Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23875/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 May 2014	**On 28 May 2014**

Before

THE HON LORD BANNATYNE, SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE LATTER

Between

MR RONAK TANK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms M Dogra, Counsel
For the Respondent: Ms Alice Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of India. On 31 October 2012 the appellant's application for entry clearance to come to the United Kingdom as a child of a parent present and settled pursuant to paragraph 297 of the Immigration Rules was refused. The appellant sought to exercise his

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rights of appeal before the First-tier Tribunal. His appeal was refused. He sought to exercise his right of appeal to this Tribunal and permission to appeal was initially refused by the First-tier Tribunal. The appellant thereafter sought permission to appeal from this Tribunal and received permission from Upper Tribunal Judge Jordan.

Background

2. The appellant was born on 16 August 1994. On 11 June 2007, the appellant's mother, Mrs Gurprit Kaur Baing, arrived in the United Kingdom on a valid student visa.

3. In 2007 and 2009, applications were made for the appellant and his father, Mrs Baing's ex-husband and the appellant's biological father, to join Mrs Baing in the UK; both of these applications were refused. Throughout the period in which these applications had been made, there had been a continuous breakdown in the relationship between Mrs Baing and her husband and between the appellant and his father. A further application for the appellant alone was made in 2010; this was the application that was later dealt with in 2011.

4. In March 2010, Mrs Baing married Mr Ravindra Yeshwant Baing.

5. The application made by the appellant in 2010 was refused by the respondent on 24 November 2010. In the refusal, the respondent stated that he was not satisfied that Mrs Baing had sole responsibility for the applicant and felt that there would be no breach of Article 8 ECHR as Mrs Baing could return to India.

6. The 2010 refusal came before the First-tier Tribunal on appeal on 4 August 2011. At the hearing it was conceded by the appellant that at that stage the Immigration Rules could not be satisfied and therefore only Article 8 grounds were relied upon. In their determination promulgated on 12 August 2011 (the "2011 determination"), the First-tier Tribunal found that no breach would occur by refusal as Mrs Baing could return to India for the period that the appellant remained a minor (see paragraph 34 of the 2011 determination).

7. On 19 April 2013, Mrs Baing was granted indefinite leave to remain in the United Kingdom. At the date of the hearing on 4 August 2011, Mrs Baing had limited leave to remain until 14 May 2012 (see: paragraph 11 of the 2011 determination).

8. On 5 July 2012, the current application which is the subject of this appeal was made. The application was refused by the respondent on 31 October 2012. On refusing the application, the respondent relied on the findings of the 2011 determination. An appeal was lodged against this refusal and came before the First-tier Tribunal on 7 October 2013 and was refused in a determination promulgated on 22 October 2013 (the "2013

determination"). The First-tier Tribunal dismissed the appeals both under the Immigration Rules and Article 8 (see: paragraphs 30 – 38 of the 2013 determination).

The Legal Framework

The Immigration Rules

> "297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> …
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;"

Submissions for the Appellant

9. The appellant sought to bring three issues before this Tribunal and they were these:

   (i) Was the First-tier Tribunal in the 2013 determination correct to find that the issue of sole responsibility was not a relevant issue? (see: paragraph 34 of the 2013 determination).

   (ii) Further to Upper Tribunal Judge Jordan's views at paragraphs 6 – 8 of his decision granting permission to appeal, was the correct approach taken in any event when considering paragraph 297(i)(f) of the Immigration Rules?

   (iii) Was Article 8 properly considered in the whole circumstances? (see: paragraph 38 of the 2013 determination).

10. With respect to the first issue the submission in short was this: the First-tier Tribunal in its 2013 determination was wrong in concluding that in light of the 2011 determination, it could not consider paragraph 297(i)(e) of the Immigration Rules.

11. Counsel submitted that it was implicit that the First-tier Tribunal in so concluding had sought to follow the approach to be taken when faced with a previous determination as laid down in **Devaseelan v Secretary of State for the Home Department** [2002] UKAIT 00702.

12. However, what the First-tier Tribunal had failed to have regard to was the material difference in the current appeal between the situation as it existed at the time of the 2011 determination and the situation as at the 2013 determination. This material difference was: Mrs Baing was now a settled person having been granted indefinite leave to remain on 19 April 2013, prior to the 2013 application being made to the respondent. This in conjunction with the fact that the appellant was a minor at the time of the application meant that paragraph 297(i)(e) of the Immigration Rules should have therefore been considered and failure to do so amounted to a material error of law.

13. Secondly, it was submitted by Counsel that in the course of its holding that paragraph 297(i)(f) was not satisfied the First-tier Tribunal in its 2013 determination had failed to consider the following relevant factors:

    (a) Whether the cultural and social conditions within India established that a 17-year old was old enough to be able to work, accommodate himself and live without the requirement for adult protection and;

    (b) Whether the particular circumstances of the case established that the appellant, though a minor, was in comfortable circumstances and not at any risk of harm.

14. Thirdly, as regards the Article 8 assessment by the First-tier Tribunal in the 2013 determination Counsel's position was that in dismissing the appellant's appeal on Article 8 grounds the First-tier Tribunal had relied on the same grounds as in the 2011 determination plus the fact that the appellant at the time of the decision was now over 18 years old.

15. In the 2011 determination, at paragraph 31, in dealing with proportionality, the First-tier Tribunal referred to the fact that at that time Mrs Baing had limited leave to remain, at the time of the present application that situation had now changed with Mrs Baing now having indefinite leave to remain in the United Kingdom.

16. At paragraph 33 of the 2011 determination the First-tier Tribunal then referred to the limited lives of Mr and Mrs Baing in the United Kingdom. Counsel went on to submit that it could clearly be seen from the bundle submitted before the First-tier Tribunal in 2013, that there was ample evidence that that position had materially altered and that Mr and Mrs Baing's financial resources and community ties to the United Kingdom, which were not disputed in 2013, were of some materiality and yet no consideration appeared to have been given to this in the 2013 determination.

17. The fact that at the time of the 2013 hearing the appellant was over 18 had to be seen in the context that at the time the application was made he was under the age of 18. It was clearly established that the best interests of a child were normally best served by being with at least one parent; what was also before the First-tier Tribunal in 2013 and was not before the 2011 Tribunal was confirmation that the appellant's father could not care for or support the appellant and was content to give custody of the appellant to Mrs Baing. Counsel submitted that this should have been considered in conjunction with the evidence of Mr and Mrs Baing regarding the behaviour of the paternal father towards the appellant and the lack of care that he had shown since Mrs Baing's departure, which evidence the Tribunal had found credible. It could not reasonably be said that it would be in the best interests of a child to stay with a parent in these circumstances. Against that whole background it was submitted that the Article 8 assessment had not been properly carried out.

Reply on Behalf of the Respondent

18. It was accepted on behalf of the respondent that there was force in each of the grounds of appeal advanced on behalf of the appellant.

19. It was conceded that the First-tier Tribunal in the 2013 determination had failed to grapple with the issues raised in terms of the relevant Immigration Rules or in terms of Article 8. It was further not disputed that the First-tier Tribunal ought to have considered Immigration Rule 297(i)(e) and had not done so. Overall, Ms Holmes found that she could not seek to support the decision of the First-tier Tribunal in 2013.

Discussion

20. We are, without any difficulty, persuaded:

    (1) That the First-tier Tribunal wrongly directed itself when it failed to consider whether the appellant satisfied Immigration Rule 297(i)(e);

    (2) Failed to consider relevant matters when considering Immigration Rule 297(i)(f) and;

    (3) Failed to consider relevant matters when assessing the Article 8 claim, which resulted in their having been no proper evaluation of the Article 8 claim by the First-tier Tribunal.

21. Each of these failures clearly amounts to a material error of law.

22. For the above reasons we set aside the decision of the First-tier Tribunal as set forth in the 2013 determination.

Re-Making of the Decision

23. Parties were agreed that this Tribunal should re-make the decision and it should do so on the basis of submissions and without hearing evidence.

Submissions on Behalf of the Appellant

24. Counsel commenced her submissions by asserting that in terms of Immigration Rule 297(i)(e) the only issue was: sole responsibility. Counsel submitted Mrs Baing had sole responsibility for the appellant and she founded on the following:

    (1) Since 2010 the appellant had stayed with friends of Mrs Baing. This step had been taken at the instance of Mrs Baing in order to ensure the appellant's well-being, given that the appellant's father took no interest in him.

    (2) Mrs Baing had, during the above period, financially supported the appellant.

    (3) In addition, during this period, Mrs Baing had arranged for the appellant's schooling and paid for this.

25. Counsel's position was that when looked at in the round the evidence showed that Mrs Baing was, during the relevant period, solely responsible for making the key decisions in the life of the appellant.

26. Counsel directed our attention to **TD (Para 297)(i)(e) "sole responsibility" Yemen** [2006] UKAIT 00049 in which the test for sole responsibility was stated to be this:

    > "… whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life."

27. Counsel submitted that applying the above test to the circumstances of the instant case it was clear that the test was satisfied.

28. Counsel, in addition, made submissions in terms of Immigration Rule 297(i)(f) and Article 8, however, we do not require to detail these.

Reply on Behalf of the Respondent

29. Ms Holmes' submission was a short one: she conceded that it was plain that the terms of Immigration Rule 297(i)(e) were met.

Discussion

30. We are satisfied that Ms Holmes was entirely correct to make the above concession. We are persuaded that on the basis of the submissions made on behalf of the appellant that the terms of Immigration Rule 297(i)(e) are satisfied.

Decision

31. For the reasons given we have set aside the decision of the First-tier Tribunal set forth in the 2013 determination. We have re-made its decision. Our decision is that the appellant's appeal against the decision of the respondent is allowed on the basis that the terms of Immigration Rule 297(i)(e) are satisfied.

32. For the purposes of this appeal we have not had to decide this question: if the appellant had failed to satisfy this Tribunal as regards Immigration Rule 297(i)(e) and had also failed to meet the requirements of Immigration Rule 297(i)(f) could he have been successful in terms of his Article 8 claim? However, we would observe that **Gulshan** [2013] UKUT 00640 (IAC) makes clear that an Article 8 assessment should only be carried out when there are compelling circumstances not recognised by the Immigration Rules. Looking to the terms of Immigration Rule 297(i)(f) we find it difficult to conceive of compelling circumstances which would fall outwith the Rule which would justify proceeding to an Article 8 assessment.

Signed Date

Lord Bannatyne, Sitting as a Judge of the Upper Tribunal