IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20489/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 27th January 2022	**On the 13th April 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between
ENTRY CLEARANCE OFFICER - SHEFFIELD

Appellant

and

MISS PANAWALA VIDANALAGE RAVINA MAREESHA PERIES
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr M. Aslam (Counsel)
For the Respondent: Ms H. Gilmore (SPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge K. R. Moore, promulgated on 23rd August 2021, following a hearing at Yarl's Wood. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Respondent

2. The Respondent (previously the Appellant), is a female, a citizen of Sri Lanka, and was born on 31st August 2000. She had appealed against the decision of the Entry Clearance Officer (currently the Appellant) refusing her application to enter the UK as the child of a parent present and settled in this country under Appendix FM of the Immigration Rules, with reference to Article 8 of the ECHR. The decision challenged is dated 18 November 2019. The reasons given by the Entry Clearance Appellant to this appeal are that she was not satisfied that the Respondent met the eligibility requirements for entry clearance since she was 19 years of age when the application was submitted, and not under the age of 18 years. The application therefore fell to be considered under the adult dependent relative Rule, but the Respondent failed to provide evidence to satisfy the Immigration Rules.

The Respondent's Claim

3. The Respondent's claim is that she applied for entry clearance for the purposes of settlement, together with her mother and her two siblings to join her British citizen father. However, although their applications were allowed, that of the Respondent was refused, notwithstanding the fact that the Respondent was unmarried, unemployed, and financially dependent on her British Sponsor Step-father. Moreover, she had a family life established within the meaning of Article 8 with the other Applicants, and that family life did not end on her 18th birthday. She came from a culture where there was a strong expectation that the family unit would remain together until the children left the family home to marry.

4. The decision of the Entry Clearance Officer was that given that the applicant in this case was 19-years of age at the date of her application on 11th October 2019, having been born n 31st August 2000, and so did not qualify for entry clearance under the 5-year child route. The application accordingly had to be considered under the Adult Dependent Relative rule but the application fell to be refused under paragraph EC-C.1.1(d) of Appendix FM and there were no exceptional circumstances.

The Judge's Findings

5. At the hearing before Judge K. R. Moore, the current Appellant Entry Clearance Officer was unrepresented. The current Respondent's representative, Mr Aslam, relied on his skeleton argument, dated 3rd October 2020, and submitted that the Respondent still remained dependent on her mother and her stepfather in the same way as her siblings had done. Her biological father had not been around since the divorce with the Respondent's mother in 2018. Even before then there was no relationship between the biological father and the Respondent.

The Respondent was now 21 years of age but remained unemployed, and had never worked in Sri Lanka, and had always relied on her mother and her stepfather for primary financial support as well as for emotional support.

6. Judge K. R. Moore held that given the rest of the current Respondent's family had now got permission to enter the UK, to join the Respondent's British citizen stepfather, she had no immediate family members to whom she could look for emotional support in Sri Lanka. She was unmarried, unemployed and had never worked. Indeed, it was the judge's views that,

> "I am further satisfied that this Appellant [as she then was] had enjoyed closer than usual family ties with the mother, and siblings having lived with them in the same household in Sri Lanka for her entire life. In this regard, I have paid due regard to reliable evidence form the mother that she had a particularly close relationship with the Appellant, and that she and the Appellant, together with the Appellant's two siblings slept together in the same room in their home in Sri Lanka" (paragraph 18).

7. The judge, moreover, had regard to the fact that "it is a custom and tradition in Sri Lanka for unmarried daughters to live with their parents or family", and that in this case "relationship between the mother and her two siblings in particular is a very close relationship". The judge was clear in the conclusion that, "there are indeed exceptional circumstances which would warrant a grant of leave outside the Rules" in these circumstances (paragraph 19).

8. The appeal was allowed.

Grounds of Application

9. The grounds of application state that the judge had not had proper regard to the Appellant's ability to speak English as required by Section 117B(2) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). The judge also had not made any sustainable findings as to the Appellant's financial independence. It had also not been stated by the judge whether the mother's income exceeded the minimum income threshold contained within the Immigration Rules. Furthermore, the finding that the Appellant at the time would be able to find employment within a reasonable timescale in the UK was based on speculation without any evidential basis. Finally, the judge had failed to have regard to the public interest considerations in Section 117B (see **Dube (SS.117A – 117D) [2015] UKUT 00090**).

10. On 5th October 2021 permission to appeal was granted by the First-tier Tribunal.

Submissions

11. At the hearing before us on 27th November 2022, Ms Gilmore, appearing on behalf of the Appellant, Entry Clearance Officer, relied on the Grounds of Appeal. She submitted that the issue before this Tribunal was a narrow one, namely, whether the judge had given proper regard to Section 117B of the NIAA 2002, and if he had not done so this was a material misdirection in law. Ms Gilmore emphasised the fact that in her concluding paragraph, the judge stated (at paragraph 20) that the mother of the current Respondent was in permanent paid employment as a care worker and that the Appellant at the time was in education in Sri Lanka and that "it is likely that within a reasonable period of time that the Appellant would continue with education in the United Kingdom or would find employment within a reasonable period of time", and that this was conjectural. Such a conclusion could not be reached, submitted Ms Gilmore, given that the Appellant did not speak English at all. It was not clear how the judge came to the conclusion that the Appellant would not be a burden on the state, continued Ms Gilmore. To merely say that the mother was in full-time employment was not enough from which to draw an inference that the Appellant would not be a burden on the state. Had the judge given proper consideration to the balancing exercise he could have potentially come to a different conclusion.

12. In reply, Mr Aslam of Counsel stated that the refusal letter did not raise an issue of the current Respondent not being able to speak the English language. In any event, nothing would turn on that. In fact, the oral evidence given at the hearing was that the Respondent was studying a foreign language. This, however, was not in the determination. It would be in the Record of Proceedings, submitted Mr Aslam, for certain. This would record how the Respondent had said that she was learning English and studying French. The other two siblings, who had been granted entry clearance certificates, were also in exactly the same position. However, most importantly, the refusal letter did not address any of these issues. It did not regard these matters to be of any significance. The only issue raised in the refusal letter was that of the applicable financial requirements.

No Error of Law

13. We find there is no material error of law in the original judge's determination. In coming to this conclusion, we have considered the basis of the findings of the judge, the evidence before him, and the submissions that we have heard today.

14. First, none of the issues raised today were before the original judge. The refusal letter accepted that the financial threshold had been met. The letter did not state that there was a requirement to meet the English language eligibility criteria. The Respondent Entry Clearance Officer at the time was unrepresented, for example through a Home Office Presenting Officer. In the circumstances the **Surendran** guidelines applied. These Guidelines have been addressed by Mr Justice Collins in **MNM (Surendran guidelines for Adjudicators) Kenya [2000] UKIAT 00005,** where it

was pointed out that, “the absence of representatives on behalf of the Home Office has been regularly criticised by Adjudicators and the Tribunal”, and that, “while we appreciate the problem created by the increase in the number of cases and the consequential increase in sittings, in an adversarial process, ….. it is very difficult for the Adjudicator if the Home Office is unrepresented”. This is because “The Adjudicator cannot be expected to conduct its case for the Home Office”, even when, “he will be understandably and correctly reluctant to let what he regards as an improbable account lead to a wrong decision …” (paragraph 18). The established Rules were well set, according to Mr Justice Collins, in that “they must not involve themselves directly in questioning Appellants or witnesses save as was absolutely necessary to enable them to ascertain the truth and must never adopt or appear to adopt a hostile attitude”, and that this “is wholly consistent with the **Surendran** guidelines which show how the Adjudicator should conduct such an exercise” (paragraph 19).

15. Mr Justice Collins appended the **Surendran** guidelines to the determination in question. These are worth setting out at length:

> “The system pertaining at present is essentially an adversial system and the special Adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office’s argument and basis of refusal, as contained in the letter of refusal, is the Home Office’s case purely and simply, subject to any other representations which the Home Office may make to the special Adjudicator. It is not the function of the special Adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it…” (see paragraph 8 of **MATUA v SSHD (HX/53882/2000)**.

16. What is accordingly clear from the above is that, although Mr Justice Collins does allow for the possibility that a judge “could and should probe apparent in probabilities” (at paragraph 19), the **Surendran** guidelines are nevertheless clear in their statement that where the Home Office does not appear then “the Home Office’s case purely and simply” is limited to the refusal letter. In the instant case the matters now raised by Ms Gilmore, were not raised orally, and were not even in the written refusal letter before Judge Moore.

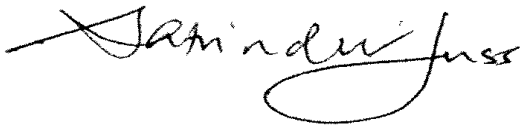
17. Secondly, that then leaves the issue of whether the judge took into account Section 117B of the NIAA 2002 when evaluating the public interest. There is nothing in this point. The judge clearly addresses this provision at paragraph 20 of the determination drawing specific attention to “the public interest considerations contained therein” after having set out his findings in the preceding paragraphs on the relevant issues that were before the judge on that day. Accordingly, this application falls to be dismissed.

Notice of Decision

18. There is no material error of law in the original Judge's decision. The determination shall stand.

19. No anonymity direction is made.

Signed Date



Deputy Upper Tribunal Judge Juss 27th March 2022