whether or not in funds, should have attended the hearing as officers of the court, even if they had not instructed Counsel.
9. No response has been received. I therefore proceed to consider this appeal on the papers, which include the First-tier Tribunal decision, the grounds of appeal, the grant of permission, the respondent's Rule 24 Reply and a skeleton argument received from Mr Melvin yesterday.

Background

10. The main basis of the appellant's case is that his mother has had sole responsibility for him during his minority, following the (now unchallenged) death of his father in August 2017. He has been living with an uncle in Nepal, but the uncle is said to have four children and the relationship between uncle and nephew has become strained. The sponsor says that she has been sending money for his support while living in the UK.
11. The First-tier Judge identified three issues: whether the sponsor had sole responsibility under paragraph 297(i)(e); whether there were serious compelling family considerations engaging paragraph 297(i)(f); and in the alternative, whether there were exceptional circumstances for which leave to enter should be granted pursuant to Article 8 ECHR outside the Rules.

12. The First-tier Judge dismissed the appeal principally because he had concerns about the sponsor's evidence on sole responsibility. He found as a fact that despite some untranslated Facebook posts, the evidence of sole responsibility was not sufficient, on the balance of probabilities. He also gave weight to the delay in making this application: the appellant's father had been dead for 30 months when the application was made, and it was made on the day before the appellant's 18th birthday, with no clear explanation for that timing.
13. The First-tier Judge found that the appellant had not demonstrated serious compelling family or other reasons, because of his asserted falling out with his uncle. There was only the evidence of the appellant and sponsor about this and the judge did not believe them. The evidence was that the sponsor had a house in Nepal still, and that the appellant's maternal grandmother still lived close to his uncle's house. Paragraph 297(i)(f) would not avail him.
14. The appeal was also dismissed under Article 8 outside the Rules. The appellant appealed to the Upper Tribunal.

Permission to appeal

15. Permission to appeal to the Upper Tribunal was granted by First-tier Judge O'Garro, who considered it arguable that the First-tier Tribunal had failed to note that the appellant did come within paragraph 297(e), now that it was accepted that his father had died in 2017 as alleged.
16. In her Rule 24 Reply, the respondent accepted that the appellant did come within paragraph 297(i)(e) and stated that:
 - “4. In light of the judge's clear error, the respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant satisfies paragraph 297 of the Immigration Rules.
 5. The judge notes that an application was made a day before the appellant's 18th birthday and considers the appellant's circumstances in Nepal. It is submitted that the judge's findings in relation to Article 8 ECHR [outside the Rules] were open to him and they should be maintained. ”
17. Despite that concession, this appeal was listed before me today for an error of law hearing.

Upper Tribunal hearing

18. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I received yesterday a skeleton argument from Mr Melvin, in which, while stating that he did not seek to reopen the concession noted above, he nevertheless purported to do so. Mr Melvin argued that there was no record or witness statement by Counsel for the appellant, or the author of the appellant's grounds of appeal, raising the

point raised by the judge who granted permission. He submitted that 'it does not follow without findings as to how that parental relationship was maintained that the appellant immediately qualifies under [paragraph] 297(i)(d).'

Paragraph 297

19. The relevant requirements of paragraph 297 in this appeal are as follows:

"297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:...

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; *and*

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; ...

(vii) does not fall for refusal under the general grounds for refusal."

[Emphasis added]

Conclusions

20. Mr Melvin's arguments are not inconsistent with the respondent's Rule 24 concession, when examined closely: they focus on paragraph 297(i)(e), but

the concession is under paragraph 297(i)(d): there is no sole responsibility requirement where it is accepted that the other parent has died.

21. The First-tier Judge's focus on sole responsibility similarly shows a confusion with the requirements in sub-paragraphs 297(i)(d) and (e) and as the Rule 24 Reply conceded, to apply the sole responsibility test where one parent has died is a plain error of law.
22. In addition, the First-tier Judge's decision does not make adequate findings under sub-paragraphs 297(ii)-(vii).
23. Whilst the challenge in the grounds of appeal to Article 8 ECHR outside the Rules (if that is what it is) is not as strong, I do not consider it appropriate to exclude that ground from the remaking of this decision.
24. The finding that the appellant's father died in 2017 is preserved. In view of the need for further findings under sub-paragraphs 297(ii)-(vii), the appeal will be remitted to the First-tier Tribunal for remaking.
25. The appellant's appeal is allowed.

Notice of Decision

26. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Judith A J C Gleeson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 17 March 2023