



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

Appeal Number: IA/52621/2013

THE IMMIGRATION ACTS

Heard at Field House

On 11 July 2014

Determination

Promulgated

On 30th July 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MISS HELEN HEART MACAPAGAL BAWINGAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji, Counsel

For the Respondent: Mr G Saunders, HOPO

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Symes in which he allowed the appeal of the appellant under Immigration Rule 298 and under Article 8 of the ECHR.
2. The appellant is a citizen of the Philippines born on 16 March 2005. She entered the UK as a visitor on 27 April 2013. On 8 October 2013 an

application was made on her behalf for leave to remain in the UK on grounds of her private life. The basis of the application was that there were inadequate care arrangements for her abroad. Her grandmother Helen Dukes was now her guardian, and was a joint sponsor to the application together with her husband, the appellant's step grandfather. The application explained that she had no family in the Philippines aside from a distant aunt. Her grandmother, stepgrandfather and father were in the UK. The supporting representations set out the background to the application, explaining that she had spent only the first two years of her life with her mother (Luzvimidal Bawingan) and her father (Austin Bawingan): following their own relationship deteriorating her mother left the family home, it was suspected to pursue another relationship. Her whereabouts were unknown as shown by an affidavit to such effect sworn by the neighbours.

3. She was subsequently cared for by her father with some help from an elderly aunt, though he struggled to meet his responsibility for her, and eventually left her wholly in the care of her Aunt Grace Bawingan, who was from time to time helped by Milosav Bawingan, Helen's uncle, her father Austin's brother. Her father left the Philippines and came to the UK to study. On 2 October 2009 her Uncle Milosav passed away, leaving Aunt Grace as the sole carer.
4. An application for a visit entry clearance was refused on 2 November 2012. The appellant was seven years old at the time and the intention was for her to stay with her father and grandparents for two months after which she would return to the Philippines. The appeal against the refusal of the visit application was allowed by First-tier Tribunal Judge Sweet on 12 November 2012.
5. When Mrs Duke travelled to the Philippines to collect Helen and bring her to the UK, she learned that whilst her Aunt had provided Helen with a minimal level of food and accommodation, her care was otherwise inadequate. Her living conditions were poor and Mrs. Duke feared for her well being. The neighbours reported that the Aunt failed to provide her with adequate food and clothing. She had been seen roaming the streets at night. Her aunt's ability to provide even the minimal historic level of care was now compromised by her own sister's recent incapacity having suffered a stroke. In these circumstances, it was argued that the sponsors in this country had effective sole responsibility for Helen's care given that the grandmother had played a significant role in her life having been involved in her upbringing since her birth by taking important decisions in relation to her accommodation, schooling and studies, holiday arrangements and medical treatment, and having taken a decisive role in bringing to the UK.
6. As already stated above, the judge allowed the appeal under paragraph 298 of the Immigration Rules. I was told by Mr Dhanji who was also Counsel below that a discussion ensued at the hearing between the

parties regarding the application of paragraph 298 of the Immigration Rules. It was the understanding at the end of the hearing that the judge could be the primary decision maker in respect of paragraph 298 and that is what the judge appears to have done.

7. The respondent's grounds did not directly challenge the judge's application of paragraph 298 but Mr Saunders submitted that the grounds which challenge the well-foundedness of the judge's findings will necessarily inform both issues i.e. the paragraph 298 and Article 8 findings made by the judge.
8. Mr Saunders argued that the Secretary of State's complaint raises factual difficulties which were not sufficiently resolved by the judge to enable him to justify allowing the appeal under either head. For example the issue as to when the decision was made that the appellant should come and live in the UK for good; and the unsatisfactory living conditions of the appellant, which were accepted by the judge, were apparent before she made the application to come and visit. These matters were not satisfactorily resolved by the judge.
9. When I made the point that in cases such as this it is the appellant's intention that we are looking at, Mr. Saunders submitted that as the appellant is a minor and as such does not have the capacity to have her own intentions, the sponsors' intentions would be attributable to the appellant.
10. I took on board Mr Saunders' submission that the challenges to the judge's findings on credibility and intention make the same point.
11. In this case the judge found the sponsors to be reliable witnesses as to the evidence they gave. He said at paragraph 29 that he had no doubt that Mrs Dukes was truly surprised when she made a visit unexpected by Aunt Grace, and discovered the conditions in which the appellant lived. Mrs Dukes' evidence on this point was detailed and vivid, and was indeed effectively unchallenged in cross-examination, unsurprisingly given that it was consistent throughout her written statements and oral evidence. Mrs Dukes also gave evidence of the change in the appellant's demeanour and behaviour during her time in this country, in that she had become increasingly confident the longer she was here whereas on arrival, she was agitated and disturbed. The judge said such a presentation would be expected of a young girl removed from her usual care arrangements with a person with whom she had a long-term loving relationship in appropriate circumstances and attached significant weight to it.
12. The grounds of appeal argued that the sponsor's evidence on the appellant's living conditions in the Philippines was unsupported by any documentary or photographic evidence and, in the light of the credibility issues, should not be relied upon as solely indicative of the conditions of the appellant upon return. I find that these grounds do not undermine the

judge's finding that the evidence of the sponsor Mrs Dukes was vivid and detailed and unchallenged in cross-examination. In the circumstances I find that it is rather too late for the respondent to now seek to challenge the evidence given by the sponsor when he should have done so at the hearing by way of cross-examination. As that was not done, I find no error of law in the judge's finding which was based on the evidence of the sponsor which he found was reliable.

13. At paragraph 30 the judge accepted that Aunt Grace's ability to care for the appellant even to historic levels was now further compromised by the need for her to care for her sick sister. This feature of the account has been advanced consistently throughout the application and appeal proceedings. He said that Mrs Dukes plainly found it difficult to provide dates in a structured fashion but once she was carefully re-examined, was satisfied that her evidence was not that Aunt Grace's own sister suffered a stroke shortly after her son, Milosav's death but rather it took place a significant period after his death and after Mrs Dukes and the appellant had returned to the UK. The notarised letter from a qualified neurologist was plainly written as an updating report specifically for the purpose of an inquiry from relatives, and so there was nothing surprising about it bearing a relatively recent date. The judge accepted that Mrs Dukes had found it difficult to obtain efficient and timely responses from the Philippines in general.
14. The grounds argued that the sponsors were unable to provide credible evidence on the subject of Auntie Betty's stroke. In particular both sponsors provided conflicting evidence in respect of when this event occurred. The discrepancy was not minor, it spanned several years 2009-2013 and there were three potential dates for the stroke's date of occurrence if the witness statements are also considered. Documentary evidence in respect of Betty's stroke was limited, a single letter, produced on the day of the hearing purporting to support the assertion of the family.
15. I find that these grounds are an attempt to re-litigate the case. The judge's findings at paragraph 30 adequately covered the issues raised in the grounds. The judge's findings were reasonably open to him.
16. The grounds submitted that the sponsors were unable to provide credible evidence of the intended duration of the appellant's visit. The appellant's grandfather stated that the visit would last six months, whilst the appellant's grandmother stated two months. This was not a minor discrepancy.
17. I note that the judge dealt with the intentions of the sponsors at paragraphs 32 and 34. At 32 he said that while he had reservations about the state of mind of the sponsors when the application was made, Mrs Dukes clearly stated under cross-examination that she had contemplated a settlement application for the appellant even before she left the Philippines with her to travel with her on her visit to the UK. Mr Dukes

repeatedly denied that he had held such thoughts. He said that the planned visit was for a holiday, and when it was put to him that six months was excessive for the purposes of leisure for a girl attending school, he said that they had thought that she would be able to catch up on any missed schooling. It seemed to the judge unlikely that they would not have carefully considered the impact of an extended stay away from school on a girl whose best interest they clearly had at heart. Mrs Dukes said that the visit was intended to last no more than two months.

18. The judge then went on to find at paragraph 34 that whilst he had some concerns about the intentions of the sponsors, having considered all the evidence in the round he had resolved this issue in their favour. He did not find that the respondent had made good the allegation that they were positively dishonest in the visit application. There could be no doubt that they both wished to secure the appellant's welfare. Nevertheless Mrs Dukes pointed to the purchase of a return ticket for her at significant expense to them as people of moderate means, and to the lengthy and repeated discussions they had had with Aunt Grace after the appellant's arrival here. Mrs Dukes stated that when she travelled to collect the appellant, Aunt Grace was very elusive during the trip. Mrs Dukes was clearly a witness who struggled to present dates and details in a chronological order, but the judge did not consider her to be an evasive witness. Indeed it was her candour that had led to the consistent evidence being provided. On the balance of probabilities the judge found that whilst Mrs Dukes contemplated the possibility of looking after Helen on a long-term basis when pursuing the visit to this country and prior to passing through immigration control, this sentiment was more of a wish than it was a settled intention, and the question of settlement was not, he found, contemplated by the sponsor, Mrs Dukes until some time after the appellant's arrival here. He did not accept that the label of dishonesty could properly attach to a situation where one of the sponsors contemplated the possibility of a settlement application in the future without that possibility having crystallised into a settled intention.
19. I find that the respondent's grounds disclose no arguable error of law in the judge's findings. The judge adequately dealt with the intentions of the sponsor and made findings that were open to him.
20. Whilst the appellant is a minor and therefore unable to form her own intentions, I accept Mr. Saunders' submission that the intentions of the sponsors which would be attributable to her. The judge found that the sponsors were reliable witnesses and their intentions regarding the appellant's visit application were not dishonest.
21. I find that the judge made no error of law in his findings. Accordingly, the judge's decision allowing the appellant's appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun