



**The Upper Tribunal
(Immigration and Asylum Chamber)
OA/13596/2013**

Appeal number:

THE IMMIGRATION ACTS

**Heard at Field House
On September 8, 2014**

**Determination
Promulgated
On September 11, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**MISS HK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Chipperfield, Counsel, instructed by Paul John &

Co Solicitors

For the Respondent: Mr Avery (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born February 27, 2011, is a citizen of India. She applied for entry clearance as a child dependant on April 27, 2013. Her application was considered by the respondent on May 27, 2013 but refused for failing to meet the requirements of paragraph 297 HC 395. She lodged grounds of appeal on June 19, 2013 under Section 82(1) of the Nationality,

Immigration and Asylum Act 2002 in which she argued that she did satisfy the requirements of paragraph 297 HC 395 or alternatively she should be granted admission under article 8 ECHR. The entry clearance manager reviewed the grounds of appeal and upheld the original decision and further concluded that any refusal under article 8 was both proportionate and appropriate.

2. On June 23, 2014 Judge of the First Tier Tribunal AR Williams (hereinafter referred to as the "FtTJ") heard her appeal and dismissed it in determination promulgated on June 26, 2014.
3. The appellant lodged grounds of appeal on July 7, 2014 in which she argued that there had been a material error because:-
 - a. The FtTJ had not considered Section 55 of the Borders, Citizenship and Immigration Act 2009 (referred in grounds to UK Borders Act 2007)
 - b. The maintenance and accommodation requirements of paragraph 297 were met.
4. Permission to appeal was given by Judge of the First-tier Tribunal Nicholson on July 18, 2014. He found that it was arguable the FtTJ should have considered the best interests of the child and section 55. He did not refuse permission on the other ground but stated it lacked merit.
5. A Rule 24 response was filed in which the respondent stated:
 - a. The grounds raised a matter that was not argued before the FtTJ and consequently there was no error.
 - b. In any event based on the findings there could not be any meaningful discussion on the issue.
6. The appellant's mother attended the hearing.

SUBMISSIONS

7. Mr Chipperfield adopted his skeleton argument and submitted that the FtTJ should have considered section 55. Whilst the child was not in the United Kingdom it remained arguable following Mundeba (section 55 and paragraph 297(i)(f) [2013] UKUT 00088 (IAC) that the FtTJ should have addressed this issue in his determination regardless of whether article 8 ECHR was engaged. As regards the second ground he accepted the new evidence post-dated the date of decision by over 12 months and was not something the Tribunal could have regard to.

8. Mr Avery submitted there was no error in law. He argued the Court of Appeal made clear in Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195 that where submissions were not made before the First-tier Tribunal in respect of article 8 then such a claim could be treated as abandoned. He submitted the appellant's representative declined to pursue article 8 and the FtTJ was dissatisfied with every aspect of the case placed before him and it was difficult to see what alternative conclusion could have been reached.
9. Mr Chipperfield responded stating that the IDI's place an obligation on the respondent to consider Section 55 when considering an application under paragraph 297(i)(f) HC 395.
10. I reserved my decision.

ERROR OF LAW ASSESSMENT

11. The respondent considered this application under paragraph 297 HC 395 and on review also considered it under article 8 ECHR. Mrs Anne Heller, Counsel, represented the appellant at the hearing on June 23, 2014. The FtTJ's assessment of the evidence begins at paragraph [18] of his determination and he found there were "serious concerns" regarding sole responsibility and accommodation.
12. His findings on accommodation in paragraphs [19] to [22] are well reasoned and were perfectly open to him on an examination of the evidence. His reasons for refusing this appeal on "sole responsibility" are adequately contained in paragraph [23].
13. At paragraph [25] of his determination the FtTJ recorded in his determination-

"As Mrs Heller quite properly conceded she could not raise article 8 of the European Convention on Human rights in this case if the appeal was going to fail under the Immigration Rules."
14. Mr Chipperfield, against this background, has sought to argue that the FtTJ erred for the reasons contained in his skeleton argument and as set out above.
15. The Tribunal in Mundeba considered an appeal under paragraph 297(i)(f) and the relevance of Section 55. From paragraph [39] onwards they considered whether there had been an error in law.

16. Following their approach it can be seen that the correct approach is to assess the assessment of the evidence for the purposes of paragraph 297. In this current appeal the FtTJ had regard to all of the evidence including the child's circumstances and who was caring for her. He also set out in detail Mrs Heller's submissions and was clearly aware of the submissions being advanced. Clear and sustainable findings were made in paragraph [23] on the appellant's claim relating to sole responsibility. The findings made by the FtTJ were clearly ones open to him on the evidence presented.
17. It is in considering article 8 the Tribunal in Mundebe considered Section 55. The difference between that case and the case before the FtTJ was that counsel for the applicant in Mundebe argued article 8 whereas counsel in this current case did not and the FtTJ noted that counsel accepted that if the appeal did not succeed under the rules then it would not succeed under article 8.
18. In any event the FtTJ clearly had regard to the facts of the case. He rejected sole responsibility because he was not satisfied the sponsor was financially supporting her daughter as she claimed and there was no evidence from the sponsor's sister or any other member of the family of what was happening in India. Against this background there was evidence the appellant's father had returned to India. The FtTJ was unimpressed with the sponsor's evidence and made that clear in paragraph [22] of his determination.
19. I am therefore satisfied that the assessment of the claim under paragraph 297 was properly conducted and the FtTJ had regard to all of the circumstances.
20. The issue of section 55 would become relevant in an article 8 assessment but none was argued in this appeal. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195 the Court of Appeal stated in paragraph [13]

“... Mr. Malik felt obliged to accept, correctly in my view that an appellant before the First-tier Tribunal is entitled to abandon any grounds of appeal that he does not wish to pursue. If he does abandon a ground of appeal the tribunal cannot be criticised for failing to deal with it. In this case the third appellant's argument that the Secretary of State had failed to consider his welfare as required by section 55 of the 2009 Act was not pursued.... No evidence or argument was placed before the First-tier Tribunal in support of it and in my view the

tribunal was entitled to treat it as having been abandoned, although it did not formally do so. Even if that were not the case, however, there was no evidential basis on which the First-tier Tribunal could have found that that ground of appeal had been made out. It follows that if there were an error of law in failing formally to dispose of it, it was not material

21. The FtTJ's record of proceedings records Mrs Heller's closing submissions and she did not advance any section 55 argument. It therefore follows that just because article 8 was raised in the original grounds did not mean it was being pursued.
22. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC) the Tribunal held that where the evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.
23. The FtTJ in this appeal was not satisfied that the Sponsor financially supported the appellant as claimed and made findings on the evidence that were clearly open to him on this issue and in respect of accommodation. In light of his findings there was no reason for him to carry out a separate section 55 consideration in circumstances where the appellant's own representative was not inviting him to because the natural conclusion was the child's best interests were status quo and a section 55 assessment would not have altered the fact the appellant did not meet the Rules.
24. I am not persuaded the FtTJ erred in not carrying out his own assessment because even if he had I am satisfied, in light of his findings, he would have reached the same conclusion. In the circumstances I do not find a material error in law.

Decision

25. The decision of the First-tier Tribunal did not disclose an error. I uphold the original decision.
26. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier Tribunal and I do not vary that decision.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis



TO THE RESPONDENT

I make no fee award as the appeal was dismissed.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

