IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07578/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14th May 2015
Given extempore

Decision & Reasons Promulgated
On 10th June 2015

Before

Upper Tribunal Judge Chalkley

Between

Entry Clearance Officer - Shefo

Appellant

and

ABIBATU TAYYIBBAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Fijiwala, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer who was the respondent before the First-tier Tribunal Judge. For ease of reference I refer to the parties as the Entry Clearance Officer and the claimant. The claimant was born on 26th July, 1997 and is a national of Sierra Leone. Her father, the sponsor, is a British subject originally from Sierra Leone. He appeared before me today and gave me certain evidence, as a result of which I am able to prepare this determination.

2. The claimant made application in December 2013, when she was 16 years of age for entry clearance to settle with her father in the United Kingdom. That application was refused by the Entry Clearance Officer on 7th March, 2014, as a result of which the claimant appealed to the

First-tier Tribunal. Her appeal was heard by First-tier Tribunal Judge S J Steer who, in a determination promulgated on 15th January 2015, allowed claimant's appeal. The application had originally been refused by the Entry Clearance Officer with reference to Immigration Rules HC 395 as amended because, first, it was not accepted that the sponsor was her father, that was on the basis of paragraph 297(1). Alternatively that he had not sole responsibility for her. That was on the basis of paragraph 297(1)(e). Further in the alternative that there were serious and compelling family or other reasons making her exclusion undesirable – paragraph 297(1)(e). And lastly in any event, it was said that he could not adequately maintain her without recourse to public funds as required by paragraph 297(v). The judge allowed the appeal.

3. There was no dispute between the parties that she was able to meet the remaining requirements of the Immigration Rules.

4. The sponsor gave oral evidence at the appeal before the First-tier Tribunal and there was cross-examination although not going to the issues of his credibility and submissions were made. The judge concluded that claimant met all the disputed requirements of paragraph 297 and allowed the appeal under the Immigration Rules. The judge refers to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom, but did not go on to consider whether an adverse immigration decision resulted in a breach of human rights because, that was not of course necessary.

5. The Entry Clearance Officer appealed, suggesting first that the judge had failed to apply the correct test set out in *KA and Others (Adequacy of maintenance)* Pakistan [2006] UKAIT 00065, which required a comparator of income as at the date of decision, in this case 7th March 2014, with the relevant income support entitlement in addition to housing costs, in this case rent and council tax, and does not allow for reliance on third party support.

6. Secondly, that the judge took into account evidence of circumstances that did not appertain at the date of decision, namely the release of funds for the claimant's maintenance as a result of another of the sponsor's children going to university contrary to Section 85 of the Nationality, Immigration and Asylum Act 2002.

7. Under Section 85(4) of the 2002 Act on appeal under Section 82(1) and 83 the Tribunal can consider evidence about any matter which it thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision. However Section 85(4) of the 2002 Act is now subject to the exceptions contained in Section 85A which was brought into force by Section 19 of the UK Borders Act 2009.

8. Pursuant to Exception 1 in appeals against refusal of entry clearance or a refusal of a Certificate of Entitlement under Section 10 the Tribunal "may consider only the circumstances pertaining at the time of decision". It follows that evidence of matters arising post-decision cannot be considered in such cases but this does not mean that any evidence post-decision cannot be considered. There is a distinction between post-decision evidence that "sheds light" on the circumstances pertaining at the date of decision which remains admissible under the 2002 Act and post-decision evidence relating to post-decision events which is not admissible under the Act.

9. The judge correctly self-directed at paragraph 21 of her decision that the consideration was confined to evidence of the position as it was at the date of decision when she turned to deal with the question of the maintenance dispute at paragraph 27.

10. The sponsor sought to rely on evidence of his pension entitlement and his wife's earnings totalling £1,200 per month and evidence of his rental expenses of less than £8 a week in the context of his pension credits as well as his current council tax charge. More to the point that the relevant consideration of public funds set out in the ECO's grounds of £177.62 plus housing costs were not met so that the judge's conclusions were in fact supported by evidence.

11. The matter came for hearing before the Honourable Mr Justice Edis sitting as a Judge of the Upper Tribunal and Deputy Upper Tribunal Judge Davidge on 14th May 2015. In their determination, a copy of which is set out in the annex to this determination, they found that the release of funds for maintaining the claimant through the sponsor's son going to university was a matter that arose after the decision. It should not have admitted and the judge's reliance upon it was an error of law.

12. They make it clear that the starting point for the judge should have been an evaluation of the oral and documentary evidence of the financial position of the sponsor and his wife at 7th March, 2014 and a comparison of that position as against income support comparator for the 7th March, 2014. Only if the income was established as being sufficient as at 7th March, 2014 could the claimant's appeal under the Rules have succeeded.

13. The Tribunal sitting on 14th May, 2015 found an error of law in that the decision of the First-tier Tribunal in respect of maintenance at paragraph 297(5) revealed an error of law such that to that extent only the decision must be set aside. They pointed out that the claimant was not legally represented and is still a minor and in those circumstances, so that the sponsor could understand the importance of the assessment being conducted as at 4th March, 2014, they decided to give their decision orally at the hearing and set out in brief their reasons. They annexed to their determination the oral reasons provided on the day. They indicated to the parties that in the event of a finding that the evidence did not establish that the financial requirements were met, the issue as to whether or not the adverse immigration decision resulted in a breach of Article 8 to be assessed at 7th March, 2014 remained open.

14. At the end of the hearing the sponsor indicated that he might not prefer to proceed with this appeal but instead to make a fresh application urgently before the claimant became 18 when different Rules would apply. As it transpired, the claimant has pursued the appeal.

15. In evidence before me today the sponsor has established that his pension credit as at the date of the Entry Clearance Officer's decision was £118.38 per week. He has also established in evidence before me today that his wife was earning at least £107 per week as at the date of the Entry Clearance Officer's decision and, indeed, it may have been very slightly more. He has further established before me today that in respect of his two other children he and his wife were in receipt of tax credits of £111.12 per week and that his wife was in addition in receipt of child benefit of £33.70 per week.

16. On behalf of the respondent the Presenting Officer confirmed that she agreed those figures and, more importantly, accepted that the sponsor was in receipt at the date of the Entry Clearance Officer's decision of a sum in excess of £360 per week. That is important because the figure set out in the original grounds of appeal at paragraph 6 is wron,g but it is wrong in favour of the claimant. It suggests that the sponsor would need a weekly income of £112 for himself and his wife plus £65.62 for a child, making a total of £171.62. In fact he would need to have had an income of £309.41 because he had two additional children and two further sums of £65.62 have to be added to the figure of £177.62. In other words, for the purposes of this appeal the claimant needs to demonstrate that the sponsor's income is in excess of £309.41 as at 7th March and, as has been accepted by the Presenting Officer, the sponsor has clearly demonstrated that

this was the case, in fact his income was considerably in excess of this sum as at the date of the Entry Clearance Officer's decision.

Decision

17. The Presenting Officer agreed with me that the right course would be for this appeal to be allowed and I allow it now. A copy of the determination of the Panel sitting on 14th May 2015 is at Appendix I below.

Richard Chalkley
Upper Tribunal Judge Chalkley

Appendix 1 above referred to

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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07578/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2015

Decision & Reasons Promulgated

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Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ABIBATU TAYYIBBAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Savage, Home Office Presenting Officer
For the Respondent: No Representative

DECISION AND REASONS

1. This is not a full reasoned decision on the Secretary of State's appeal against the decision of the First-tier Tribunal in this case. Full reasons will follow in writing. Because the child who is the appellant will reach her 18th birthday at the end of July it is of importance that if this appeal ought ultimately to succeed it is disposed of as quickly as it can be. For that reason I am giving this oral account of our decision to enable matters to proceed after today quickly.

2. We have reached the clear conclusion that the decision of Judge Steer in the First-tier Tribunal on 11 January 2015 cannot stand. Her assessment of means was based squarely on the fact that one of the two children who had been living in this family home had now gone to university so that the income which had been used to maintain him could hereafter be used to maintain the appellant if she arrived in the United Kingdom. That is a decision which was not open to her in law because it relied upon evidence which concerned the state of affairs after the decision was taken which is 7 March 2014 and that is a firm Rule which arises out of the terms of the Act which we cannot abrogate.

3. Therefore, having set that decision aside, it is for this Tribunal in our judgment to remake the decision. That involves as far as this Tribunal is concerned affording the sponsor and the appellant an opportunity to lodge whatever evidence they consider they can on the questions which are going to determine the decision when it is remade, and the questions which are going to determine the decision when it is remade are first whether the means of the sponsor, which would, we think, include those of his wife, were on 7 March 2014 sufficient to provide adequate maintenance for the child so that she would not have to have recourse to public funds.

4. That evidence could, given the age of this application, take a variety of forms. If, for example, as at 7 March 2014 Mr Tayyibbah expected on good grounds that he would shortly receive a pension even if it was not then in payment that would be evidence which the Tribunal could consider. Whether it would be adequate would be another matter. So therefore we consider that the appellant and the sponsor should have an opportunity to lodge whatever evidence they can relating to that question: the means of the family as at 7 March 2014. Secondly, on the assumption that the sponsor's means may turn out not to be adequate, this is a case in our judgment where there would have to be a consideration of Article 8. Article 8 involves an assessment of whether the application of the Rules would be disproportionate to the effect that it would have on the appellant's family and private life.

5. It is not obvious that there is any material which could bear on that question which we do not already have. The judge in the First-tier Tribunal made findings of fact which are not challenged and which plainly are relevant to the Article 8 assessment even though she did not herself carry out an Article 8 assessment. However, we do offer the opportunity to the appellant and her sponsor to file any further evidence relevant to the Article 8 question but they must remember that this Tribunal will be considering the Article 8 question as it stood in March 2014 and not as it stands now.

6. So what we propose to do is to set aside the decision in the First-tier Tribunal for reasons which we will give later.

Signed Date

Mr Justice Edis