



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10779/2012

THE IMMIGRATION ACTS

Heard at Field House
On 8 August 2013

Determination Promulgated
On 19 August 2013

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

MISS VERA MITZI MATEL FRANCISCO

Respondent

Representation:

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

For the Respondent: Dr D Samuels of JDS Solicitors

DETERMINATION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Entry Clearance Officer in Manila. For ease of reference I shall refer herein to Miss Francisco as the claimant.
2. The claimant is a citizen of the Philippines born in October 1998. This appeal has its origins in a decision of the Entry Clearance Officer of 17 May 2012 refusing the claimant entry clearance to settle in the United Kingdom as the dependent daughter of a person present and settled here, that being her father Mr George Francisco.
3. The reasons given by the Entry Clearance Officer for refusing to grant the claimant entry clearance were as follows:
 - “• You have provided evidence that your father regularly remits money to your bank account the Philippines. You have provided a letter from your mother in

which she states that she wishes to relinquish parental responsibility to your father. It is clear therefore that your mother has had the sole responsibility for your upbringing until now even though your father has been providing some financial support.

- Nothing has been provided in your application that there are any serious or compelling considerations to justify issue of this visa. From the information provided your father and mother have decided that you should spend time with your father in the UK. However this is not a consideration which appears in the Rules. I am not therefore satisfied you meet the requirements for this visa. 297
- I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant paragraph of the United Kingdom Immigration Rules."

4. The only relevant requirements of the Immigration Rules, for the purposes of this appeal, are those to be found in paragraphs 297(i)(e) and (f); which state as follows:

"Requirements for 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

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:

...

(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; ...

First-tier Tribunal's determination

5. The claimant challenged the Entry Clearance Officer's decision by way of an appeal to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Majid on 1 May 2013 and allowed both under the Immigration Rules and in relation to Article 8 ECHR [outside of those Rules] in a determination promulgated on 21 May 2013.
6. Both Mr Francisco, the claimant's father, and Ms De-Vera, the claimant's stepmother, gave oral evidence to the First-tier Tribunal. In relation to the former the First-tier Tribunal Judge set out Mr Francisco's witness statement of 19 April 2013 in full and

then noted that he had also given oral evidence before the tribunal consistent with such statement. Insofar as the claimant's stepmother is concerned the First-tier Tribunal Judge set out various passages from her short witness statement, also dated 19 April 2013, and concluded that she had "corroborated the evidence of her husband" and, "validated his assertions" as contained in his witness statement.

7. I pause at this point to highlight that (i) the First-tier Tribunal Judge did not at any point during the course of his determination summarise the oral evidence before him and (ii) the Tribunal's file does not contain the First-tier Tribunal judge's record of the proceedings.

8. After briefly summarising the closing submissions the judge directed himself as follows [paragraph 18]:

"18. In serious matters law requires a stronger burden of proof. Where a civil court is considering allegations of fraud or other criminal or quasi criminal conduct, or of conduct involving a high degree of moral turpitude, the court still applies the standard of the preponderance of probabilities, though in such cases the court may require more cogent evidence (often called 'clear and convincing evidence'), the cogency required increasing with the gravity of the charges, before finding that the scales have been tipped in favour of the asserting party. (Hornal v. Neuberger Products Ltd [1957] 1 QB 247; re Dellow's Will Trusts [1964] 1 WLR 451, 454-5; 'fundamentals of evidence', evidence and advocacy.)"

9. Immediately thereafter the Judge came to the following findings of fact;

"19. I do not see here any clear and convincing evidence of production of forgery or deception. I cannot accept a datum against an claimant which is not supported by admissible evidence. Over-suspicious evaluation of evidence cannot justify the serious allegation of mal-doing against a human being. I do accept Dr Akin-Samuels' submission that the sponsoring father's oral evidence and that of his wife was credible and no way justifying the label that it was a pack of lies."

20. In fact I observed that in their oral evidence, the sponsor was all the time struggling to hold his tear back to give evidence. Both stepmother and father of the claimant were credible. The stepmother in the UK said, 'Definitely I am here to support the appeal of the appellant. I do not work for the NSPCC but it is very close to my heart that she will have the protection of caring people after suffering serious abuse at the hands of the new man in the life of her biological mother. Actually, my two daughters, [C] and [L], are looking forward to the appellant coming to join them as they are very close to her'."

10. Between paragraphs 21 and 28 of the determination the judge traverses through well-known authorities on Article 8 ECHR. At paragraph 29 he concludes as follows:

"29. There is no evidence whatsoever that anyone else has helped this appellant financially. In this context the sponsor's evidence has left me in no doubt that only he has taken responsibility for the appellant..."

11. The judge subsequently directs himself (i) that persons such as the claimant's mother's new husband cannot be relied upon "if he is 'indifferent' to the welfare of the Dependent Relative" i.e. the claimant in the instant appeal (ii) that "girls like the claimant seem to be unwilling to trouble their distant parent by narrating the particulars of real abuse by persons in the position of the [claimant's] new husband" [30], and (iii) that it would be "utterly unfair to be blind to the impact of [the tribunal's] decision on the father of this claimant who is gravely distressed by this separation", and thereafter concludes as follows [35];

"35. In the circumstances, in view of my deliberations in the preceding paragraphs and having taken into account all of the oral and documentary evidence as well as submissions at my disposal, cognisant of the fact the burden of proof is on the appellant and the standard of proof is the balance of probabilities, I am persuaded that the appellant comes within the Immigration Rules HC 395 (as amended), as well as the provisions of the ECHR."

Error of Law

11. The grounds of application for permission to appeal submit that the First-tier Tribunal Judge unlawfully placed a burden on the Entry Clearance Officer to substantiate the reasons for refusing the application. Additionally the grounds set out extracts from the Presenting Officer's note of hearing in support of the submission that a number of important issues raised by the Presenting Officer before the First-tier Tribunal, relating to the credibility of the evidence of the sponsor and the claimant's stepmother, had not been referred to or considered within the First-tier Tribunal's determination. In particular it was highlighted that;
- (i) The claimant's brother had made an entry clearance application in 2010, which had been successful on appeal; however, during the course of that application it had been alleged, after the application had been refused by the ECO (as was the case in the instant appeal), that the claimant's mother and stepfather had been cruel and abusive to the claimant's brother;
 - (ii) No explanation had been given as to why the claimant had been left living with her mother and stepfather after the allegations of abuse had been made by her brother;
 - (iii) The claimant's father initially stated in cross-examination that he had not moved the claimant to live with his mother; however, he had changed his account to state that she had in fact been living with her grandmother at weekends. In contrast, the claimant's stepmother gave evidence that claimant had not lived anywhere other than her current address for the past five years;
 - (iv) The claimant's father stated in evidence that he had found out about the claimant's abuse in 2010 whereas her stepmother stated that she had found out in 2012;

- (v) The claimant's father and stepmother had done nothing to address the alleged abuse, had made no contact with the authorities in the claimant's home country in this regard, and had made no attempts to move the claimant to a safer environment, such as a boarding school. This was implausible;
 - (vi) No documentary evidence had been produced from a doctor or the claimant's school to confirm the existence of the abuse;
 - (vii) The claimant's father, when asked how he had taken responsibility for the claimant, stated that he had sent her money. When asked if he had done anything else, he responded in the negative.
12. First-tier Tribunal Judge Brunnen granted the Entry Clearance Officer permission to appeal by way of a decision dated 24 June 2013 made in the following material terms:
- "4. At paragraph 35 of the determination the judge said 'In the circumstances, in view of my deliberations in the preceding paragraphs and having taken account of all the oral and documentary evidence as well as the submissions at my disposal, ... I am persuaded that the appellant comes within the Immigration Rules HC 395 (as amended) as well as the provisions of the ECHR.' It is arguable that nowhere in the determination did the judge give any reasons for this conclusion; that in the preceding paragraphs he merely set out some legal principles but did not address the facts of this appeal; that he made no findings to explain how the appellant came within the Immigration Rules; and that he failed to carry out any structured analysis of the issues arising under Article 8."
13. Thus the appeal came before me.
14. At the outset of the hearing I observed that the Entry Clearance Officer had failed to provide either the Tribunal, or the claimant's legal representative, with a copy of the Presenting Officer's note of proceedings, which had formed the basis of grounds of appeal. This failure would have placed the Entry Clearance Officer in grave difficulty in making out his case, however, Dr Samuels, quite properly, indicated at the outset of the hearing that his note of the proceedings before the First-tier Tribunal accorded with the extract contained within the Entry Clearance Officer's grounds of appeal. Consequently, he was content for that extract to be taken as an accurate reflection of that which had occurred before the First-tier Tribunal.
15. Turning to the parties' submissions on the issue of whether the First-tier Tribunal's determination involved the making of an error on a point of law, Mr Avery relied upon the contents of the pleaded grounds and reiterated that the First-tier Tribunal Judge had failed to engage with a number of significant points that had been raised before him. Those matters, it was submitted, went directly to the credibility of the assertions made by the claimant and her family members. Mr Avery additionally submitted that, even on the accepted evidence, it was not open to the First-tier Tribunal to conclude that the claimant's father had had sole responsibility for the claimant's upbringing.

16. In response Dr Samuels submitted that the sponsor, and his wife, had provided written and oral evidence to the First-tier Tribunal and that they had conclusively demonstrated that their evidence to be truthful. He further observed that at paragraph 10 of the First-tier Tribunal's determination it indicated that it had taken into account all of the documentary and oral evidence before it. With that in mind Dr Samuels submitted that the First-tier Tribunal had been not required to give more extensive reasons than those which were contained within its determination. It was further submitted that the First-tier Tribunal's conclusion to allow the appeal was open to it. In summary Dr Samuels submitted that the determination was clear, cogent and rational.
17. Despite the most capable efforts of Dr Samuels, I agree with Mr Avery's submissions and conclude that the determination of the First-tier Tribunal suffers from a lack of clear reasoning and fails to engage with important points raised by the ECO in relation to the credibility of the evidence given before the tribunal.
18. In coming to my conclusion I have borne well in mind that whilst there is a legal duty on the First-tier Tribunal to give an explanation for its the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision as a whole makes sense having regard to the material accepted by the judge (see Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)).
19. In the instant case I find that not only does the determination of the First-tier Tribunal lack cogent reasons for the conclusions set out therein, but more significantly the fact finding process by which the First-tier Tribunal came to its conclusions was flawed.
20. It is not in dispute that the claimant's father and stepmother gave inconsistent evidence as to when each purportedly found out about the physical and emotional abuse of the claimant. The Presenting Officer also clearly raised issue, before the First-tier Tribunal, with the plausibility of the claimant's father and stepmother leaving the claimant in what, on their evidence, they knew to be an abusive household, without having provided any adequate explanation as to why this was so. Issue was further taken with the lack of corroborative evidence of the abuse. Nowhere in the determination are such submissions recorded and neither are they addressed, even in a cursory fashion. The issues raised by the ECO go directly to the credibility of the assertion that the claimant has been, and continues to be, abused by her mother and 'step-father'.
21. In relation to the issue of sole responsibility, it is accepted that the claimant's father gave evidence to the First-tier Tribunal that he did no more for the claimant than send her monies. Had the First-tier Tribunal Judge directed himself in accordance with the decision in TD (paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, he may well have come to a different decision on this issue; however he did not do so and there is no other explanation within the determination as to how the mere sending of money met, in this case, the sole responsibility requirement of the relevant immigration rule.

22. For all of these reasons I conclude that the determination of the First-tier Tribunal involved the making of an error on a point of law, such that it is to be set aside. I notified the parties of this decision during the course of the hearing. Neither party objected to me thereafter proceeding directly to remake the decision on the appeal on a de novo basis.

Remaking of Decision

Evidence

23. I have before me a bundle produced by the Entry Clearance Officer dated 13 September 2012 as well as a bundle from the claimant, which was also produced to the First-tier Tribunal, running to 59 pages. This bundle contains a short witness statement from the claimant, plus witness statements from Mr Francisco and Ms De-Vera, all dated 19 April 2013. It further materially includes the determination of Judge Callender Smith, promulgated on 31 December 2010, allowing the claimant's brother's appeal under the Immigration Rules. There is additionally a death certificate relating to the claimant's grandmother, a copy of Mr Francisco's passport, various photographs, money transfer receipts, payslips and bank statements relating to Mr Francisco as well as the income and expenditure sheet in that regard. Both the claimant's father - Mr Francisco, and her stepmother - Ms De-Vera, gave oral evidence before me.
24. In his witness statement Mr Francisco confirmed that he left the claimant with her mother after he moved out of the marital home following the annulment of his marriage. Prior to leaving the Philippines he provided his daughter with whatever she wanted, including taking her out to the cinema etc. He left the Philippines in 2010 and he now resides in the United Kingdom with his wife, Ms De-Vera. He visited the claimant in December 2012, she having travelled to the airport alone to meet him. She looked unkempt and older than her real age. She said that her mother now lives with another man in the former marital home and that she, the claimant, sleeps in the front room. She further stated that she was beaten regularly by her mother and her mother's partner. She goes to school on her own and without food. She had considered taking her own life because she felt neglected by her mother and by Mr Francisco.
25. The claimant stayed with her father in a hotel whilst he was in the Philippines. Mr Francisco confronted the claimant's mother about the allegation of abuse. She told him that he should keep the claimant because she, the claimant's mother, had her own life to live. This, it is said, resulted in a physical fight at which time Mr Francisco was pushed out of the house. There was no one else in the Philippines for the claimant to live with and thus he had to leave her with her mother and her mother's partner.
26. In his oral evidence Mr Francisco adopted the contents of his witness statement as being true and accurate and indicated that he had last seen his daughter in December 2012. He confirmed that he had made the application for his daughter to come to the United Kingdom because she had been suffering; he had found out that she had not

been studying and, although he gave money for her clothing, she only had old clothes. He sends monies for the claimant's education. When asked why he had not made arrangements for the claimant move away from her mother's house, given the alleged abusive situation therein, Mr Francisco stated that he did not have the financial capacity to do so. Mr Francesco further confirmed that his mother had been living in the Philippines until January 2013, when she had unfortunately passed away. He also has a sister in the Philippines, but she lives far away from the claimant, has three children of her own, struggles financially and lives in one small room. When asked why he would nevertheless not relocate the claimant to live with his sister, even temporarily, given that the claim that she is living in an abusive household, Mr Francesco asserted that the place in which his sister lives is very dangerous, there being many rebels and bombs continually exploding and further that the distance between the claimant's current home and the sister's home is approximately 300 miles.

27. When asked when he first found out about the abuse of the claimant Mr Francesco stated this to have been in the middle of 2011.
28. Under cross examination Mr Francisco stated that he found out about the abuse of the claimant via Skype, during a conversation with her. He further confirmed that she had no difficulty accessing Skype and that his stepdaughters also have Facebook and MSN contact with the claimant.
29. Mr Avery then took Mr Francisco to the First-tier Tribunal's determination of his son's appeal and in particular to the record of the assertions made by Mr Francisco that his son had been abused physically and emotionally by the claimant's mother and partner and that this had caused his education, upbringing and welfare to suffer (paragraph 6 therein). Mr Francisco was invited to comment as to whether this 'rung any alarm bells' about the possible abuse of the claimant. In response Mr Francisco indicated that had not done so because he had thought that 'they would just hit a boy'; he had asked his son whether the claimant was alright but his son's answers were unclear.
30. In relation to the claimant's schooling Mr Francisco confirmed that he paid for this but he had not been sent receipts for such payments or the claimant's school reports. He had asked the claimant how her schooling was going. Mr Francesco was then asked whether he had "any input in whether your daughter is allowed to go out and things of that nature?" to which he stated in response, "no, everything that is going on is the mother's decision". He further confirmed that he had not reported the claimant's abuse to the authorities in the Philippines, because 'he did not trust the police'.
31. At the end of cross-examination I had a number of questions of Mr Francisco for clarification purposes. I observed to Mr Francisco that it had been accepted that he had stated to the First-tier Tribunal that he had first found out about his daughter's abuse in 2010, however he had stated before me that he had first found out about the abuse in the middle 2011. I invited him to comment upon this apparent

inconsistency. In doing so he stated that *"I have a habit when I hear something I do not listen and believe it until I see it for myself. I am confused about times and dates, I'm under pressure."* He then confirmed that he had known about the abuse in 2010 *"but not fully"*. He had delayed in making the entry clearance application because he had to save money. He had first informed his wife of the abuse after the burial of his mother in 2013, he having been embarrassed to talk to her about it.

32. In her witness statement of 19 April 2013 Ms De-Vera confirmed her awareness of the claimant's living conditions. She thought that the claimant would make a success of her education if given the opportunity. She had sent financial assistance to the claimant, albeit through her mother whom she has been informed has done little or nothing for the claimant. Ms De-Vera further confirmed that the claimant is not currently attending her studies.
33. In her oral evidence Ms De-Vera confirmed that she had last met the claimant in 2008 at the time of her wedding to Mr Francisco. She communicates with the claimant via Skype. She had first been informed of the claimant's problems at the beginning of 2012, at which time it was decided to submit the application for entry clearance. At this time it was drawn to Ms De Vera's attention that her husband had indicated that he had first told her of the claimant's problems in January 2013. In response Ms De-Vera postulated that *"maybe his brain is mixed up"*.
34. Ms De-Vera continued her evidence by confirming that she had spoken with the claimant approximately once per week on Skype and that she had not got a sense from those conversations that the claimant was being abused, although she did observe that she was sad. The claimant had previously told her that everything was fine, although she now wishes to kill herself and everybody is worried about her. Ms De-Vera then confirmed that Mr Francisco has a sister living in the Philippines but that she lives far away from the claimant, is single, and lives in one room with her three children.
35. Under cross-examination Ms De-Vera confirmed that her daughters had not received information from claimant about the problems she was having in the Philippines. Her stepson, the claimant's brother, had made no mention of such problems. She and Mr Francisco had not been aware that the claimant was not attending school until Mr Francisco visited the Philippines in December 2012.
36. When asked what decisions Mr Francisco takes in relation to the claimant's activities in the Philippines, Ms De-Vera responded by stating that the claimant asks permission if she can go out. It was pointed out to her that the claimant asserts in her statement that her mother and stepfather do not allow her to go out. In response Ms De-Vera said that the claimant asks the permission of her father to go out, however it may be that her mother may says no, even if her father says yes.
37. In clarification I observed that Mr Francisco had stated that he had found out that the claimant had stopped attending school in 2011. Ms De-Vera responded by stating that she only knew what Mr Francisco had told her.

38. The claimant, for obvious reasons, did not give oral evidence to the Tribunal. She did however produce a witness statement. In that statement she asserts that her mother leaves her at home on her own and returns home after the claimant has gone to bed. From the time her mother's partner started living in the family house the claimant was forced to sleep on the floor in the front room of the house. Whenever there is an argument between the claimant's mother and her partner, the claimant's mother would beat her up. Her mother sends her to school without food and when she returns home from school her food is either in the kitchen or in the front room, and nobody else is at home. She is not allowed to mix with anyone and if she is seen doing so she is beaten up. She informed her father of this abusive situation. She feels like taking her own life because she cannot believe her mother would abandon her in such a way. People at school laugh at her because her school uniform is torn.

Submissions

39. Mr Avery relied upon the Entry Clearance Officer's refusal decision. He submitted that the witnesses had given vague and inconsistent accounts and, consequently, that the credibility of the assertions made in relation to the living circumstances of the claimant, including the abuse, ought not to be believed. In relation to the issue of sole responsibility he directed my attention to the decision of the Tribunal in TD (paragraph 297(i)(e); sole responsibility) Yemen [2006] UKAIT 00049 and observed that in his evidence the claimant's father had stated that (i) his involvement with the claimant was limited to the sending of monies and (i) that the claimant's mother had the ultimate decision in all matters in respect of the claimant's life. He submitted that this did not amount to sole responsibility.
40. In relation to the issue of whether or not there are any serious and compelling circumstances which made exclusion of the claimant undesirable, Mr Avery referred back to the assertions made earlier made in relation to the claimant's living circumstances in the Philippines. He submitted that looking at the circumstances as a whole they did not meet the requirements of 297(i)(f) of the Immigration Rules.
41. As to Article 8 Mr Avery relied upon his submissions in relation to 297(i)(f) and submitted that if the claimant did not succeed under this provision then the circumstances of her case were such that she could not succeed on Article 8 ECHR grounds.
42. In reply Dr Samuels submitted that although the claimant's mother had charge of the claimant on a day-to-day basis this was a consequence of the need for her to have practical sole responsibility because the claimant was living with her. The theoretical sole responsibility was, he submitted, vested in the claimant's father. In support of this submission Dr Samuels observed that the claimant's father sent monies to the claimant and gave instructions as to how such monies were to be spent i.e. on the claimant's education. He further observed the sponsor speaks to his daughter on Skype on a regular basis that she seeks his permission to go out; the practical side of this being handled thereafter by the mother. He therefore submitted that the claimant satisfied the requirements of paragraph 297(i)(e) of the Immigration Rules.

43. In the alternative Dr Samuels submitted that there were serious and compelling circumstances which required the claimant to be granted entry clearance. He accepted that there had been a series of mix-ups in relation to the dates on which various family members had found out about the abuse of the claimant, but asserted that this did not go to the heart of the matter given that the claimant is a child. He invited the Tribunal to conclude that the claimant has been the subject of abuse by her mother and her mother's partner to the extent that she has suffered actual bodily harm.
44. No submissions were made in relation to Article 8 ECHR.

Decision and Reasons

45. The burden of proof is on the claimant and the standard of proof is to the balance of probabilities. By virtue of Sections 85 and 85A of the Nationality, Immigration and Asylum Act 2002, I am required only to take into account "the circumstances appertaining at the time of the decision" i.e. 17 May 2012.

Paragraph 297(i)(e) – Sole Responsibility

46. The Tribunal gave guidance on the issue of sole responsibility in the decision of TD [cited above]. In that decision the Tribunal state as follows:

"[52] Questions of "sole responsibility" under the immigration rules should be approached as follows:

- i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
- ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.
- iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.
- iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.
- v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.
- vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not

have sole responsibility.

vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.

viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.

ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

47. Having considered all of the evidence before me in the round, and applying the guidance given by the Tribunal in TD, I am not prepared to accept that the claimant has proved, to the balance of probabilities, that her father has had sole responsibility for her upbringing.
48. I have taken into account the letter from the Claimant's mother of 30 April 2012 indicating that she "*have (sic) relinquish parental responsibility...*", but attach little weight to it. It provides no indication as to when the claimant's mother purportedly relinquished such responsibility, or indeed whether this had in fact already occurred or whether it was a proposed future act. Neither does the letter detail what this means in practical terms.
49. Even if the evidence of the claimant's father is taken at its highest and he has financed her to stay in the Philippines, including her education, it is plain from his own evidence that he does not have, and has not had since at least the time of his move the UK in 2010, control and direction of the claimant's upbringing. He does not make all, or indeed it appears any, of the important decisions in the claimant's life. Whilst I accept Dr Samuels' submission that there is a difference between someone having day-to-day practical responsibility for a child and someone having sole responsibility for that child, in this particular case I find that that difference is not material.
50. On the evidence given by the claimant's father to the First-tier Tribunal, which Dr Samuels accepted was correctly cited in the grounds of appeal to the Upper Tribunal, the claimant's father has done nothing else by way of taking the responsibility for the claimant save for sending her money. This was evidence confirmed by the claimant's father during the course of the hearing before the Upper Tribunal. Although the claimant's stepmother, Ms De-Vera, stated that the claimant asked her father for permission to go out, this, of itself, even if true does not lead me to conclude that he has sole responsibility. Ms De-Vera quite candidly accepted in her evidence that it may be that the claimant's mother effectively has the last word on such matters because the claimant is living with her and the fact that this is so is consistent with the claimant's father's evidence. The appellant's witness statement is silent on this

issue. There are no examples given, save for the fact that the claimant's father wishes his daughter to have an education in the Philippines, of the claimant's father exercising the sort of control and direction that was envisaged by the Tribunal in TD. It is the claimant's mother who exercises such control and direction, with limited input from her father.

51. Looking at all of the evidence in the round I do not accept that the claimant meets the requirements of paragraph 297(i)(e) of the Immigration Rules.

Paragraph 297(i)(f) – Serious and Compelling Reasons etc

52. When coming to my conclusions on this issue I have fully considered and applied the decision of the Tribunal in Mundeba (s.55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC). I observe that at paragraph 34 of Mundeba the Tribunal state as follows:

“34. In our view, serious means that there needs to be more than the parties simply desiring a state of affairs to obtain. Compelling in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. Serious read with compelling together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.

35. The terms of s.55(1) and the decision of the Upper Tribunal in T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483, made it clear that s.55 only applies to children who are in the United Kingdom. The requirement therefore in the IDIs we have quoted above that officers must not apply actions set out in the instruction without having regard to s.55 inaccurately states the legal position, although the Tribunal noted at [18] that the statutory guidance asks

‘Staff working overseas to adhere to the spirit if the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention’.”

53. Mr Avery accepted, during the course of his submissions, that if the account given by the claimant of abuse by her mother and her mother's partner is truthful then she would meet the requirements of paragraph 297(i)(f) of the Immigration Rules; a concession I consider to have been properly made.
54. An analysis of the various accounts given by the claimant, the claimant's father and the claimant's stepmother demonstrates that they are punctuated by inconsistency. The claimant's father informed the First-tier Tribunal that he had first found out about the abuse of the claimant in 2010, whereas he gave evidence before the Upper Tribunal that this had occurred in mid 2011. His explanation for this inconsistency was vague and unpersuasive. There is also inconsistency as to when the claimant's stepmother found out about such abuse, she indicating in her evidence that this was

early in 2012 whereas the claimant's father indicated that he did not tell his wife of the claimant's abuse until his return from the Philippines in 2013. The only explanation given for this inconsistency was that the claimant's father's "brain must be mixed up". There is further inconsistency regarding the claimant's schooling. The claimant's witness statement of 19 April 2013 uses the present tense, it asserting that her friends at school 'continue to laugh' at her because her school uniform is torn. The claimant's father stated in his evidence that he found out that the claimant was not attending school in 2011 however his wife indicates that she did not find out until the claimant's father returned from the Philippines in 2013. Again there has been no satisfactory explanation for these inconsistencies.

55. Additionally I observe that neither the claimant's application, nor the letters which covered it to the Entry Clearance Officer, make mention of the fact that she had suffered abuse. On their evidence the claimant's United Kingdom based family were aware of the claimed abuse at this time. They would also have been aware of its relevance given that the claimant's father and stepmother had been through the appeal process on exactly the same issue with the claimant's brother, and had raised within that process the fact that he had been living in an abusive home in the Philippines. I pause at this stage to observe that First-tier Tribunal Judge Callender Smith made no findings on the issue of whether the abuse of the claimant's brother had taken place.
56. Looking at all of the evidence before me I am not prepared to accept, to the balance of probabilities, that I have been told the truth about the claimant's circumstances in the Philippines. I do not accept that she has been physically or emotionally abused by her mother or her mother's partner. Further, I do not accept that she is being prevented from attending at school by her mother or her mother's partner.
57. Given what I have found above I am not prepared to accept, to the balance of probabilities, that there are serious and compelling family or other considerations which make the exclusion of the claimant undesirable. The claimant does not meet the requirements of paragraph 297(i)(f) of the Immigration Rules.
58. The claimant's appeal brought in relation to the Immigration Rules is therefore dismissed.

Article 8 ECHR

59. As to the Article 8 ECHR ground no additional submissions were made in this regard by Dr Samuels at the hearing. I am prepared to accept that the claimant has a family life with her father, stepmother and indeed her stepmother's daughters. If the claimant were to come to the United Kingdom that of course would lead to an interference with the family life she currently has with her mother and her mother's partner in the Philippines. On the other hand it is also correct to say that denying entry clearance to the claimant would interfere with her opportunity to build up a fuller family life with the family unit which is in the United Kingdom. If, for the purposes of this determination, it were to be assumed that the interference with the claimant's family life caused by refusing her entry clearance would be of such

severity so as to engage Article 8, it is plain to me that the decision to do so was nevertheless a proportionate one. The claimant has lived with her mother for the entirety of her life and remains living in her mother's household. Whilst I have no doubt that she would be living in more advantageous circumstances in the United Kingdom, this does not lead me to conclude that it is in her best interests to move here neither is it sufficient, in my conclusion, to render the ECO's decision disproportionate. Continuity of residence is important for a child. The appellant would be remaining with her close family in a country in which she has lived for her entire life.

60. Even if it were in the claimant's best interests to come to the United Kingdom, given the facts I have found above I would nevertheless still conclude that the refusal of entry clearance was proportionate. The public interest in a fair and firm system of immigration control is considerable (EB Kosovo). The claimant does not meet the requirements of the Immigration Rules. She has not established that she is living in circumstances that would cause risk to her welfare; she is living in adequate accommodation and, on my findings, is not being denied an education. Whilst I have no doubt that the claimant, her father, her stepmother will be distressed by the decision to refuse her entry clearance there is no evidence before me to demonstrate that such refusal is likely to have an adverse long-term psychological or physical impact on any of them.
61. Looking at all the evidence before me in the round including that which I have not specifically referred to above, I conclude that a decision to refuse entry clearance to the claimant is proportionate on the facts of the instant case. I therefore dismiss the appeal brought on Article 8 ECHR grounds.

Decision

The determination of the First-tier Tribunal is set aside for the reasons given above.

I remake the decision on the appeal and conclude that the appeal is to be dismissed on all grounds. The claimant does not meet the requirements of the Immigration Rules and the decision of the Entry Clearance Officer does not lead to a breach of Article 8 ECHR.

Signed:



Upper Tribunal Judge O'Connor
Date 12 August 2013