



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09077/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 15 May 2019**

**Decision &
Promulgated
On 25 June 2019**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS CHENG YI TEH

Respondent

Representation:

For the Appellant: Mr Lewis Moore, Home Office Presenting Officer
For the Respondent: Mr Neil Garrod, Counsel for David Tang & Co Solicitors,
London

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Malaysia born on 30 April 2000. She appealed against the decision of the respondent dated 10 August 2017 refusing her application for leave to remain in the United Kingdom on the basis of her private life pursuant to the Immigration Rules HC395 as amended. Her appeal was heard by Judge of the First-Tier Tribunal Sweet on 12 February

2019. Her appeal was allowed in a decision promulgated on 20 February 2019.

3. An application for permission to appeal was lodged by the Secretary of State for the Home Department and permission was granted by Judge of the First-Tier Tribunal Macdonald on 3 April 2019. The grounds contend that the Judge made a material misdirection of law by appearing to have used Article 8 as a general dispensing power contrary to **Patel**. They go on to state that the findings that it would be disproportionate for the appellant to have to return to Malaysia and make a fresh application were not adequately reasoned. The Judge also stated that it would be disproportionate for the appellant to return to Malaysia to make a fresh application now that she is an adult but no proportionality assessment was undertaken. Public interest was not weighed against the appellant's Article 8 rights.
4. There is no Rule 24 response.

The Hearing

5. There were no preliminary issues. The Presenting Officer submitted that he is relying on the grounds for permission to appeal dated 28 February 2019. Permission was granted on 3 April 2019. He submitted that the Judge has erred materially as there is no proportionality exercise in his decision and yet the appeal has been allowed under Article 8 outside the Rules. I was referred to paragraph 27 of the First-Tier Judge's decision which states that the application cannot meet the terms of the Immigration Rules, in particular relating to the appellant's mother having sole responsibility for the appellant's upbringing. The Judge goes on to state that there are no serious and compelling family or other considerations which make her exclusion from the United Kingdom undesirable. The Judge states that he is allowing the appeal to succeed under Article 8 of ECHR because it would be disproportionate for the appellant to have to return to Malaysia and make a fresh application now that she is an adult. The Presenting Officer submitted that the Judge failed to give adequate reasons for his decision.
6. I was referred to paragraph 297 of the Immigration Rules and it was submitted that its terms cannot be satisfied either at the date of the application or at today's date. The Presenting Officer submitted that the appellant's mother cannot satisfy the sole responsibility requirement in the Rules as there is no evidence of her having had such responsibility since 2015. He submitted that the **Chikwamba** test cannot be satisfied and I was referred to paragraph 27 of the First-Tier decision. The Presenting Officer submitted that there would be no unjustifiably harsh consequences if the appellant did not gain entry to the United Kingdom. When the Judge made his decision, there was no proportionality exercise carried out. The Judge did not balance the need for effective immigration control against the appellant's Article 8 rights and her family's Article 8 rights. He submitted that the Judge made no reference to Section 117B of

Part 5 of the 2002 Act. The Presenting Officer accepted that he did refer to Section 55 of the 2009 Act, the appellant's best interests, and the fact that the appellant is in full time education in the UK.

7. The Presenting Officer submitted that the Judge accepted that the appellant has family life with her mother but as the sole responsibility request cannot be satisfied, the respondent in the refusal letter could not have come to a different decision from the one he did. I was referred to the case of ***Patel & Others*** [2013] 3WLR 1517 UKSC, paragraph 57 which states that Article 8 is not a general dispensing power. This is not the same as the Secretary of State's discretion to grant leave to remain outside the Rules. The Presenting Officer submitted that the First-Tier Judge has used Article 8 as a general dispensing power and I was asked to find that this must be a material error of law. I was asked to set the decision aside and remake it.
8. Counsel for the appellant submitted that the starting point for this hearing must be paragraph 27 of the First-Tier Judge's decision in which the Judge deals with Article 8 of ECHR and Section 55.
9. He submitted that the case of ***Patel*** is not relevant as in ***Patel*** the appellant's application is based on her education and the fact that she was near to qualifying whereas in this case the appellant is applying as her mother's child and her mother has indefinite leave to remain in the United Kingdom.
10. He submitted that the First-Tier Judge has stated that the appeal is allowed although not under the Immigration Rules and he submitted that Section 55 is different from Article 8 and the First-Tier Judge was able to reach the decision he did under Section 55. He submitted that the Judge has explained his reasons for his decision and no issue has been taken with these.
11. Counsel submitted that in the case of ***Patel*** at paragraph 56 a "near miss" is referred to and he submitted that that is not the case here.
12. Counsel submitted that ***Chikwamba*** is not relevant as it deals with family life under Article 8 and not the appellant's rights under Section 55.
13. Counsel submitted that Section 55 does not apply to children outside the United Kingdom but in this case the appellant is in the United Kingdom and Section 55 does apply. He submitted that Section 55 rights are therefore available to this appellant. He referred to the case of ***T (Jamaica)*** [2011] UKUT 00483 (IAC). A paragraph 30 thereof it is stated that compliance with Section 55 is a matter of substance rather than form and if the decision maker's mind is directed to the situation of the child under the Rules or Article 8 of ECHR or under Section 55, it is difficult to contend that there has been no consideration of his statutory duty. He submitted that the Judge was entitled to reach the decision he did and that the Judge has given proper reasons for his findings.

14. Counsel submitted that although a proportionality exercise has not been carried out the Judge has considered the Section 55 test, being the best interests of the child, as a primary obligation and has made his decision based on what is best for the appellant. He finds that it is best for the child to be in the United Kingdom and although the respondent states that the Judge's reasoning is insufficient, his reasoning under Section 55 has to be given considerable weight and no challenge should be made to the outcome.
15. He submitted that if I find that there is insufficient reasoning there must be a requirement for new evidence and in that case the appeal should be remitted back to the First-Tier Tribunal.
16. The Presenting Officer made further submissions referring to Section 82(1) of the Nationality, Immigration and Asylum Act. He submitted that Section 55 is not a ground of appeal under Section 82(1).
17. He submitted that the case of ***T (Jamaica)*** applies. At headnote (v) it is stated "In this case it is difficult to contemplate a scenario where Section 55 duty is material to an immigration decision and indicates a certain outcome but Article 8 does not." I was asked to consider the Immigration Rules and the statutory guidance and find that the spirit of Section 55 has to be looked at but it is Article 8 that is relevant in the decision. He submitted that inadequate reasoning has been provided as to why the First-Tier Judge came to the conclusion he did.
18. The Presenting Officer submitted that the appellant has a father in Malaysia who has contact with the appellant. The First-Tier Judge accepts that the appellant had lived with her father, but also accepts that the appellant's mother wishes her to be in the United Kingdom to further her education.
19. He submitted that the Judge has accepted that the terms of the Immigration Rules cannot be satisfied. The Presenting Officer submitted that at the date of the hearing the appellant was aged 19. He submitted that this appellant could never have met the terms of the Immigration Rules even if she had been under 18 at the date of the hearing.
20. I was asked to consider paragraph 298 of the Immigration Rules. He submitted that indefinite leave to remain for a child under paragraph 298(vi) depends on an appellant having had limited leave to remain to enter the United Kingdom. Paragraph 298 therefore cannot be satisfied. Neither can paragraph 297 as the appellant is already in the United Kingdom.
21. With regard to the Judge's credibility findings the Presenting Officer submitted that these have not been criticised but he submitted there is a material error of law in the Judge's decision.

Decision and Reasons

22. The Judge's decision is clear up to paragraph 27 of his decision. The Judge has accepted that the terms of the Immigration Rules cannot be satisfied but has carried out no proportionality assessment when considering Article 8 of ECHR. The first thing that has to be considered in the balancing exercise is the fact that the terms of the Rules cannot be satisfied. It is accepted that the appellant's mother does not have sole responsibility for the appellant and it is accepted that there are no serious or compelling family or other considerations which make her exclusion from the United Kingdom undesirable.
23. I find that the said case of ***Patel*** is relevant. The Judge states "I am persuaded that she should succeed under Article 8 ECHR because it would be disproportionate for her to have to return to Malaysia and make a fresh application now that she is an adult and no longer under the age of 18." This was reached without proper reasoning and without any proportionality assessment. There is no mention in the decision of Section 117B of the 2002 Act. Public interest has to be considered. This appellant has no right to be in the United Kingdom. The terms of the Rules at no time could be or can be satisfied. This was pointed out in detail by the Presenting Officer at the hearing. It is correct that Section 55 of the 2009 Act has to be considered but when the proportionality assessment is carried out and effective immigration control is considered, effective immigration control must succeed over the appellant's and her mother's human rights.
24. The Judge made a material misdirection of law as he used Article 8 as a general dispensing power contrary to the said case of ***Patel***. The reasoning in the decision is inadequate. Public interest must succeed over the appellant's and her mother's Article 8 rights.
25. There is therefore a material error of law in the First-Tier Judge's decision and I am remaking the decision as I find that no further evidence is



required.

Notice of Decision

The decision of Judge of the First-Tier Tribunal Sweet promulgated on 20 February 2019 is set aside.

I dismiss the appeal of Miss Cheng Yi Teh.

Anonymity has not been directed.

Signed

Date 21 June 2019

Deputy Upper Tribunal Judge Murray