Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/07666/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 30 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE ENTRY CLEARANCE OFFICER - MANILA

Applicant

and

KMT
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondents: Mr J Collins, of Counsel, instructed by Howe & Co Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Judge Callender Smith) allowing the applicant's appeal against a decision of the Entry Clearance Officer (ECO) made on 24 March 2015 refusing her application for entry clearance as a dependent child to enable her to join her relative (hereafter "the sponsor") in the UK. In this decision, I will refer to the parties as they were before the First-tier

Tribunal, the applicant as the appellant and the ECO as the respondent.

Background

2. The appellant is a citizen of the Philippines. At the date of the respondent's decision she was nine years old. She is the biological child of the sponsor's first cousin and his wife.

3. On 25 January 2015, the appellant made an application for entry clearance as a child dependent of the sponsor. The sponsor came to the UK in 1998 as a work permit holder and was naturalised as a British citizen in July 2005. Shortly after the appellant was born she became ill. As her parents lived in poverty with other children they were unable to meet her care needs. They asked the sponsor's parents to care for the appellant who, in turn, asked the sponsor to take on that responsibility. While the sponsor had no relationship with her cousin, she agreed to care for the appellant and visited her in the Philippines in October 2005. Since then, the sponsor has visited the appellant each year and has remained in contact through various methods of communication. Whilst the appellant lives with the sponsor's parents, it is the sponsor who takes full responsibly for the appellant. This includes meeting the costs of her education, medical expenses and paying for the services of nannies to provide day-to-day care.

4. In 2008 the sponsor initiated adoption proceedings in the Philippines. The adoption was finalised in 2010, together with consent given to change the appellant's name. The only contact the appellant has had with her biological parents since 2005, was in 2009, when they were present at a hearing in the Philippines.

5. Since 2010, the appellant's applications to join the sponsor in the UK have been unsuccessful. The last refusal, which is the subject of this appeal, was on the basis that the respondent was not satisfied that there had been a genuine transfer of parental responsibility and thus it had not been demonstrated that a de facto adoption had taken place, and nor was she satisfied that an inter-country adoption could take place as the domestic courts in the Philippines were not regarded as a competent authority for the purposes of adoption under The Hague Convention. The respondent was further not satisfied that the sponsor was the appellant's primary carer or that she [the appellant] had severed all ties with her biological parents.

6. Finally, whilst the respondent noted the compassionate circumstances raised by the application, she was not satisfied that there were serious and compelling family or other considerations which made exclusion undesirable. The appellant could not therefore meet the requirements of the Immigration Rules ("the Rules") and there were

no circumstances constituting exceptional circumstances justifying a grant of leave outside the Rules.

The Hearing before the First-tier Tribunal

7. At the hearing before the First-tier Tribunal on 13 September 2016, the sponsor gave oral evidence relying in substance on what was noted as a detailed witness statement filed in support of the appeal. The judge noted that the sponsor's evidence was supported by considerable documentary evidence and found the evidence was *"clear, cogent and credible."*

8. The judge canvassed with the representatives his view that the respondent's *"section 55 assessment"* (section 55 of the Borders, Citizenship and Immigration Act 2009) was so inadequate that it was unlawful (at [30]). There appears to have been no dissent from the respondent's representative to that view and the representatives thus agreed that it was open to the judge *"to remit the matter to the Respondent to make a lawful decision."* While the judge has no statutory power to remit an appeal, nothing turns on this unfortunate phraseology. Nevertheless, the judge adopted the appropriate course and proceeded to deal with the appeal.

9. Before the judge, Counsel on behalf of the appellant, based her submissions on the requirements of paragraph 297 of the Rules. It was said that either the appellant qualified under sub-paragraph (e) or (f) thereof *"because there were serious and compelling reasons that made her exclusion from the UK undesirable. There had been a legal adoption and, at no stage, was any issue raised about maintenance and accommodation in the UK being inadequate or unsatisfactory"* (at [34]).

10. The judge stated that he agreed with those submissions and then said this (at [36]):

"However, I am mindful that this young Appellant deserves to have the greatest possible attention given to the reasons why her appeal should succeed in exactly the same way as the Respondent is entitled to know why I have concluded that, even outside of the Immigration Rules, I find that the cursory Article 8/section 55 assessment purportedly conducted by the ECO and ECM are neither satisfactory nor proportionate in all the circumstances."

11. There is then a detailed rendition of Article 8 jurisprudence (at [38]-[87]) following which the judge concluding thus (at [88]-[90]):

"Considering the Article 8 family life bonding and dependency between the Sponsor and the Appellant and, in addition, factoring in the manifest efforts that the Sponsor has devoted to the continuing

support, welfare and upbringing of this disabled and otherwise disadvantaged Appellant in circumstances of determined personal energy and commitment over the years that it has taken her to create a stable situation of actual adoption – even by the Appellant is currently living away from the Sponsor – I find that it is overwhelmingly in the best interests (in section 55 terms) of the Appellant to be living in the UK with the Sponsor at this critical stage in her development. (sic)

Respect for the Respondent's concerns about effective immigration control, insofar as those are proportionality issues that need to be weighed into the balance, are completely outweighed by the Appellant's practical needs and rights to be with her adoptive mother in the UK (and vice versa between those two parties in family life terms).

While I have formally allowed the Appeal under the Immigration Rules, I emphasise that I have specifically reinforced that result by my Article 8/section 55 decision as well."

12. On that basis, the appeal succeeded.

The Grounds of Application

13. The respondent's grounds seek to argue that the judge misdirected himself in law in failing to deal with the Rules relating to adoption and thus failed to have regard to the legal requirements in bringing a child to the UK. It is further asserted that the judge failed to make any findings as to the relationship or identify in which capacity the appellant was being brought to the UK. It is argued given that failure the judge's Article 8 assessment was inadequate.

14. Permission to appeal was granted by First-tier Tribunal Judge Saffer for the following reasons:

"Paragraphs 37 to 87 of the Judge's decision are unhelpful as they simply recite numerous case ratio's by way of academic lecture on s55 and do not apply them to the facts of this case (sic)*. It is arguable that the Judge ignored the immigration rules and lawfulness of the "adoption" in reaching the decision within the rules and outside them."*

Consideration of Whether there is an Error of Law

15. I agree with the observation of Judge Saffer that the judge's recital of numerous Article 8 case summaries is unhelpful. It is not good practice and requires revision. Some of the cases referenced are no longer good law or do not have strict application in an entry

clearance appeal. Notwithstanding, I am not satisfied that the judge materially erred in law.

16. There is no merit in the grounds that the judge failed to make findings on the relationship between the appellant and sponsor. The judge was clearly aware of the relationship as this is referred to in the sponsor's detailed evidence which the judge accepted.

17. While it is correct to say, as Mr Tufan submits, that the judge did not deal with the Rules relating to adoption, the difficulty with the respondent's grounds is that it fails, as Mr Collins submits, to recognise that the judge allowed the appeal under paragraph 297 of the Rules. Mr Tufan fairly and properly acknowledged that there is no challenge in the grounds to the judge's decision allowing the appeal under the Rules. Paragraph 297 permits a child to join a "relative" present and settled in the UK if certain conditions are met. As there was no evidence the appellant's adoption was recognised under UK law, the judge was not prohibited from considering paragraph 297 - see **SK ("Adoption" not recognised in UK) India** [2006] UKAIT 00068. In the absence of any challenge to the judge's decision that the appellant should be permitted to join the sponsor in the UK as a relative, that decision must stand. In any event, even if there had been a challenge, any failure to consider the adoption Rules was not material for the reasons given above.

18. Nevertheless, Mr Tufan submits that the judge's Article 8 findings are inadequate and that he failed to follow the well-known step-by-step approach enunciated in **Razgar** [2004] UK HL 27. I accept, as Mr Tufan submits, that the judge's decision is open to criticism in that, he could have elaborated more on the detail and addressed the **Razgar** questions specifically, however, I am not satisfied that his consideration is so inadequate as to render the decision unsustainable.

19. The judge clearly considered all the evidence including the respondent's refusal which he made detailed reference to at [6]–[17]. He made equally detailed reference to the sponsor's evidence at [19]-[27]. There is no challenge to those findings which were plainly open to the judge on the evidence.

20. As I indicated earlier there was no dissent by the respondent's representative to the judge's conclusion that the respondent's decision was unlawful. That must have been in the judge's mind when he came to assess the Article 8 claim. On a holistic reading of the decision it is plain, in my judgement, that the judge was aware of the legal requirements and interests in play on both sides and, whilst his reasons are brief, it is clear why on the facts the judge reached the decision that he did. It is unsurprising that the judge concluded that she was entitled to admission under Article 8 with reference to

paragraph 297 given his conclusions at [34] & [88]-[90]. The grounds are essentially limited to a challenge that the judge failed to consider the adoption Rules. Given the alternate route the judge took to determine the appellant's admission under the Rules, that failure does not materially infect his decision under Article 8, given with reference to paragraph 297.

21. I am thus satisfied that the judge's decision when read as a whole sets out findings that were sustainable and based on adequate reasoning.

Decision

22. I therefore find that no material errors of law have been established and that the judge's decision should stand. The respondent's appeal is dismissed.

23. No application has been made to discharge or vary the anonymity order made by the First-tier Tribunal and that order accordingly remains in force.

Signed Date: 25 June 2017

Deputy Upper Tribunal Judge Bagral