**UT Neutral citation number: [2023] UKUT 00116 (IAC)**

Caguitla (Paragraphs 197 and 199) Philippines

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Heard at **Field House**

**THE IMMIGRATION ACTS**

Heard on **21 February 2023**
Promulgated on **27 April 2023**

**Before**

**THE HONOURABLE MR JUSTICE DOVE, PRESIDENT**
**MR C M G OCKELTON, VICE PRESIDENT**

**Between**

**GLYDELYN MAE CAGUITLA**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Hodson, instructed by Queen's Park Solicitors.
For the Respondent: Mr T Lindsey, Senior Home Office Presenting Officer.

1. *In order to meet the requirements of paragraph 197(ii) of the Immigration Rules, an applicant must be either under 18 or have current leave as the child of a person with leave under paragraphs 128-193.*

2. *In order to meet the requirements of paragraph 197(i) or 199(i) the parent upon whom the applicant relies for eligibility must have leave; if that person is a British Citizen the requirements are not met.*

## DECISION AND REASONS

1. This appeal raises issues on the construction of paragraphs 197-199 of the Statement of Changes in Immigration Rules, HC 395 (as amended), relating to leave granted to children of overseas domestic workers.

2. The facts, which are not now in dispute, are as follows. The appellant ("A") was born on 20 August 1998. She, her mother ("M"), and her father ("F"), are nationals of the Philippines. On 20 April 2007 M arrived in the United Kingdom with entry clearance as a domestic worker in a private household under paragraph 159A of the Immigration Rules. She had a number of extensions of that leave, in the same category. On 18 April 2012 she applied for indefinite leave to remain on the strength of her five years' continuous leave. The letter indicating that leave had been granted is of the same date. As a matter of detail, the permit she was then sent had to be replaced during 2013, because she had mislaid it. She subsequently applied for British citizenship by naturalisation, which was granted on 19 February 2014.

3. On 5 August 2016 A and F applied for entry clearance as the child and husband of M. Their application was avowedly for settlement as the family members of a British citizen. Their applications were refused, but then granted following a successful appeal. By then A was over the age of 18, but by the operation of paragraph 27 of the Immigration Rules continued to be treated, for entry clearance purposes, as a person under the age of 18. A and F entered the United Kingdom on 16 April 2018 and were granted leave until 30 December 2020.

4. That leave took effect as continuing leave even if A left the United Kingdom, which she did, twice. She was in the Philippines from 30 April until 25 July 2018, and from 16 March 2019 until 19 November 2020, her return travel having been delayed by the pandemic. On 10 December 2020, A and F applied for further leave. F applied as M's partner, and was granted a further thirty months leave, valid until 9 November 2023. A applied for indefinite leave. On 7 May 2021 her application was refused.

5. A appealed to the First-tier Tribunal, and Judge S Taylor dismissed her appeal. Permission to appeal was refused by the First-tier Tribunal, but granted by UTJ Keith, limited to grounds relating to the interpretation and application of the Rules. Before us, Mr Hodson sought to expand the grounds in order to encompass a limited human rights argument. That application was not opposed by Mr Lindsey, nor was an application to adduce further evidence.

6. This is a human rights appeal, and it lies on a point of law only. So far as the additional evidence is concerned, we are content to allow it to be introduced. It merely establishes the immigration history of M, which had previously been capable of being doubted. Given the terms of Judge Keith's grant of permission, we were more cautious about granting Mr Hodson's other application. We heard his human rights arguments *de bene esse*, and our conclusions on them, and on his application, feature later in this decision.

7. Because this is a human rights appeal, the immigration rules have an indirect, but important, role. First, an applicant may be able to show that, contrary to the position implied by the decision under appeal, he or she actually met the requirements of the Immigration Rules at the relevant date. In such circumstances, the balance of public interest against the individual circumstance of the appellant clearly falls in favour of the appellant, because the immigration rules demonstrate that there is no public interest in excluding a person who meets their requirements. Secondly, an appellant who does not meet the requirements of the rules may be able to show, by relying on the terms of the rules, that it would be disproportionate to exclude an appellant who falls in a very similar category to one who would meet the requirements of the rules. That will not be so if the problem is that the appellant misses (even narrowly misses) a quantitive or numerical requirement of the rules; but an appellant may be able to show that the public interest demonstrated by the rules ought to be read in exactly the same way in relation to the appellant's own circumstances, despite the latter not precisely meeting the terms of the rules.

8. In his developed submissions to us, Mr Hodson argued first, that A met the requirements of the rules. Secondly, if she did not meet the requirements of the rules, she did so only because M was, at the relevant time, a British citizen, rather than having indefinite leave to remain, and it was disproportionate to refuse leave to a person who relied on a relationship to an individual who had a closer link to the United Kingdom than envisaged in the rules.

9. The immigration rules in question are paragraphs 199, 197 and, by way of comparison, 196D. They have been subject to amendment from time to time, but we do no injustice by setting them out as follows, in the order in which we shall refer to them.

> "Requirements for indefinite leave to remain as the child of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K)
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> 199. The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) are that the applicant:
>
> (i) is the child of a person who:
> (1) has limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) and who is being granted indefinite leave to remain at the same time; or
> (2) has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) immediately before being granted indefinite leave to remain; and
> (ii) meets the requirements of paragraph 197(i)-(vi) and (viii); and
> (iii) was not last granted:
> (1) entry clearance or leave as a visitor, short-term student or short-term student (child),
> (2) temporary admission, or
> (3) temporary release; and
> (iv) does not fall for refusal under the general grounds for refusal; and
> (v) must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded; and

(vi) has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL, unless he is under the age of 18 at the date on which the application is made.

Requirements for leave to enter or remain as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K)

197. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as a child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) are that:

(i) he is the child of a parent with limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) or, in respect of applications for leave to remain only, of a parent who has indefinite leave to enter or remain in the UK but who immediately before that grant had limited leave to enter or remain under those paragraphs; and

(ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and

(iii) he is unmarried and is not a civil partner, has not formed an independent family unit and is not leading an independent life; and

(iv) he can and will be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and

(v) he will not stay in the United Kingdom beyond any period of leave granted to his parent(s); and

(vi) both parents are being or have been admitted to or allowed to remain in the United Kingdom save where:

(a) the parent he is accompanying or joining is his sole surviving parent;
or

(b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or

(c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and

(vii) if seeking leave to enter, he holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, he was not last granted:

(1) entry clearance or leave as a visitor, short-term student or short-term student (child),

(2) temporary admission, or

(3) temporary release; and

(viii) if seeking leave to remain, must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.

Requirements for indefinite leave to remain for the partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K)

196D. The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-196 (but not paragraphs 135I-135K) are that the applicant:

(i) is the spouse, civil partner, unmarried or same-sex partner of a person who:

(1) has limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) and who is being granted indefinite leave to remain at the same time; or
(2) is the spouse, civil partner, unmarried or same-sex partner of a person who has indefinite leave to remain in the United Kingdom or has become a British citizen, and who had limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) immediately before being granted indefinite leave to remain
…."

10. As we have said, there were previously doubts about the terms of M's leave. It is, however, now clear that at all times up to her grant of indefinite leave to remain, M's leave fell within the phrase "under paragraphs 128-193 (but not paragraphs 135I-135K)". A's difficulty so far as paragraph 199(i) is concerned that M did not, at the relevant time, have any form of leave, because she was already a British citizen. As s. 3(1) of the Immigration Act 1971 makes clear, leave is a concept applicable only to those who are not British citizens. Paragraph 199(iii)-(vi) poses no difficulties for A. Paragraph 199(ii) requires reference to paragraph 197.

11. So far as concerns that paragraph, sub-paragraph (vii) is not applicable, because of the terms of paragraph 199(ii). Sub-paragraphs (iii)-(vi) and (viii) pose no difficulties for A. So far as concerns paragraph 197(i), the difficulty for A is the same as that under paragraph 199: M does not have leave, but, at all relevant times was a British citizen. Can A meet the requirements of paragraph 197(ii)?

12. At no relevant time could it be said that she "is" under the age of 18. The question then relates to the meaning of the remaining words of that sub-paragraph, "or has current leave to enter or remain in this capacity". At the relevant date, A's leave was leave granted to her as the family member of a British citizen, admitted as such. It derived from an application made when she was under 18. Mr Hodson's argument is that the words "in this capacity" refer to the capacity of being under the age of 18. His submission is that A had current leave in the capacity of being under the age of 18. That argument bristles with difficulties and is in our judgment incorrect. First, reading the rule as a whole, including its title, we note that it is concerned with leave "as the child of a person with limited leave". That phraseology appears both in the title and in the *chapeau* or opening words of the rule, before it divides into the sub-paragraphs of which (ii) is one. The obvious meaning of "in this capacity" is "in the capacity with which this paragraph of the rules is concerned". Indeed in our view that is so obviously the reading that would be adopted by a person coming to the rule, that one would expect a phrase distancing the overall purpose of the rule from the word "this" in sub-paragraph (ii) if such were intended. Secondly, it is not at all easy to discover a provision of the rules granting leave to somebody solely in the "capacity" of their being under the age of 18. There are rules that apply only to a person under the age of 18, but there are no rules, so far as we are aware, which provide for a grant of leave to a person on the basis of age without any other condition.

13. Thirdly, it is not at all easy to see in any event that A could say that she has current leave to enter or remain in the capacity of being under the age of 18. Her current leave was, as we have said, granted in 2018 when she was over 18. It was granted to her not on the basis that she was under 18, but on the basis that she had made a valid application for leave at a time when she was under 18.

14. Mr Hodson drew our attention to the terms of paragraph 199(iii). He pointed out that a person who already has leave in the capacity of a family member of a person with leave under paragraphs 128-193 cannot be a person whose last grant was in one of the categories set out in

that sub-paragraph. That, however, is not a problem if, as in our view is the case, paragraph 197(ii) embraces the two categories of the person who is under 18 and the person who is not under 18 but who has existing leave as a family member of a person with limited leave under paragraphs 128-193. The provisions of sub-paragraph 199(iii) are unlikely to affect the second category, but they may affect the first. As Mr Lindsey accepted, there may be a slight difficulty in the reference separately to a short-term student and a short-term student (child), because the first of those, in contrast to the second, implies an individual over the age of 18. That might be an error. If so, it is a small one, and certainly insufficient to displace the obvious meaning of paragraph 197(ii). On reflection, however, we suspect that the wording in paragraph 197(iii)(1) is a relic of the time when leave in the category of short-term student (child) was introduced, at which time there would still have been individuals under 18 who had leave in the undivided student category.

15. Our conclusion is that a person cannot meet the requirements of paragraph 197(ii) unless he or she either is under 18, or has current leave as the child of a person with leave under paragraphs 128-193.

16. At the relevant date, A fell into neither of those categories. She therefore could not meet the requirements of the Rules. That conclusion follows without taking account of the additional difficulty that we have already identified, arising from sub-paragraph (i) of both paragraph 197 and paragraph 199.

17. We turn now to that issue. Mr Hodson's primary argument was that those paragraphs should be read as if, as well as applying to the child of a person with indefinite leave to remain, they applied to a person who was a child of a British citizen. Like M, many people who have indefinite leave to remain become British citizens. It would be odd if their closer relationship to the United Kingdom excluded the possibility of their having their family members with them in the United Kingdom. He suggested that any information given by the Secretary of State about obtaining British citizenship should include warnings as to what might be lost if British citizenship was obtained. In any event, Mr Hodson submitted, if the child of a person with mere indefinite leave to remain is entitled to admission, the public interest cannot demand the exclusion of the child of a person who is a British citizen.

18. We do not accept those arguments. First, looking at the rule itself, there is no reason to suppose that the exclusion of British citizens is accidental. That conclusion is virtually inevitable, given the terms of paragraph 196D(i), which we have set out above. There, in a rule forming part of precisely the same scheme, and introduced at the same time as paragraphs 197 and 199, a possibility of the applicant's relationship being with a British citizen, as distinct from a person with leave, is specifically recognised. There is a clear distinction between the requirements of paragraph 196D and the stricter requirements of paragraphs 197 and 199. Secondly, there is no ambiguity in paragraph 199 that might need resolution. For the reason we have already given, there is no possibility of treating phrases describing people having leave as including people having British citizenship. Thirdly, it does not follow that the Secretary of State (or any well-advised maker of coherent immigration rules) should treat the children of British citizens in the same way as the children of those with leave. The very fact that, in the former case, the parent in question is not subject to immigration control, is an obvious difference from the point of view of immigration law. There are means by which the children of British citizens may obtain leave, or further leave, to be in the United Kingdom; but there is no good reason for supposing that those rules should be identical to those applying to the family members of those who are not British citizens.

19. We therefore reject both Mr Hodson's arguments. A did not meet the requirements of paragraph 199, for two reasons. The first was that M, whose child she is, was not at the relevant time a person with leave. The second is that A did not meet the requirements of paragraph 197(ii), and therefore did not meet the requirements of paragraph 199(ii). For the latter reason A was not deprived of compliance with the rules solely because her mother had become a British citizen. Even if that had been the case, however, there is not such a similarity between British citizens and those with leave that immigration rules giving a benefit to the children of those with leave demonstrate that there is no public interest in denying precisely the same benefit to the children of British citizens. As it is, however, A, being an adult child of a British citizen, who herself has not and never has had leave as the child of a person with leave under paragraphs 128-193, falls well outside the provisions of the rules, and there is no viable argument that the provisions of the rules demonstrate that the refusal of her application was disproportionate.

20. Mr Hodson's arguments were a well-formulated coherent whole, which we found very helpful in this somewhat involved appeal. We grant him permission to expand the issues from the original grant of permission to appeal, but, as we have said, we reject the arguments. Mr Lindsey told us that he conceded that Judge Taylor had erred in law, because of the statement in paragraph 17 of the decision that "paragraph 197(ii) requires that the appellant is under the age of 18". We are far from confident that it is right to read the judge's careful decision in that way. The statement to which Mr Lindsey drew attention follows a discussion of the previous leave of both A and F, as a result of which the judge appears to have ruled out the possibility that A had leave "in this capacity", leaving only the consideration of whether she was under 18. In any event, if that was an error, it was immaterial, because, as we have decided, A could not meet the requirements of the rules in any event. For completeness we should say that we see no reason to differ in any way from Judge Taylor's conclusions in relation to the application of article 8 to A's general circumstances as the adult child of M and F who has spent some time (but a relatively small proportion of her life) in the United Kingdom.

21. A's appeal fell to be dismissed. Judge Taylor dismissed it. Despite having had the benefit of considerably more complete legal argument than Judge Taylor had, we are not persuaded that the First-tier Tribunal made any error of law. This appeal is accordingly dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 23 February 2023