Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01745/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20 May 2019

Decision & Reasons Promulgated
On 05 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

HASHINI [P]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, Counsel, instructed by Courtney Smith Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. My decision on the error of law in this case was given extempore at the hearing. I reserved my decision on the remaking issue.

2. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Howard (the judge), promulgated on 27 February 2019, in which he dismissed her appeal against the Respondent's decision of 4 December 2017, refusing her human

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rights application which had been made on 7 September 2017. Significantly for the purposes of this appeal the Appellant was aged 16 when that human rights claim was made and 17 as at the date of decision. By the time the appeal came before the judge on 21 January 2019 the Appellant had attained her majority.

The judge's decision

3. In considering the appeal, the judge first dealt with the issue of the Immigration Rules, in particular paragraph 297. Between paragraphs 11 and 21 of his decision, the judge sets out a number of factors he regarded as being relevant to his assessment, cumulating in the conclusion that the Appellant had not been able to meet the requirements of the particular Rule in question. Thereafter the judge undertakes a wider Article 8 assessment outside the context of the Rules. Having regard to factors already considered, the judge concludes that the Respondent's decision was proportionate in all the circumstances.

The grounds of appeal and grant of permission

4. The succinct grounds of appeal make three assertions. First, that the judge failed to conduct a best interests' assessment; second that in light of paragraph 27 of the Rules the judge had erroneously assessed the Appellant's case within the Rules as though she was an adult rather than still a child; third, that the judge had made inadequate findings and/or had provided inadequate reasons on the Appellant's circumstances as a whole.

5. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 11 April 2019.

The hearing

6. At the hearing before me Mr Sowerby relied on the grounds. In particular, he submitted that the judge should have undertaken the paragraph 297 assessment on the basis of the Appellant's circumstances when she was still a child. He submitted that this simply had not been done and in effect the judge had treated her throughout his assessment as being an adult (as he acknowledged the Appellant indeed was at the date of hearing before the judge). Mr Sowerby submitted that this was a fundamental error. He did accept, rightly in my view, that the judge had been entitled to deal with the Appellant as though she was an adult when making the wider Article 8 assessment outside the context of the Rules.

7. Mr Tufan submitted that there were no errors. He indicated that paragraph 27 of the Rules acted as a protective mechanism, as it were, which meant that an applicant would not be refused or have their appeal dismissed solely on the basis that they had

attained majority by the time of a decision by either the Respondent or the First-tier Tribunal. However, he submitted that this did not mean that a judge was bound to consider the individual circumstances as though they were still a minor if this was not in fact the case as at the date of hearing. Alternatively, Mr Tufan submitted that even if there had been errors these were on the facts of this particular case immaterial.

Decision on error of law

8. In my view the judge has materially erred in law. Taking what I consider to be a holistic and sensible approach to the decision, and reading it in a fair manner, I conclude that what is said in paragraphs 11 to 21 of the judge's decision indicates a strong possibility that he had in fact assessed the Appellant's case within the context of the Rules on the basis that she was an adult. In other words, in light of her situation as at the date of hearing.

9. It is true that he has referred to her age when the application was made (that being 16). However, it is the case that he consistently uses the present tense when referring to her situation. In paragraph 13 he expressly refers to her as an "18 year old woman" and again in paragraph 19 makes a clear reference to her current circumstances. Although I accept that the case of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC) has been referred to in paragraph 18, this is in my view outweighed by all of the other references in the surrounding paragraphs.

10. In my view paragraph 27 of the Rules operates not simply as a technical or protective mechanism in respect of an individual's age when applying as a child for entry clearance: this would be too narrow a reading and would render a consideration of the case in the context of the Rules artificial if the substantive criteria under the particular Rule in question (here paragraph 297) were not to be assessed in light of the circumstances of the individual as a child. It seems to me that a contrary interpretation would render paragraph 297 as being of little or no utility.

11. The judge's error is in my view material because the Appellant's circumstances when she was still a child *could,* if properly assessed, have made a significant difference to the outcome of her case within the context of the Rules. Further, a satisfaction of the relevant Rule is of course extremely important in the overall determination of an Article 8 claim (see for example TZ (Pakistan) [2018] ECWA Civ).

Remaking the decision in this appeal

12. In remaking the decision, I have had regard to the evidence contained in the Appellant's bundle that was before the First-tier Tribunal, together with the submissions made by Mr Sowerby and Mr Tufan.

13. In summary, Mr Sowerby's submissions were as follows. The judge had found the evidence to be reliable, and there was nothing new to displace that view. The Appellant's mother had in fact died only a day after the Appellant received her GCSE results. There was a good bond between the Appellant and her aunt in the United Kingdom: this relationship had subsisted both before and after the death of the Appellant's mother. The living arrangements for the Appellant with her great-aunt had only been temporary in nature. In addition, the great-aunt suffered from ill-health. Mr Sowerby emphasised the sexual assault that the Appellant had suffered on a bus journey. He submitted that there were indeed serious and compelling reasons rendering the Appellant's exclusion from United Kingdom undesirable.

14. Mr Tufan essentially relied on the points he had made when contending that there was no error of law in the judge's decision. In short terms, the facts of this case were insufficient to meet the relevant test.

Findings of fact

15. I find that the evidence before me is reliable. In addition to the judge's view of it, there has been no challenge forthcoming from Mr Tufan before me.

16. On the basis of the evidence, I make the following findings of fact.

17. I find that the Appellant's father had never played an active role in her life. I find that her mother tragically passed away 29 March 2017, a day after the Appellant had received her exam results. The Appellant then went to live with her great-aunt, with whom I find that she continues to reside up to the present day. I accept that this arrangement was not thought of as being a permanent one. It is however the case that the Appellant has been able to continue living with this individual from approximately March 2017, throughout the rest of her minority, and beyond her 18th birthday.

18. There is no suggestion in the evidence that the accommodation at which the Appellant was living whilst she was still a minor was sub- standard or in any other way represented a risk to her well-being. I find that the property was rented, and that necessary payments were being made.

19. I find that despite the horrible circumstances of her mother's death, the Appellant went on to study her a-levels. That is very much to her credit.

20. On the basis of the doctor's letter at 61 of the Appellant's bundle, I accept that the Appellant's great-aunt suffered from diabetes and neuralgia. It appears as though the great-aunt was unable to undertake housework and depended on others for certain aspects of her daily routine. The evidence does not show that the great-aunt actually required residential care at the material time, or that the Appellant was forced to act as a full-time carer.

21. I find that the Appellant was the victim of a sexual assault whilst making a bus journey alone. I do not have details of what precisely happened, but I am willing to accept that this was a very nasty experience.

22. I turn to the Appellant's relationship with her aunt in the United Kingdom. I find that the aunt came to this country in 2003. I am willing to accept that the Appellant and her aunt have maintained contact over time, and it is likely that this contact has increased since the death of the Appellant's mother in 2017. I accept that the Appellant aunt has provided financial support to her overtime.

23. I have no doubt that the Appellant's aunt is willing and able to provide maintenance accommodation, and indeed a very loving home, to her were she could to come to the United Kingdom.

Conclusions

24. I now apply my findings of fact to the issue arising under paragraph 297(i)(f) of the Rules, namely whether, at the time of the Respondent's decision and then during the remainder of her minority, there were "serious and compelling family or other considerations" making the Appellant's exclusion from the United Kingdom undesirable.

25. I take full account of the guidance set out in Mundeba. I direct myself that the phrase "serious and compelling" represents a high threshold.

26. For the reasons set out below, and whilst wishing to express a good deal of sympathy for the Appellant, I have concluded that she is unable to show that there were "serious and compelling" family or other considerations in her particular case.

27. It is of course the case that the Appellant had suffered a serious bereavement through the loss of her mother in March 2017. One can only have sympathy for her. It is far from my intention to diminish the sense of loss that the Appellant must have experienced following this event. However, it is the case that she was able to go and live with her great-aunt inappropriate accommodation, receive financial assistance from her aunt in the United Kingdom, and was then able to continue on with her studies. Whilst of course every individual deals with difficult circumstances in their own particular way, there is no medical evidence of mental health problems having been suffered by the Appellant. There is no evidence of neglect.

28. In terms of the Appellant's emotional needs, I would certainly accept that the aunt in the United Kingdom would have been able to provide for these. Yet the evidence before me does not show that there was a lack of emotional support for the Appellant in Sri Lanka at the relevant time which constituted serious and compelling circumstances.

29. I have taken account of the great-aunt's health. It has not been suggested that the Appellant was having to act as a carer to the extent that this inappropriately impinged on her own life. I have found that the great-aunt did not require residential care at the time and this has been borne out by the fact that the Appellant continues to live with her.

30. I have found that the Appellant's aunt had been away from Sri Lanka for many years prior to the time with which I am now concerned. I have accepted that contact was maintained and I would conclude that there clearly existed a bond between the two which is likely to have strengthened following the death of the Appellant's mother. Having said that, taking the evidence as a whole, I would not conclude that the aunt had assumed the role of a substitute mother, as it were. Intending no disrespect to the aunt whatsoever, she clearly had her own family in the United Kingdom and was unable to have travelled out to Sri Lanka and take on a caring role for the Appellant. Quite admirably, she was providing financial assistance to her niece, which in turn helped to ensure that the latter was living in what I conclude to be appropriate circumstances.

31. In respect of the assault on the bus, I reiterate the fact that this would have been a nasty experience for the Appellant. There is, though, merit in Mr Tufan's submission (made in an appropriate fashion) that the incident was isolated in nature did not represent a significant ongoing risk to the Appellant in terms of repetition. In a sense, it is something that could have occurred in this country almost others around the world. Nonetheless, I take this into account as a relevant factor.

32. I have no hesitation in concluding that the Appellant very much wanted to join her aunt United Kingdom and that her aunt wished this to be so. Those feelings are entirely understandable. They do not, of themselves, represent a serious and compelling reason.

33. I take into account the fact that the Appellant had of course been born and brought up in Sri Lanka and, as at the relevant time, had strong educational and social ties in that country. Whilst in no way decisive, these connections represent a relevant factor (see paragraph 38 of Mundeba).

34. Taking all relevant considerations into account and viewing these cumulatively, I conclude that the Appellant's best interests (whilst still a minor) did not lie in leaving her home country and coming to reside with her aunt in the United Kingdom.

35. If I were wrong about that and the Appellant's best interests had lain in coming to the United Kingdom, I would in any event conclude that on the facts of this case they were not particularly strong.

36. On a cumulative evaluation of the relevant factors in this case, and even if her best interests were in play and acted as a primary consideration, the Appellant's circumstances at the material time were insufficient to meet the high threshold.

37. I turn now to consider the Appellant's situation as at the date of the hearing before me. Without intending any disrespect, I can deal with this issue relatively briefly. In a sense, everything that I have said in relation to the paragraph 297 issue, above, applies here, but with the additional factor that the Appellant is now that much older and has, on the evidence before me, continued to live her life in Sri Lanka at the very least to a reasonable level. There is certainly nothing to indicate that her circumstances have significantly deteriorated since becoming an adult. It is clear that her support mechanisms are still in place and that her living circumstances are appropriate. She has successfully continued with her education.

38. I conclude that the Appellant cannot show a sufficiently strong Article 8 claim in order to succeed outside the context of the Rules.

39. In light of the above, the Appellant's appeal must be dismissed.

Additional comment

40. Whilst what I now say has paid no material part in my remaking decision, it is in my view appropriate to state some observations about my conclusions on the First-tier Tribunal's error of law.

41. It is right to say that on reflection I have some misgivings about the correctness of my error of law decision. In particular, I am now aware of a judgement from the Court of Appeal which, whilst not on all fours with the present case, would nonetheless appear to have a considerably relevant bearing on the question of the relevant date for the assessment of a claim under the Rules in which a child applicant has attained their majority between the date of the application and the date of the hearing of their appeal.

42. In SO (Nigeria) [2007] EWCA Civ 76, the Court was concerned with paragraph 298 of the Rules (dealing with in-country applications for leave to remain by a dependent child). The Court was deeply unimpressed with arguments put forward by the appellant in that case to the effect that a Tribunal was bound to consider the claim made by an individual when they were still a minor as though they still held that status, notwithstanding the fact that they were an adult by the time an appeal was heard.

43. With reference to section 85(4) of the Nationality, Immigration and Asylum Act 2002 (prior to its amendment by the Immigration Act 2014), the Court stated:

> 14. *With respect to Mr Ehiribe's ingenuity, in my view his interpretation of Section 85(4) is simply unarguable. The adjudicator was bound to apply the law as enshrined in statute and the statutory regulations. There is no ambiguity in the statute; the words are clear. Whatever the guidance issued by the department to its officers and whatever the generous interpretation given to that guidance by the Tribunal, it is absolutely plain that the Tribunal is expressly authorised to consider evidence about any matter*

which it thinks relevant to the substance of the decision, including evidence arising after the date of the decision. Nothing restricts the operation of Section 85(4) to appeals in asylum cases.

15. *The Tribunal rightly pointed out the absurdity if Mr Ehiribe's argument prevailed. Paragraph 298 is directed at dependent children. On his analysis a tribunal faced with an applicant who by the time of the appeal was married, with children of their own and living an independent life, would have to ignore reality and treat the Appellant as if he or she was leading the life of a dependent child. That cannot have been and, in my view, was not Parliament's intention. The age, growing maturity and independence of an applicant must be relevant to the substance of a decision concerned with "serious and compelling reasons" as to whether the applicant should be allowed to stay as a dependent relative, which this case is. I fail to see, therefore, how the Adjudicator could have made a determination without considering all that had happened since the application had been made.*

16. *In any event if the Tribunal's interpretation of the instructions to immigration officers is correct, about which I have my doubts, it is also clear on my reading of the Adjudicator's determination that she did not rely solely upon the age of two of the Appellants by the time the matter reached her. She relied upon a number of factors. She took into account all the circumstances. These Appellants were all born and brought up in Nigeria. They had a mother there with whom they have lived all their lives until relatively recently. The Adjudicator found, as she was entitled to find, that the mother is willing to offer them a home there. At the time of the appeal two of the Appellants were over eighteen and one over the age of sixteen. If they did not want to live in Nigeria with their mother, the Adjudicator found they have another option. The first Appellant could become the head of the household or that they can make a proper application to move to this country from Nigeria with the assistance of their sponsors.*

17. *It follows from those observations that, for my part, I would therefore agree with the Asylum and Immigration Tribunal's conclusion that there was here no error of law in the Adjudicator's taking into account the fact that two of the Appellants had reached the age of eighteen by the time of her determination or in her emphasising the point in the way in which she did. I am mindful of the basis of Latham LJ's decision to grant permission to appeal on this ground. He was concerned about the effect of delay which is not attributable to the Appellants where the passage of time turns out to be crucial. I readily accept that tribunals will give anxious scrutiny to the passage of time between an application made by a child and an adjudication; if for no other reason than what has happened in the course of that delay may well be relevant for any Article 8 claim. But, Mr Ehiribe was not able to point to an administrative delay of any great significance in this case for which the respondent Secretary of State could be held responsible. There was only a matter of approximately six months between application and the decision. For an important decision of this kind, affecting the lives of three young people, that cannot be described in my view as an excessive delay;*

certainly not a delay of the kind referred to in the decisions put before us by Mr Ehiribe. With respect to him, in my view this appeal was an attempt to appeal the findings of fact made on the evidence by the Adjudicator dressed up as an appeal on the law.

44. The views of the Court bear real relevance to present case for two primary reasons. First, they highlight an artificiality of a consideration of the claim of an adult on the basis that they are still a child. Second, after the amendments made to the 2002 Act by the Immigration Act 2014, section 85(4) does no longer contains a restriction in entry clearance cases relating to the circumstances pertaining as at the date of the Respondent's decision. The present case is of course governed by the amended section 85(4). Thus, what is said in SO (Nigeria) now has much more force than would have been the case before the legislative amendments.

45. It *may* be that what I said in my error of law decision is incorrect. It seems to me as though the interplay between paragraph 27 and 297 of the Rules and section 85(4) of the 2002 Act may require particular consideration in an appropriate case.

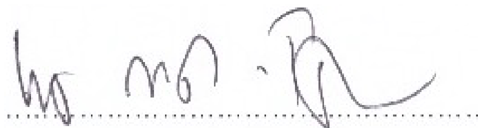
46. I have carefully considered whether I should invite representations from the parties on SO (Nigeria) and my observations set out in the preceding paragraphs. However, as I have concluded that the Appellant cannot succeed in her appeal even on my original view of the correct legal approach as expressed in my error of law decision, such an exercise would be of no material value: it could not affect the outcome. Indeed, if I am wrong in respect of my approach to the Appellant's case and the correct line is that discussed in SO (Nigeria), the Appellant's appeal would certainly fail in any event.

Notice of Decision

I conclude that the decision of the First-tier Tribunal contains material error of law and I have set it aside.

I remake the decision by dismissing the Appellant's appeal.

No anonymity direction is made.



Signed Date: 3 June 2019

Upper Tribunal Judge Norton-Taylor