Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/22512/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2015	**On 21 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MISS ABULAITI GULIMIRE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, BEIJING

Respondent

Representation:
For the Appellant: Ms V Easty, Counsel, instructed by Luqmani Thompson and Partners Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Steer (Judge Steer), dated 24 March 2015, in which she dismissed the Appellant's appeal. That appeal was against a decision of the Respondent, dated 18 October 2012, refusing to grant entry clearance to join her family in the United Kingdom.

2. The Appellant is a Chinese national, born on 23 February 1995. The application for entry clearance was made on 4 July 2012. She was a minor as at the date of the Respondent's decision.

3. The Appellant sought to join her parents and two younger siblings in this country. Her father, Mr Abulaiti Maikiniyazi, is a Chinese national who now has Indefinite Leave to Remain (ILR) in the United Kingdom, as do her mother and siblings. At the time of the entry application and decision thereon, the father only had Discretionary Leave to Remain. The ILR had been belatedly granted in 2014 following a protracted judicial review challenge by his solicitors.

4. The Respondent refused the application on several bases. First, that a false birth certificate had been submitted and so Paragraph 320(7A) of the Immigration Rules applied. Second, that Paragraph 301 of the Rules could not assist, as the father did not have settled status here. Third, that Article 8 would not be breached.

5. The Appellant's appeal was originally heard by First-tier Tribunal Judge Easterman. By a decision promulgated on 2 January 2014 he allowed the appeal under the Rules and on Article 8 grounds. He also found that Paragraph 320(7A) did not apply. This decision was successfully challenged by the Respondent, Deputy Upper Tribunal Appleyard concluding that Judge Easterman had erred in respect of his assessment under the Rules and Article 8. He found that the Paragraph 320(7A) issue had been properly considered by Judge Easterman. The appeal was remitted back to the First-tier Tribunal for a new decision on Article 8 only.

The decision of Judge Steer

6. Judge Steer found that there was family life as between the Appellant and her family in this country (paragraph 25). She found that the Respondent's decision interfered with that life to the extent that Article 8 was engaged (paragraph 26). The core issue was that of proportionality. In this regard, Ms Easty (who appeared for the Appellant then as now) had submitted that the Respondent's delay in granting the father ILR was relevant to the balancing exercise: if the delay had not occurred, the Appellant could have applied for entry clearance under the Rules and almost certainly would have been successful. Therefore, the Respondent's delay diminished the weight attributable to the need to maintain effective immigration control.

7. At paragraph 33 Judge Steer rejected an element of this submission that was predicated upon the decision in AP (India) [2015] EWCA Civ 89. Judge Steer stated that AP (India) was relied on as being, in effect, a decisive factor in the case before her, but that this was misconceived. However, and importantly, she also acknowledged that delay is a factor relevant, "to be weighed against the public interest in maintaining effective immigration controls", and she cited EB (Kosovo) [2008] UKHL 41 to this end. Judge Steer goes on in paragraph 34 to take account of the financial support from the Appellant's parents, and the ability to maintain contact

with the siblings through the telephone and visits. In paragraph 35, it is said that the Appellant "is now an adult, aged 20. She is living an independent life as a student, in Malaysia."

The Appellant's grounds of appeal

8. Ms Easty drafted the grounds of appeal. They take issue with Judge Steer's alleged failure to attach any weight to the Respondent's delay, or to give any reasons for why she was not attaching any such weight, if this was the case. Further, it is said that Judge Steer erred in her conclusion that the Appellant had been leading an independent life.

9. Permission to appeal was granted by First-tier Tribunal Judge Levin on 19 May 2015.

The hearing before me

10. Ms Easty relied on her grounds. She submitted that the delay point related to the time taken for the Respondent to finally grant ILR to the family, a grant that should have occurred years previously. The fact that the judicial review proceedings were ultimately settled by consent (on the basis that the Respondent would grant ILR) indicated an acceptance by the Respondent that she had acted erroneously in only granting Discretionary Leave in 2011. Judge Steer had failed to deal with the delay issue properly. This was material because of the errors relating to the finding on independent life in paragraph 35.

11. Mr Duffy suggested that Judge Steer had dealt adequately with the AP (India) issue, and that as this was what the Appellant's complaint was really concerned with there was no error. He did acknowledge that Judge Steer appeared to have erred in taking into account post-decision facts when concluding that the Appellant was an adult and leading an independent life in Malaysia.

Decision on error of law

12. I find that Judge Steer did err in law in respect of the delay issue.

13. I acknowledge Mr Duffy's point that the Appellant's delay submission could have been expressed in somewhat different terms, or that what has been expressed could be read in different ways. However, I am satisfied that the Appellant's argument before Judge Steer was put, at least in large part, on the basis that the Respondent's delay in respect of the father's case was a relevant factor in the assessment of proportionally under Article 8 (see, for example, paragraphs 27-28 of the decision and paragraph 6 of Ms Easty's second supplementary skeleton argument). To that extent, the argument was not simply a reliance on the AP (India) decision (or indeed on Rashid [2005] EWCA Civ 744, a case which has not found favour of late).

14. Judge Steer was bound to have dealt with this factor when undertaking the balancing exercise. Indeed, she clearly acknowledges that delay of the

sort relied on by the Appellant was a relevant factor (paragraph 33). The problem is that she then fails to attach any weight to the factor, or to provide any reasons as to why she was declining to attach any such weight, if that was her view. These failures constitute an error of law.

15. Is this material? In my view, yes. This is because Judge Steer also erred in respect of her conclusion that the Appellant was living an independent life. Primarily, the error lies in her taking into account the fact that the Appellant was an adult as at the date of hearing, a fact that obviously arose some two and half years after the date of decision. She was bound to consider the facts as at the earlier date, at which time the Appellant was still a minor. Her minority was indicative (although not conclusive) of the absence of an independent life. The chronological error was therefore material. In addition, Judge Steer appears to have overlooked the mother's evidence that the Appellant was completely financially dependent upon her parents (paragraph 10), or at least does not attempt to resolve any conflict in the evidence as regards what the father said at paragraph 14. Judge Steer's assessment of the evidence before her is therefore flawed.

16. In light of the above, I set aside the decision of Judge Steer.

Re-make decision

17. Both representatives were agreed that I could and should go on and re-make the decision myself, based upon the evidence now before me. It was also agreed that the sole issue to be decided now is whether the Respondent's refusal of entry clearance constituted a disproportionate interference with (or lack of respect for) the Appellant's family life. The issue is narrowly defined because it is rightly accepted by Ms Easty that Paragraph 301 of and Appendix FM to the Immigration Rules cannot not assist the Appellant in her appeal. In addition, Mr Duffy acknowledges that Judge Steer's finding that there was family life between the Appellant and her family members in the United Kingdom, and that the refusal was a sufficiently serious interference with (or lack of respect for) that life, had not been challenged and should stand for the purposes of my reconsideration of this case.

18. I agree with the position adopted by both representatives.

19. In re-making the decision I have regard to the following evidence:

    a) The Respondent's original appeal bundle (RB);
    b) An Appellant's bundle (AB1), indexed and paginated 1-358;
    c) A recent statement from the Appellant, dated 1 August 2015;
    d) A full chronology of events.

20. The Appellant's mother gave very brief oral evidence to confirm that the Appellant had been studying in Malaysia as at the date of the Respondent's decision, but these were entirely funded by the parents. In addition, at that time the Appellant had not yet met her siblings face-to-face, although this had changed subsequently.

21. By way of submissions, Ms Easty acknowledged the high threshold for Article 8 cases involving entry clearance, as stated by the Court of Appeal in SS (Congo) and Others [2015] EWCA Civ 387 (SS (Congo)). However, the Appellant was a minor at the relevant time. She was wholly dependent upon her parents. Her maintenance and accommodation if in the United Kingdom were not in issue. Importantly, the Respondent's delay in dealing with the father's asylum claim and then the further representations led directly to the consequence that he was not granted ILR when he should have been, and that the Appellant was unable to obtain entry clearance through the Rules, a route that would, submitted Ms Easty, have almost certainly have been successful. The fact that the Respondent agreed to grant the ILR following the judicial review claim strongly indicated an acknowledgement of previous failings in administrative processes. The three skeleton arguments were relied on, but only the third now has relevance to the issue before me.

22. Mr Duffy reiterated the threshold set out in SS (Congo). The Appellant had been left behind by her parents, and this was not the responsibility of the Respondent. The Appellant had developed family life with her grandparents as well. At the date of decision the Appellant was in Malaysia and moving towards independence. The Appellant was a minor, but nearing the age of eighteen; thus her position was not as strong as if she had been a young child.

23. In respect of the proportionality issue, I take into account the following matters.

24. I should begin with the Appellant's best interests as being a primary consideration: she was, after all, a minor at the relevant time. I find that these lay in being reunited with her parents and having the opportunity to develop ties with her siblings (whom she had not yet met). I fully acknowledge the fact that she had not lived with her parents in a full-time single unit since 2001. However, there was significant direct contact after that time, both with the mother in Turkey (see, for example 8 and 25 of AB1, and the Appellant's recent statement) and her father, once he obtained travel documentation in this country. The Appellant remained fully dependent upon her parents at all material times. This state of affairs was recognised in part by Judge Steer when concluding that family life existed. In terms of the nascent relationship with the siblings, her best interests encompassed this aspect of the family life found to exist by Judge Steer.

25. Of course, the best interests are by no means a trump card in this or indeed any case. However, I regard it as a compelling factor.

26. Next, the need to maintain effective immigration control is in the public interest and represents a very weighty factor in the Respondent's favour. This is clear from section 117B(1) of the Nationality, Immigration and Asylum Act 2002. In addition, SS (Congo) sets the bar for a successful Article 8 claim in entry cases outside the Rules relatively high:

> "40.In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.
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> 41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or "very compelling circumstances" test applicable in the special contexts explained in *MF (Nigeria)* (precariousness of family relationship and deportation of foreigners convicted of serious crimes)."

27. A significant aspect of this public interest factor is that applicants should show themselves able to satisfy the Rules for the purposes of obtaining entry into the United Kingdom. The Rules are the primary basis upon which immigration is effectively controlled. A person who is unable to meet the relevant Rules will usually fail in a separate claim under Article 8.

28. In the Appellant's case, she was unable to meet the Rules (whether Paragraphs 297 or 310, or Appendix FM) because of the nature of her father's leave at the time. He was not a person present and settled in the United Kingdom, his Discretionary Leave was not a status with "a view to settlement", and that status was not obtained under Appendix FM. Other than this, it is clear to me that, having regard to the evidence as a whole and the decisions of previous Tribunals during the protracted course of this appeal, an application under the Rules would almost certainly have succeeded, as no other relevant criteria have ever been determined against the Appellant.

29. It is therefore important to examine the reason why the father did not have ILR at the time, a status which would have effectively allowed the Appellant to meet the Rules. This is where the Respondent's delay becomes relevant. There were, I find, two periods of unexplained and significant delay: first in respect of the father's asylum claim, which took three years to consider; second, the additional six years it took to consider the further representations submitted in October 2005 (and quite properly chased-up by his solicitors). My own view of this is fully supported by the

Respondent's file note of 22 September 2011 at 41 AB1. As a direct consequence of the first period of delay, the father was placed in a class of persons in respect of whom, all other things being equal, a grant of ILR would very probably have been forthcoming. As a direct consequence of the second period of delay, the father's position was not considered until after the Respondent's policy on granting ILR had changed in July 2011 to a position in which only Discretionary Leave was given. In addition to this, I accept Ms Easty's submission that the Respondent's grant of ILR to the father in 2014 following the judicial review challenge due to what were described by her as "exceptional circumstances" (see 252 AB1) was indicative (I put it no higher) of an acknowledgement of past failings in his case. I conclude that the Respondent's delay, in particular relating to the second period, is another compelling factor in this appeal. This is not simply because of the impact it had on the father, but much more importantly because of the knock-on effect it had on the Appellant's ability to be reunited with her family, via the Rules and in accordance with what have always been her best interests.

30. In respect of Appendix FM, limited leave to remain can be sufficient under E-ECC.1.6, however, the leave must have been granted under the Appendix itself. Therefore, even with the Discretionary Leave he had, the father was precluded from acting as a sponsor. Whilst this may not amount to a compelling circumstance, it is something that was wholly outwith the control of either the father or the Appellant. It had nothing to do with choice, or any adverse conduct.

31. Mr Duffy was right to say that the Appellant's case would be stronger if she had been younger at the date of decision. There is a qualitative difference between the situation of a seven year old and a seventeen year old. However, in my view, this argument only goes so far. The Appellant was still a child who was, I find, desperate to be with her parents and siblings. The fact that the case could have been stronger does not mean that it is nonetheless not strong enough to succeed.

32. The Appellant was in Malaysia at the relevant time. It is right that this would indicate a greater degree of independence than if she had been living a secluded life back in China with her grandparents. It does not follow, and I do not find, that she was living an independent life. She was simply a minor student in a foreign country. I accept her own written evidence that she felt vulnerable and alone, notwithstanding interaction with other students (see 5 AB1). Her location does not, I conclude, detract materially from the strength of her claim.

33. In respect of the Appellant's relationship with her grandparents I find that there was, perhaps unsurprisingly, a good bond. However, as expressed in her statement at 4 AB1, the Appellant clearly felt the need for her parents. There were obvious difficulties in terms of the practical ability of ageing family members to care for a young teenager.

34. Having regard to section 117B(2) and (3) of the 2002 Act, I find that the Appellant had an ability to express herself in English at something close to a reasonable level. I infer this primarily from her statement, which I find was composed by her, at 4-5 AB1. Although it post-dates the Respondent's decision by some eleven months, I infer that there was a pre-existing ability. Maintenance and accommodation are not in dispute. The fact that the Appellant would not be a drain on the public purse does not enhance her own claim, but nor does it detract from it.

35. There has never been any suggestion from the Respondent that the United Kingdom-based family could be expected to relocate to China.

36. Bringing all of the above together, I conclude that the Respondent's decision to refuse entry clearance amounted to a disproportionate interference with, or lack of respect for, the Appellant's right to family life under Article 8. In particular, I have identified what I deem to be the two compelling factors of the Appellant's best interests and the Respondent's delay. These factors are not the *most* compelling, but that it is not the applicable test. It is right also that that public interest is only outweighed in this case by a relatively narrow margin. But no greater margin need be shown.

37. The combination of the two compelling factors and the absence of other adverse matters leads to the success of this appeal after what has been a very lengthy appellate process.

Anonymity

38. No direction has been made previously, and none was sought in respect of my decision. I see no good reason to make one, and therefore no direction is made.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal on human rights grounds

Signed Date: 21 August 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 21 August 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal