



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01695/2018

THE IMMIGRATION ACTS

Heard at Field House
On 17 May 2019

Decision & Reasons Promulgated
On 31 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS AFIA AFIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Gilbert, Counsel instructed by Rahman & Company Solicitors
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bowler sitting at Hatton Cross on 14 December 2018) dismissing her appeal against the decision of an Entry Clearance Officer to refuse her entry clearance for the purposes of settlement as a child under the age of 18 of a person present and settled here. The First-tier Tribunal did not

make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 29 March 2019 First-tier Tribunal Judge Hollingworth granted the appellant permission to appeal as it was arguable, in the light of what was accepted by the Respondent, that the Judge had not applied the correct criteria under Rule 297.

Relevant Background

3. The appellant is a national of Pakistan, whose date of birth is 28 December 2018. Just before her 18th birthday, she applied for entry clearance to join her mother in the UK. She presented documents to show her father had died on 14 December 2009.
4. On 27 October 2017 an Entry Clearance Officer gave his reasons for refusing her application by reference to Rule 297. He accepted that her mother was her sole surviving parent. But he was not satisfied that her mother had had sole responsibility for her upbringing; or alternatively that the criteria in Rule 297(i)(f) were satisfied. In addition, he was not satisfied that there would be adequate maintenance and accommodation for her and her mother without recourse to public funds, having regard to the guidance given in **Ahmed (Benefits; Proof of Receipt: Evidence) Bangladesh [2013] UKUT 84 (IAC)**.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. There was no legal representation for the appellant at the hearing before Judge Bowler. The Judge received oral evidence from the Sponsor.
6. In his subsequent decision, Judge Bowler found that the Sponsor was exercising very little responsibility for the appellant; and that her welfare was not prejudiced by her current living arrangements.
7. The Judge then turned to consider an Article 8 claim outside the Rules. He observed that the Sponsor's wages of less than £1,350 per month gross as shown by the payslips totalled £16,200, which was less than the figure of £18,600 per annum which was "*generally applied as a financial requirement*". Alternatively, the appellant had not shown that her mother's wages were sufficient to maintain and accommodate her and her mother without recourse to public funds, "*especially as the rent is stated to be for a one bedroom flat*". The Judge went on to conclude that the interference with family and private life consequential on the maintenance of the refusal decision was proportionate.

The Hearing in the Upper Tribunal

8. At the hearing before me to determine whether an error of law was made out, Mr Gilbert briefly developed the appellant's case. Mr Tarlow conceded that the Judge had materially erred in law in not considering the application of Rule 297(i)(d). I

accepted Mr Tarlow's concession, and held that an error of law was made out. My reasons for so finding are set out below.

9. For the purposes of remaking the decision, I sought clarification from Mr Tarlow as to his position on the maintenance and accommodation requirements. He said that he was not challenging the documentary evidence on this issue that had been contained in the appellant's bundle for the hearing in the First-tier Tribunal. He made it clear that he was content that the decision should be remade in the appellant's favour.

Reasons for Finding an Error of Law

10. Rule 297 provides that 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 into 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:
 - ...
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement *and the other parent is dead* (my emphasis); or
 - (e) one parent is 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
 - (ii) is under the age of 18; and
 - (iii) is not leading an independent life, is unmarried and is not a civil partner, and is not from an independent family unit; 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 of the child is seeking to join, own or occupy exclusively; and
 - (v) can, and will be maintained adequately by the parent, parents or relative of the child is seeking to join, without recourse to public funds; and
 - (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and
 - (viii) does not fall for refusal under the general grounds for the refusal.
11. The Judge gave adequate reasons for finding that the appellant did not satisfy the gateway requirement of sole responsibility or the gateway requirement of there being serious and compelling family or other considerations which made her exclusion undesirable. However, he failed to address the question of whether the appellant qualified for entry clearance on the simple basis that her father was dead.

Even though the point had not been taken by the appellant – which was understandable, as she was not legally represented – it was a “Robinson obvious” point which needed to be addressed, as it was accepted in the RFRL that the appellant’s father was dead and that the Sponsor was her sole surviving parent.

12. The Judge also erred in not giving adequate reasons for finding that the appellant did not meet the requirements of Rules 297(iv) and (v).
13. The reasoning which underpinned the Judge’s negative findings under Rules 297(iv) and (v) was that the evidence as to the Sponsor’s income and the amount of rent she was paying each month only consisted of a “*simple statement*” to this effect. But this was not true. The bundle of documents filed for the hearing contained a Tenancy Agreement showing that the Sponsor was paying £500 per month and the following sources of evidence for the Sponsor’s earnings and disposable income: a P60, a series of wage slips, money transfer receipts, and an employment letter from Sun Foods Ltd.
14. The Judge also appears to have assumed that a one bedroom flat will be inherently unsuitable to accommodate the appellant as well as her mother, although this was not a point taken in the RFRL. As pleaded in the permission application, under the Housing Act 1985 there will not be statutory over-crowding where two adults share a one bedroom flat.
15. For the above reasons, the decision of the First-tier Tribunal contains an error of law such that it must be set aside and remade.

Discussion and Findings on Remaking

16. It is accepted in the RFRL that the appellant’s father is dead. Accordingly, the appellant is able to bring herself within Rule 297(i)(d) as her mother is present and settled in the United Kingdom, and “*the other parent is dead*”. It appears to have been the view of the Entry Clearance Officer who refused the application that the death of the father was not the reason why the appellant was seeking entry clearance just before her 18th birthday, which is probably true, and that therefore his death was irrelevant to the question of the appellant’s ability to bring herself within the scope of Rule 297 (i). But this approach was misconceived. The appellant was not required to justify her motivation. All that the Rule requires is that one of the set of circumstances set out in sub-paragraph (i) applies. The appellant was applying in circumstances where one parent was settled in the UK, and the other parent was dead. That was all that the appellant needed to prove.
17. The Entry Clearance Officer put in issue the Sponsor’s ability to maintain and accommodate the appellant adequately without recourse to public funds, due to the paucity of the supporting documents provided with the application. As Mr Tarlow accepts, the appellant has adequately addressed this concern by filing the documents which I have listed in [13] above. It is common ground that the appellant does not need to meet the MIR. She has provided sufficient evidence to show that her mother’s net income comfortably exceeds the rent she has to pay each month, and

that, after taking into account additional outgoings such as utility bills, there is still likely to be a substantial surplus in the mother's disposal income so as to enable her to maintain and accommodate her daughter adequately in the UK without recourse to public funds.

18. As all the relevant requirements of Rule 297 are met, the question of proportionality does not arise. The appellant has made out her case that the decision to refuse her human rights claim by reference to Rule 297 is unlawful under Section 6 of the Human Rights Act 1998.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal is allowed.

I make no anonymity direction.

Signed

Date 28 May 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make a whole fee award of £80 as the main ground of refusal was misconceived.

Signed

Date 28 May 2019

Deputy Upper Tribunal Judge Monson