



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06266/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 September 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR JAPHET BARUELA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Chhotu, Direct Access Counsel

For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal from the decision of First-tier Tribunal Judge O'Malley which was promulgated on 2 March 2018. The decision of Judge O'Malley was set aside by me for the reasons briefly set out in my decision promulgated on 2 July 2018. That decision expressly preserved the factual findings made in the First-tier Tribunal.
2. Mr Chhotu, who continues to represent the appellant, made an application at the outset of the hearing to introduce a short updating statement from the appellant. There was no explanation as to why that statement could not have been provided any

earlier, nor was there any application to extend the time for filing and serving witness statements, provision for which had been made in the error of law directions. There was no reference within Mr Chhotu's skeleton argument (served last Friday) to the prospect of this additional evidence being adduced and, as Mr Wilding for the Secretary of State pointed out, there was no Rule 15 application. I refused to admit the statement into evidence. The application was made too late, and there was no explanation for its lateness nor for the failure to comply with my earlier directions.

3. As the salient facts have been preserved, the background can be stated relatively shortly. The appellant is a citizen of the Philippines. He was born on 7 July 1988. At the time of making his application for entry clearance he was some days short of his 17th birthday. The application was refused on 29 August 2015 and the refusal was upheld by the Entry Clearance Manager on 16 November 2015. It was from that refusal that the appellant appealed to the First-tier Tribunal. By the time the matter was before the First-tier Tribunal the appellant had obtained his majority and he is now 20 years of age.
4. The provision relied upon by the appellant was paragraph 297 in Appendix FM to the Immigration Rules, the relevant parts of which read as follows:

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; and

...

- (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively".

5. The findings of the First-tier Tribunal Judge were fully set out in her decision and reasons. The judge expressly found at paragraph 61 that the sponsor (the appellant's father) was sharing parental responsibility with other family members and did not

have sole responsibility for the appellant's upbringing. The other material findings of the First-tier Tribunal are as follows:

- "74. It was also put to me that the appellant can succeed under the requirements of paragraph 297(i)(f) as his maternal grandparents are in poor health and unable to look after him and he is at risk of living on the streets and of getting involved in drugs and guns. It was put by Mr Eaton [for the Secretary of State] that such concerns are not real in a family which shows such support for the appellant. I accept his assertion. The appellant has an aunt and uncle in Manila with whom he is in contact, he has financial support from his father and from his paternal grandparents and is free to live in their substantial property if he is not able to continue living with the maternal grandparents.
75. For the avoidance of doubt, I am not persuaded that the medical evidence provided in relation to the maternal grandparents indicates any significant difficulty with the health of either of them such that they could not continue to provide care for the appellant, appropriate to his age. I find that their age is not significant, there is no clarification in any of the medical evidence of requirements for treatment or medication and the grandparents themselves do not indicate any limitation, setting out that they had been 'advised to reduce the stress in our lives'. There is no indication that giving accommodation to the appellant causes stress to them, indeed the evidence of Mr Brierley was that the presence of the appellant was a distinct advantage to them as it provided their only source of income, in the absence of which they would be destitute, a situation which I conclude would be a significant source of stress.
76. The evidence of the paternal grandparents is that the appellant can live in their seven bedroom house should he be unable to live with the maternal grandparents. I accept the evidence that he stays at this property with the paternal grandparents when they visit so that he is familiar with that home. I note that he has other paternal family on the outskirts of Manila and I am satisfied that he will be cared for appropriately by family members both in the UK and in the Philippines if the maternal grandparents are no longer willing or able to continue in their role. I find no evidence to support a finding that the appellant comes within the provision of paragraph 297(i)(f)."
6. The First-tier Tribunal Judge then carried out an examination of the sponsor's financial circumstances and came to the conclusion that paragraph 297(iv) was not satisfied because the sponsor's income did not meet the income support level and also because housing benefit is public funding and would be paid at an increased level on the arrival of the appellant.

7. There is no challenge to any of these factual findings which are dispositive of the claim under paragraph 297. The issue therefore, to borrow from the oft-quoted formulation of the Richards LJ in **Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387**, is whether the appellant can show that compelling circumstances exist (which are not sufficiently recognised under the Rules) to require the grant of entry clearance.
8. Mr Chhotu's struggled to identify and articulate the alleged compelling circumstances upon which the appellant might rely. At various stages in argument he deployed the term "compassionate" as an alternative to "compelling". He seemed to be making a substantive point, as he had at the error of law hearing, that the Tribunal should look at the situation at the date of the application (when the appellant was a minor) and not at the date of hearing, although he could not point me to any express authority which supported his general proposition.
9. This appeal postdates the coming into force of the Immigration Act 2014 which amended the Nationality, Immigration and Asylum Act 2002, deleting the former section 85(5) which had constrained the First-tier Tribunal to considering only the circumstances appertaining at the time of the entry clearance officer's decision. That provision has been repealed and, as Mr Chhotu ultimately conceded, this matter falls to be determined on the facts as they appear at the date of the hearing.
10. In reality, however, this point is entirely academic. Rule 27 of the Immigration Rules provides that an appellant who (as here) is aged under 18 at the date when an application is made, should be treated on the basis that he is 18 at the date of the determination (and *ex hypothesi* any appeal). In other words, the Secretary of State cannot take advantage of the fact that an appellant obtains his majority during the course of proceedings which may take some while to determine for reasons often beyond the appellant's control.
11. Mr Chhotu placed reliance on section 55 of the Borders, Citizenship and Immigration Act 2009, and the duty to have regard to the welfare of child applicants. He directed me to the familiar statutory guidance issued by the UK Border Agency in the form of the document *Every Child Matters: Change for Children*. Of particular relevance is paragraph 2.34 which reads as follows:
  - "2.34. The statutory duty in Section 55 of the 2009 Act does not apply in relation to children who are outside the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention. In some instances international or local agreements are in place that permit or require children to be referred to authorities of other countries and UK Border Agency staff will abide by these".

12. Mr Chhotu stated in unambiguous terms that there is no suggestion in this instance that at the time of the application or subsequently this appellant has been in need of protection or safeguarding or presents welfare needs that require attention.
13. As Mr Wilding properly pointed out, the wording of paragraph 2.34 echoes and replicates in large measure the express provisions of paragraph 297(i)(f) in Appendix FM in respect of “serious and compelling family or other considerations which make exclusion of the child undesirable”.
14. The substantial bundle of authorities which Mr Chhotu produced I did not find to be of assistance largely because it addressed points which were not in play in this particular appeal.
15. The primary findings of fact made in the First-tier Tribunal are conclusive and dispositive of the matter. I cannot identify any compelling circumstances which suggest that the decision of the entry clearance officer was disproportionate under Article 8.
16. Mr Chhotu repeatedly submitted that this was a very difficult case on account of there being a conflict which impacted on the appellant’s constitutional rights. He spoke of the potential for prejudice or injustice by applying a “date of hearing assessment”. Despite affording him the opportunity of developing his arguments at this adjourned remake decision, I am not persuaded that there is a conflict, nor is the matter as complex as he suggests. There is no risk of prejudice or injustice as the effect of rule 27 is to make the appellant’s age immaterial.
17. The appellant has not been disadvantaged by obtaining his majority during the currency of these protracted proceedings. Any arguable delay on the part of the Secretary of State or the First-tier Tribunal (on which I make no findings) has not impacted on the outcome. This case does not begin to approach the territory of “conspicuous unfairness” as discussed in **MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 135**.
18. On the facts as found, the appellant did not satisfy the provisions of paragraph 297(i)(e) or 297(i)(f). His case was not rejected by virtue of the appellant’s age, but because on a detailed scrutiny of the evidence, there were no serious and compelling family or other considerations which made exclusion of the appellant undesirable.
19. Mr Chhotu has not identified any feature (still less a compelling circumstance) why the appeal should succeed under Article 8, which has not already been factored into the judge’s scrupulous and unimpeachable disposal of the matter under the composite elements of paragraph 297(i)(f). This is not a “near miss” case. In deference to the appellant’s interests, I have re-read all the documentation in this case and carried out a notional **Razgar** analysis, which can only be resolved one way. There is nothing to suggest the entry clearance officer’s decision was in any way disproportionate,

having regard to the appellant's failure to meet the requirements of the Rules and to the relevant public interest considerations. Accordingly this appeal is dismissed.

**Notice of Decision**

- (1) Having set aside the decision of the First-tier Tribunal, the decision is remade dismissing the appeal.
- (2) No anonymity direction is made.

Signed *Mark Hill*

Date

7 September 2018

Deputy Upper Tribunal Judge Hill QC