Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05278/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 July 2017	**On 03 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS JAHNZELLE CHRISMILE LORILLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:
For the Appellant: Mrs Catalina Lorilla, Sponsor
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of the Philippines, appeals against the decision of the First-tier Tribunal (Judge Beg sitting at Taylor House on 8 November 2016) dismissing her appeal against the decision of the Entry Clearance Officer to refuse her entry clearance for the purposes of settlement under Rule 297. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. The application for permission to appeal was settled by Counsel who did not appear below. Counsel advanced three grounds of appeal: (1) The Judge had applied too high a standard of proof; (2) The Judge had not given sufficient consideration to section 55 of the Borders, Citizenship & Immigration Act 2009 and (3) The Judge failed to consider Article 8 ECHR.

The case on Ground 3

3. Counsel pleaded that the judgment made no reference to the appellant and her mother's Article 8 rights. There appeared to be no consideration of any Article 8 case law which might have warranted entry clearance on a discretionary basis. The appellant shared a parental/child relationship with her sponsor and the absence of consideration of Article 8 clearly demonstrated a failure to give careful consideration to their relationship and the evidence in the round.

Permission granted on Ground 3 only

4. On 6 June 2017, First-tier Tribunal Judge Kelly granted permission on Ground 3 only. Given that the appellant was required by section 84 of the Nationality, Immigration & Asylum Act 2002 (as amended by section 15 of the Immigration Act 2014) to bring her appeal on the sole ground that the respondent's decision was contrary to her human rights, it was arguable that it was an error of law for the Tribunal not to give any consideration at all to the question of whether family life between the appellant and her mother could reasonably be expected to be enjoyed in the Philippines.

The Rule 24 Response

5. On 19 June 2017, a member of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, the respondent submitted that the Judge of the First-tier Tribunal directed herself appropriately. The complaint that the Judge had failed to consider whether family life between the appellant and the sponsor could be enjoyed in the Philippines was without merit. Whilst this was a human rights appeal, the Immigration Rules were Article 8-compliant in the absence of compelling circumstances (**SS Congo**). The Judge did not simply find that the sponsor did not have sole responsibility. He also found that there were "*no serious, compelling or other considerations which made exclusion undesirable*" at paragraph 19. The appellant did not meet the Immigration Rules and, in the absence of compelling circumstances, the scales fell against her.

The Hearing in the Upper Tribunal

6. At the hearing before me to determine whether an error of law was made out, the sponsor and her husband appeared in person. Upon enquiry, I established that the legal representative who had appeared for the appellant in the First-tier Tribunal had offered the services of a Barrister for the hearing in the Upper Tribunal, but the sponsor had decided to decline this offer. She confirmed that she was happy for the appeal to proceed without legal representation for her daughter.

Discussion

7. The background to this appeal is that the sponsor is a Filipino national, who has leave to remain in the United Kingdom as the spouse of a British national. She was formerly married to the father of the appellant, and they lived together in the Philippines as a family unit until January 2011 when the sponsor decided to leave the Philippines for the UK. The appellant's father remained in the Philippines.

8. The appellant applied for entry clearance some five years later. A telephone interview was conducted in Tagalog with the appellant's maternal uncle, Mr Villafranca, and the answers which he gave at that interview, lasting 33 minutes, underpinned the reasons given by the Entry Clearance Officer for the subsequent refusal decision made on 30 October 2015.

9. The application was refused on two grounds. Firstly, the Entry Clearance Officer was not satisfied that the sponsor had had sole responsibility for the appellant's upbringing. He considered that the appellant's father continued to be involved in her upbringing, and she had not provided evidence as to why she could not live with her father in the Philippines. She had also not provided any explanation as to why she could not continue to live with her uncle and cousin in the Philippines. It was noted that her uncle attended meetings with her teachers and signed her school reports, whilst his daughter (the appellant's cousin) helped her with her homework and acted as a guidance councillor for her.

10. The second ground of refusal was based on a consideration of her best interests as a child. He noted how close she appeared to be to her uncle and cousin, and he had nothing before him to show that it would be in her best interests to be removed from everything she knew in the Philippines to live in the UK with her mother, and with her step-father whom she appeared never to have met.

11. At the hearing before Judge Beg, both parties were legally represented. The Judge received oral evidence from the sponsor and from the sponsor's husband, Mr Ian French. The Judge set out the evidence which she received in considerable detail at paragraphs [4] to [9] of her subsequent decision.

12. The Judge's findings were set out at paragraph [10] onwards. She found that the evidence given by the sponsor was contradicted by the information which her brother, the appellant's maternal uncle, had given in interview on 28 July 2015. He stated that he was the appellant's guardian. He stated that the appellant began living with him when her mother left for the UK. The Judge found that this directly contradicted the evidence of the sponsor, who said that her brother had never lived with the appellant.

13. The Judge also did not find the sponsor credible in her characterisation of the appellant's father. At paragraph [14], she found that there was no credible evidence before her that the father was dangerous or that he

showed no love or affection to his daughter.

14. The Judge found that the sponsor had not seen the appellant since last year. She found that there was no credible evidence of the sponsor being in contact with the appellant's school to find out about her educational progress. She observed that there were no school reports in the appellant's bundle. She found that there was no credible evidence as to who chose the appellant's school. She found that the sponsor's repeated use of the words *"I have sole responsibility"* showed some level of rehearsal. She did not find the sponsor a credible witness.

15. With regard to the evidence given by Mr French, the Judge found that he knew very little about the appellant who he had never met. She accepted that he was prepared to support his wife in supporting the appellant, but she found that he did not know much about the appellant's circumstances, including which family members she had in the Philippines.

16. The Judge reached the following conclusion at paragraph [19]:

> "In considering the evidence in the round and on the balance of probabilities, I do not find that the sponsor has had sole responsibility for the appellant. I find that after she left the Philippines in 2010 the appellant was cared for by the sponsor's aunt and her cousin… I find that the appellant lives in a property owned by her mother. I do not find that there are any serious, compelling or other considerations which make the appellant's exclusion from the United Kingdom undesirable. I find that the appellant is receiving education in the Philippines and she has a number of relatives to whom she can turn to if she needs to. The sponsor gave evidence that she has a sister and two brothers in the Philippines. Aside from Mr Villafranca, there is another brother who lives in the next town to where the appellant lives. The sponsor also gave evidence that she had a large number of friends in the Philippines who have helped her to obtain documents. In conclusion, I find that the appellant has failed to discharge the burden of proof. She does not meet the Immigration Rules."

17. As Mr Bramble concedes, the Judge ought to have considered the appeal through the prism of a human rights claim under Article 8 ECHR. However, her failure to do so does not translate into a material error of law. This is because there was no realistic prospect of the appellant succeeding in a claim under Article 8 ECHR in circumstances where the Judge had made sustainable findings that she could not bring herself within the scope of Rule 297.

18. The appellant's real complaint is about the Judge's fact-finding. The sponsor told me that her brother had given wrong information in the telephone interview. However, it was open to the Judge to prefer the evidence of the maternal uncle to that of the sponsor, insofar as there was a conflict between the two of them, and/or to find that the credibility of the sponsor's evidence was undermined by the respects in which it was contradicted by the information given by the uncle.

19. The appellant was not given permission to argue Ground 1. However it is

convenient to address Ground 1 as it is relevant to the materiality of the Judge's error in not formally addressing a claim under Article ECHR. There was ample material before the Judge to justify an adverse credibility finding against the sponsor on the issue of whether she had been exercising sole responsibility for the appellant's upbringing. The Judge did not apply too high a standard of proof. She correctly directed herself that the standard of proof was on the balance of probabilities, and there is nothing in her reasoning which indicates that she did not follow her self-direction.

20. The only other basis on which the appellant could succeed under the Rules was if she could bring herself within Rule 297(i)(f), which applies where one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable. I consider that the Judge gave adequate reasons for deciding that there were not serious and compelling family or other considerations which made the appellant's exclusion from the UK undesirable. The Judge did not specifically address the question of whether family life between the appellant and her mother could reasonably be expected to be enjoyed in the Philippines. However, I do not consider that this was the key question. Moreover, insofar as it was one of the relevant considerations arising under Rule 297(i)(f), the Judge's implicit finding was that family life between mother and daughter could continue to be enjoyed as before, which was through occasional visits and through contacting each other on social media.

21. Since the Judge made a sustainable finding that the appellant did not qualify for entry clearance under *inter alia* Rule 297(i)(f), there was no evidential basis for a viable claim in the alternative outside the Rules under Article 8 ECHR. The negative answer to the question of whether Rule 297(i)(f) applied effectively foreclosed the possibility of the appellant contending that, notwithstanding her inability to bring herself within this rule or another gateway provision contained in Rule 297, the decision to exclude her was disproportionate. For if it was disproportionate, the appellant ought to succeed under Rule 297(i)(f). Equally, the reverse is true. There was nothing to be weighed in the scales in a proportionality assessment at stage five of the **Razgar** test which had not already, explicitly or by necessary implication, been weighed in the scales in an assessment as to whether Rule 297(i)(f) applied. Hence the Judge's error is not material as no Tribunal, properly directed, could have found against the appellant on the application of Rule 297(i)(f) but nonetheless have gone to allow her appeal on Article 8 grounds outside the Rules.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 31 July 2017

Judge Monson
Deputy Upper Tribunal Judge