



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08744/2018

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2019

Decision & Reasons Promulgated
On 3rd September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

KHYLA MARIE DELA CRUZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Miss M Dogra, Counsel, instructed by Queen's Park Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION ON ERROR OF LAW

Introduction

1. The Appellant is a national of the Philippines who applied as a child (two days before her 18th birthday) for entry clearance to join her sponsor and mother in the UK. That application was refused for reasons given in a letter dated 21 March 2018. The refusal letter is incomplete. Neither party was able to furnish the Tribunal with a complete copy and it does not appear that this was identified and made available to

the First-tier Tribunal. What is clear from the refusal however, is that it was the Respondent's view that there was insufficient evidence to establish that the sponsor had sole responsibility for the Appellant and whilst, in the alternative, the Respondent concluded that there were no serious and compelling considerations that made the Appellant's exclusion from the UK undesirable the reasons for that are incomplete. The Respondent's review of its decision taken on 22 November 2018 is not informative of those reasons.

2. The Appellant's appeal against the refusal was heard by First-tier Tribunal Judge S J Walker ("the judge"), who in a decision promulgated on 2 May 2019 dismissed the appeal. The judge gave a comprehensive analysis of the evidence and rejected it for the reasons set out at [27] to [80].
3. The Appellant's application for permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 13 June 2019. The grant is prolix and given in a closely typed lengthy paragraph and thus is not easy to follow. While Mr Kotas provided the Tribunal with a copy of its decision in *Durueke (PTA:AZ applied, proper approach) [2019] UKUT 197 (IAC)* (a decision which concerned the same judge) he did not refer to it and following a discussion with the representatives there was no dispute that the grant notwithstanding its wordiness did reflect the grounds in this case.
4. The Respondent did not reply to that grant with a Rule 24 response.

The Decision of the First-tier Tribunal

5. The judge heard evidence from the sponsor and a witness. The judge accepted that the Appellant's father had had no involvement with her upbringing since 2004 and that she had not lived with the sponsor since 2005. The Appellant was living with her grandparents and her grandmother was appointed as her legal guardian. It was the Appellant's case that her grandmother was in a fragile condition and could no longer care for her in addition to her younger sister. The judge considered the evidence and noted various inconsistencies and omissions and found that the state of the grandmother's health had been exaggerated. The judge proceeded to consider the Appellant's personal and domestic circumstances and concluded that she had failed to establish that the Rules were met and found that the refusal of entry clearance was proportionate.

Discussion

6. I have considered the submissions of the representatives and the authority of *WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213* relied upon by Mr Kotas at the hearing.
7. Mr Kotas made a valiant attempt to defend this decision and, whilst I acknowledge that the judge gave a number of reasons for rejecting the evidence and nor is he required to conduct a forensic analysis of it, there is a particular ground in my

judgement that establishes in its own right that the approach adopted by the judge led to unfairness with potentially serious consequences for the Appellant.

8. It is necessary first to look at the Respondent's (incomplete) refusal letter and the position he adopted at the hearing. I agree with Miss Dogra that the refusal letter does not challenge the credibility of the sponsor insofar as it is not suggested that she was dishonest or incredible and nor was the reliability of the documentary evidence challenged therein. The crux of the Respondent's refusal was that insufficient evidence had been provided by the Appellant to establish her case. By the time of the hearing a substantial volume of documentation had been filed in support of the appeal which included a certificate of residency confirming the Appellant's grandmother had been appointed as her legal guardian and the Appellant's school/university identity cards that named the sponsor as an emergency point of contact. It does not appear that this evidence was submitted to the Respondent on application. The judge summarised the Respondent's case at the hearing at [20] to [21]. Essentially, his case was that responsibility was shared between the sponsor and her mother. It was not alleged by the Respondent that the sponsor was dishonest or that the documentation relied upon was unreliable.
9. The judge however did take issue with this documentation and found the evidence was wanting in several respects. The judge stated thus:

"49. At paragraph 22 of her witness statement the sponsor says that the Appellant was enrolled in class 12 SY at Sunny Hillside School for the 2017-2018 academic year [~]. At paragraph 15 of the Appellant's witness statement she says that the sponsor is the main person for her school to call in case of an emergency [~].

50. At page 101 there is a (sic) what appears to be a school identity card for the Appellant. This states that her parent/guardian and the person to be called in an emergency is the sponsor. The card shows that the Appellant is in grade 12 so I take it that it was issued for the 2017/ 2018 year as this is consistent with what is said in the sponsor's statement.

51. On the face of it the document at 101 suggests that the sponsor was the emergency contact for the Appellant from the beginning of that school year.

52. Similarly, the Appellant has provided a copy of an identity card which shows that she is studying at the Polytechnic University of the Philippines for the 2018/2019 academic year. It states that the card was issued on 5 July 2018. This card also shows that in case of emergency the sponsor is to be notified.

...

54. ... On 11 October 2018 the Appellant sent images of a student and school identity cards which appeared to be identical to those relied on [~]. However, close inspection reveals one significant difference in both cases. Both cards state that in case of emergency contact is to be made with the sponsor's mother, not the sponsor. Then, on the 29 November 2018 the Appellant sent images of the same two cards now in the form that they appear in at pages 99 and 101."

10. The judge was clearly of the view that this was damning evidence and made an adverse credibility finding in respect of the Appellant and sponsor concluding that they had altered and fabricated evidence at [55] & [56]. This adverse finding plainly had an impact on the judge's view of other evidence said to emanate from the Appellant's school at [57], [59] & [70].
11. These findings are central to the Appellant's formulation of complaint of unfairness. Essentially Miss Dogra submits that the judge should have given the sponsor an opportunity to address this issue and not to do so caused unfairness. Mr Kotas submits that the judge was not obliged to do so as credibility was in issue and it was for the Appellant to prove her case. I prefer the submissions of Miss Dogra on this point. It is clear from the authority of *WVN* (supra) that it is not necessary for obvious points on credibility to be put, where credibility is generally in issue in light of the refusal letter or as a result of later evidence, but conversely where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material it is generally better for the judge to raise the point if not otherwise raised. The Tribunal in *WN* at § 40 further held that there was no hard and fast rule but *"it is a question in each case for a judgement as to what is fair and properly perceived as fair."*
12. Whilst I take account of the submission of Mr Kotas that credibility is a broad issue, in my judgement, the Respondent's case did not attack the credibility of the Appellant or her sponsor either in the refusal letter or at the hearing. The allegation of tampering with the evidence was thus not a matter that was raised by the Respondent, but it became a concern of the judge either at the hearing or during his deliberations. It is in my judgement that, at the very least, this concern should have been identified and put to the sponsor to allow her an opportunity to address it. To allow her to do so was significant in this case as the finding against the Appellant in particular of fabricating evidence and thus of being dishonest could, as Miss Dogra pointed out, have serious consequences should the Appellant seek entry to the UK for any other purpose in the future by the application of paragraph 320(7B) of the Rules. Mr Kotas did not contend that that would not be a possibility in this case.
13. In the circumstances, I am satisfied that the Appellant has made out her case of procedural unfairness, and the only proper course is to set aside the decision and remit the appeal for a hearing afresh.

Direction

The Respondent is to file and serve a complete copy of its refusal letter of 21 March 2018 on the First-tier Tribunal and the Appellant within 21 days following receipt of this Decision. Any other directions for the rehearing will be issued by the First-tier Tribunal in accordance with its case management powers.

Notice of Decision

The decision did involve the making of an error of law sufficient for it to be set aside and reheard de novo by the First-tier Tribunal (Taylor House) by a judge other than Judge S J Walker.

Signed

Date: 20 August 2019

Deputy Upper Tribunal Judge Bagral