Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09483/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2019	**On 12 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MS MITCHELLE ABITU KHASAKHALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the Appellant: Mr A Chakmakjian of Counsel instructed by Mondair Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of Kenya, date of birth 17 June 1999, appealed against the decision of the ECO, dated 1 August 2017. The basis of the application to the ECO was for leave to enter by reference to paragraph 297 of the Immigration Rules HC 395 (the rules). The matter was refused because of the absence of evidence. In particular under paragraph 297(i)

(e) on the basis that the Appellant's mother, the Sponsor, did not have sole responsibility for the child's upbringing. The Appellant had been a child at the date of application.

2. Her appeal against the ECO's decision was dismissed by First-tier Tribunal judge Grimmett (the Judge) decision [D] on 19 November 2018. Permission to appeal was given by First-tier Tribunal Judge Neville on 7 January 2019.

3. Before the Judge, in the alternative, the Appellant's representative had argued under paragraph 297(i)(f) of the rules that there were serious and compelling family or other considerations which made the exclusion of the Appellant undesirable. The Judge, with some brevity, set out clear reasons why she rejected the claim that the appeal could succeed on the grounds of sole responsibility under sub-paragraph (e) but did not specifically deal with sub-paragraph (i)(f). The Judge went on, again somewhat briefly, to refer to the family life of the Appellant bearing in mind the Appellant was a university student, living in some form of temporary accommodation with friends, financially and emotionally supported by her mother, the Sponsor. The Sponsor remains a national of Kenya who became a UK national.

4. The Judge concluded that the family life which took place had essentially been based around visits that the Sponsor had made to Kenya. The Appellant's father who was based in Tanzania, had made visits an occasional basis. The Judge concluded, again with remarkable brevity that the decision did not interfere with her family life and on the basis of the facts it would follow with her private life as well. The Judge did not formally dismiss the appeal with reference to Article 8 ECHR grounds. Mr Tufan argued that in effect it must have been the judge's intention because [D3] the Judge had referred to Article 8 issues and the discussion was on family life so that the Judge must have concluded there was no disproportionate interference in family/private life rights.

5. Mr Chakmakjian said in effect the consideration of the Judge failed to address the evidence particularly of the Sponsor who gave evidence of the visits, with or without her UK national children who are half-sisters of the

Appellant. Ultimately, the Sponsor's evidence did not get close to making out the necessary case that the Appellant's exclusion from the UK was having an adverse impact on the half-sisters nor was there evidence of significant harm to the Sponsor's wellbeing or indeed the Appellant's wellbeing from being excluded.

6. It was perhaps unsurprising that the Appellant has some sense of grievance about the fact that she has been left behind and that her mother is settled and resided in the United Kingdom and she has had the same benefits. Putting that aside, her discontent did not get close, on the evidence, to showing it was having an adverse impact upon the Appellant. Quite remarkably it seemed to me, given that the Appellant has been for some time an adult, educated and still in education, that no statement has been obtained from her to put before the Judge as to the impact of separation both in terms of her perception of the impacts on her half-sisters or indeed herself.

7. Why that should have been the case I do not know but Mr Chakmakjian was not responsible for the preparation of the appeal nor was he directing the presentation of the case before the Judge. In the circumstances it is extremely difficult to see what evidence there was of serious and compelling family or other considerations which made the exclusion of the Appellant undesirable. On the basis that sub-paragraph (i) (f) was raised in the submissions being made, I do not find there was evidence which either the Judge ignored or alternatively had not considered as to why there were serious and compelling family or other considerations which made exclusion undesirable. Accordingly, I find that the Judge in failing to refer to that matter did not make any material error of law: Even if there was an error, in failing to do so, there was nothing to indicate it was material to the outcome of the appeal on the strength of the evidence that was then advanced.

8. In relation to the Article 8 issue Mr Chakmakjian essentially said that needed to be properly looked at in the context of the fact on a remaking

that the Appellant was now an adult and a student. Whilst the case law particularly emphasises that there was no bright-line between being a child and an adult, the fact of the matter is it is very hard to see what evidence there really was of the kind necessary to show, even through the prism of the Rules that the Respondent's decision was disproportionate.

9. Accordingly, whilst it would have been better to have more fully analysed the Article 8 ECHR claim in relation to the interference in her family life by the exclusion of the Appellant, I conclude that on the strength of the limited evidence that was advanced in the manner it was, again not by Mr Chakmakjian, the inevitable outcome was that the appeal would have failed on Article 8 ECHR grounds outside of the Rules. There is nothing to show that the decision would have been unduly harsh or have consequences which have the necessary level of exceptionality that is referred to in Agyarko [2017] UKSC 11 or that the ECO's decision was disproportionate or there were unduly harsh consequences. Accordingly, I conclude the Original Tribunal's decision does not disclose a material error of law.

NOTICE OF DECISION

The appeal is dismissed.

No anonymity direction was made, nor is one required, nor was it requested.

Signed Date 6 March 2019
Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

The appeal has failed therefore no fee award is appropriate.

Signed Date 6 March 2019

Deputy Upper Tribunal Judge Davey