Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23842/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 July 2014	**On 12 August 2014**
Prepared 31 July 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MISS SUNANTHA SAMLEECHAI

Appellant

and

ENTRY CLEARANCE OFFICER - BANGKOK

Respondent

Representation:

For the Appellant: Mr A Stone of Counsel instructed by M A Consultants
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Thailand born on 26 August 1985, appeals against a decision of Judge of the First-tier Tribunal Meah who in a determination promulgated on 29 January 2014 dismissed the appellant's appeal against a decision

of the Entry Clearance Officer, Bangkok to refuse her leave to enter as the child of her mother, Ms Nutnicha Cynberg.

2. The application had been refused on 14 November 2012. In making the decision to refuse the Entry Clearance Officer noted that the appellant had always lived with her grandmother, her mother having taken three months off at the time of her birth to return to the appellant's grandmother's home. The appellant's mother had returned to her work in a different province and the appellant had been left in the full-time care of her grandmother. Her mother had always lived away from the family home until four months before she settled in Britain with the appellant's stepfather in April 2010. The Entry Clearance Officer stated that in the appellant's entire life she had only lived with her mother for a period of seven months.

3. The Entry Clearance Officer noted that the appellant's parents had separated when she was approximately 4 years old. Her father would visit her during the annual New Year festivities and take her to her paternal grandparents' home which was only a twenty minutes' walk from where she was living.

4. The Entry Clearance Officer went on to say that the appellant attended a school chosen by her grandmother and travelled to and from school with her 17 year old cousin who also lived with her. Her grandmother and cousin attended parent/teacher events and her cousin signed her end of term reports. Her cousin would assist her when she needed help with her homework tasks. Her maternal grandmother would consult with her paternal grandmother about her welfare and decisions affecting her everyday life. The Entry Clearance Officer noted that the appellant was in education, was not in need of medical treatment and indeed that the appellant's mother had only travelled to Thailand on one brief occasion between February 2011 and March 2011 since she had first settled in Britain. The Entry Clearance Officer considered therefore that the appellant did not meet the requirements of the Immigration Rules in that she had not shown that her mother had sole responsibility for her.

5. Judge Meah, having noted the terms of the refusal and the terms of paragraph 295 of the Immigration Rules, referred to the determination in the case of **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049**.

6. He considered the evidence given to him by the sponsor and her husband who had chosen not to seek legal representation. He accepted the appellant's mother's statement that she had been sending £200 a month for the appellant's maintenance and upkeep since she had arrived in Britain and that she spoke to the appellant regularly on the telephone. The appellant's mother had told the judge that she was working in Bangkok when the appellant was born. Bangkok was a four hour journey away but the appellant's mother would return to see the appellant every month when she was able to secure two consecutive days off from her employment. He noted the fact that the appellant's mother stated that she and the appellant's grandmother had made a joint decision regarding the appellant's nursery school and

the judge concluded, in paragraph 13 that major decisions in the appellant's life, including decisions about her education and schooling, had "consistently been made jointly following extensive discussion and consultation between the appellant's mother and her grandmother". He stated that the appellant's mother had explained that discussion would take place and in most instances her own mother would accede to her wishes. He stated that:

> "This to me indicates that any decision made by them was following detailed consultation between the two of them rather than the decisions solely being made by the appellant's mother."

7. Having quoted paragraphs 49 and 50 from the determination in **TD (Yemen)** the judge stated that following the appellant's mother's evidence he found that the responsibility had been shared between her and her mother. The appellant had been under the care of her grandmother effectively since birth and was now aged 8 and had lived with her grandmother all her life and that had resulted in the grandmother inevitably making some very important significant decisions in the appellant's life. He therefore found that responsibility was shared between the appellant's mother and grandmother as opposed to the appellant's mother having had sole responsibility for her. The judge found the appellant's mother and her husband to be witnesses of truth and accepted the evidence that the appellant's grandmother was now aging and that was part of the reason why the appellant's mother wished her to come to Britain. The appellant's grandmother is also responsible for six other children belonging to her son and other daughter.

8. The judge set out his findings on the appellant's rights under Article 8 of the ECHR in paragraphs 19 and 20. Having noted that Article 8 had not been relied on in the grounds of appeal he considered it in the interests of completeness and bearing in mind the sponsor was unrepresented at the hearing. He noted that the Presenting Officer had argued that Article 8 would not be breached as the status quo would simply be maintained. He went on to say:

> "I find the assessment is one of proportionality and I accept Ms Fortescue's [*the Presenting Officer's*] argument under the banner of Article 8. The appellant has a significant family life with her grandmother and indeed with the other children (her cousins) whom she resides with. A breach would most certainly occur in all of their family lives if the appellant were removed from that family set-up. The appellant's mother has been travelling back to Thailand on a yearly basis to see the appellant and I do not see any reason why she cannot continue to do this. I find that the decision is proportionate in the interests of maintaining effective immigration control."

9. Having emphasised that he had considered all the evidence in the round he found that the circumstances at the date of the decision were that the responsibility for the appellant was shared between the appellant's mother and grandmother and that the relevant provisions of the Immigration Rules had not been met.

10. He therefore dismissed the appeal on both immigration and Article 8 grounds.

11. The grounds of appeal on which Mr Stone relied emphasised that the judge had found the appellant's mother and her husband to be witnesses of truth and that he had accepted that money was being sent for the appellant's upkeep. The grounds then argue that the judge's conclusions regarding the Article 8 rights of the appellant had ignored the appellant's best interests: they referring to the determination in **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)**. In that determination it had been emphasised that the interests of minor children were a primary consideration. Having emphasised that the appellant was an 8 year old girl who wished to live with her mother it was argued that it was difficult for the judge to have reached the conclusion that she should continue to live with her grandmother and six other children.

12. It was argued that the judge had not properly set out the structured approach set out in **Razgar** and that he had not followed the direction of Moses LJ in the **Fawad Ahmadi v SSHD [2005] EWCA Civ 1721** which were that the obligation under Article 8 was not to inhibit development of real family life in the future. It was argued that there was family life between the appellant and her mother even if they had not lived together.

13. With regard to the issue of sole responsibility it was argued that the judge had misunderstood the law and in fact had missed the central guidance in **TD** which was that the test was not whether anyone else had day-to-day responsibility or whether the parents had continuing control and direction of the child's upbringing including making all the important decisions in the child's life. It was pointed out that the judge had found that the appellant's grandmother would accede to the appellant's mother's wishes and that that indicated that the appellant's mother was in charge. It was argued that the judge had missed the central point of "control and direction".

14. Judge of the First-tier Tribunal Landes granted permission to appeal stating that the grounds relating to Article 8 were arguable. She referred to the approach set out in **Mundeba [2013] UKUT 88**.

15. Judge Landes went on to say that she considered that the grounds relating to sole responsibility were weaker. She noted that the judge had made no findings about the position of the appellant's father but in any event he had not completely disappeared from the appellant's life.

16. A Rule 24 statement was served on 27 June 2011 in which the respondent stated that the grounds advanced showed no material arguable errors of law. The judge had properly considered paragraph 297 of HC 395 and the determination in **TD** and had made reasonable and sustainable findings of fact which were open to him when he found that parental responsibility was shared between the appellant's mother in Britain and the appellant's grandmother. The respondent submitted that Section 55 of the Borders, Citizenship and Immigration Act did not apply to children outside Britain but in any event the decision had been proportionate.

17. At the hearing of the appeal Mr Stone relied on the grounds of appeal but stated that he had not raised the issue of Section 55 of the UK Borders Act in the grounds of appeal as he accepted that it did not apply to an appellant who was outside Britain. What he wished to emphasise, however, was that a central issue was the child's best interests. That was something which the judge had not considered and it was surely in the appellant's best interests to be with her mother; her interests were a primary consideration.

18. He went on to refer to the various steps in **Razgar** stating that had the judge followed those steps then the impact on the appellant's future family life would have been taken into account and that the decision would have been found to be disproportionate.

19. With regard to the conclusions regarding sole responsibility he stated that the judge had erred in the way in which he dealt with the law. He emphasised that the judge had accepted that in most instances the grandmother would accede to the decisions of the appellant's mother. He argued that the issue of sole responsibility was not a matter which concerned day-to-day care and control. He asked me therefore to find that there were material errors of law in the determination.

20. In reply Mr Jarvis asked me to find that there was no material error of law in the determination. The judge had properly addressed himself on the law and on the evidence and had dealt properly with the issue of the appellant's rights under Article 8.

Discussion

21. I find no material error of law in the determination of the Immigration Judge. This is a determination in which the judge set out the relevant facts and reached a conclusion in paragraph 20 that the decision was proportionate. He correctly pointed out that Article 8 had not been relied on in the grounds of appeal or before him and therefore of course there were no detailed arguments on which he was required to comment. Nevertheless, having considered the facts of this case the conclusion he came to was clearly open to him. The reality is that this appellant had always lived with her grandmother and indeed her cousins since she was born. She lived in materially comfortable circumstances within the context of life in Thailand and was well cared for. The judge, as Mr Stone accepted and indeed did not argue, was not required to take into account Section 55 of the UK Borders Act. Although, he was required to weigh up relevant factors and to consider the interests of the child as a primary consideration. On the factual matrix which was before him it cannot be said that his decision ignored the interests of the appellant. While he could have set out his conclusions in greater detail I consider that his conclusion, that the decision was proportionate, was entirely open to him and that the fact that he did not state that he considered that the rights of the appellant were a primary consideration is not relevant.

22. Moreover, the fact that he clearly considered the issue of proportionality makes it evident that there would have been no point in him going through the various steps as set out in the judgment of the House of Lords in **Razgar**. It would, of course, have been open to him to have stated that he did not accept that there was family life between the appellant and her mother but he did not do so.

23. I consider that his conclusions were fully open to him and he made no error of law in finding that the decision was a proportionate one.

24. With regard to the appellant's rights under the Rules he again considered all the relevant evidence and applied appropriate case law. His conclusion that the appellant's mother did not have sole responsibility was entirely open to him. He was entitled to place weight on the very short period of months that the appellant's mother had spent with her and although, as Judge Landes pointed out, the judge did not comment on the role which the appellant's father played in her upbringing that clearly was also a consideration that would have fortified his conclusion that the decision was proportionate.

25. I therefore find that there is no material error of law in the determination of the judge and I therefore find that his decision dismissing this appeal on both immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy