Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10449/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6 April 2018

Decision & Reasons Promulgated
On 30 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR HAMZA TAHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan of Counsel
For the Respondent: Ms Z Ahmad, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan who was born on 25 February 1998. The appellant is therefore now an adult.

2. In this appeal I will continue to refer to the parties by their designations at the First-tier Tribunal (FtT).

Background

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3. The appellant claims to have been solely dependent on Mr Tahir Mushtaq (the sponsor), the appellant's father. This is despite having lived with his mother in Pakistan for a number of years. He claims that the sponsor has had sole responsibility for him and therefore that he meets the requirements of paragraph 297 (1) (e) of the Immigration Rules. The ECO considered the application under paragraph 297 but having considered the requirement that the appellant's father had to have sole responsibility for him considered that the appellant had failed to establish that there were any serious compelling circumstances that made his exclusion undesirable. The respondent was not satisfied that the appellant had provided evidence that the sponsor was making “the important decisions relating to his upbringing” such as those relating to his personal care, education, health and faith. Nor did the ECO consider there to be any exceptional circumstances which rendered the decision inconsistent with the appellant's right to respect for family and private life as enshrined in law by Article 8 of the European Convention on Human Rights (ECHR). The application was therefore refused by the ECO.

4. The appellant appealed that refusal and his appeal was reconsidered by the Entry Clearance Manager on 13 September 2016. The Entry Clearance Manager concluded, having had regard to both Article 8 of the ECHR and Section 55 of the Borders, Citizenship and Immigration Act 2009, that the decision was nevertheless in accordance with the law.

5. The appeal against the refusal came before Judge Callow (the Immigration Judge) on 4 July 2017. The Immigration Judge summarised the respective cases and noted that in his judgment the sponsor had been solely responsibility for making “all important decisions” concerning the appellant's education and health and “he alone” had been financially providing for all members of the family. The ease and frequency of electronic communications means showed that the sponsor was in daily communication with his family. The Immigration Judge rightly recognised that, following the commencement into force of the Immigration Act 2014, findings that the appellant qualified under the respective Immigration Rule were insufficient by themselves to justify success in the appeal. The only ground of appeal that was valid was that the respondent's decision breached the appellant's rights to respect for his private and family life under Article 8. He recognised that respect should be accorded to the assessment made by the Secretary of State, but where the Rules were met, or appeared to be met, there must be a significant indication as to why the public interest would be adversely affected by the grant of leave to an individual who met the requirements of the Rules, to justify refusal. The Immigration Judge had regard to the case of **<u>Singh</u> [2015] EWCA Civ 74**. That case demonstrated in the Immigration Judge’s view that necessary consideration need only be given to Article 8 where the Rules had been met, or appeared to have been met, there were adequate reasons for allowing the appellant to stay in the UK for him to allow the appeal on that basis. However, the Immigration Judge also set out the requirements of Section 117A–B of the Nationality, Immigration and

Asylum Act 2002 (2002 Act). The Immigration Judge considered that the provisions of those sections were the only “countervailing considerations" to which he had to have regard in deciding whether the interference with the appellant’s Article 8 rights was justified. He concluded that the interference with the appellant’s Article 8 rights was not justified on these facts. Accordingly, he allowed the appeal but made no anonymity direction. The Immigration Judge decided to make no fee award as the appeal had succeeded as a result of further evidence of the circumstances appertaining at the date of the decision to refuse, which could have been produced before the Entry Clearance Officer.

The Appeal to the Upper Tribunal

6. In the appeal to the Upper Tribunal the respondent takes issue with the application of the Rules to the facts of this case, pointing out that both parents were involved in the upbringing of the appellant and it would be wholly exceptional therefore for one of them to have “sole responsibility”. Even if only one parent was involved in the appellant’s upbringing this did not mean that that parent had “sole responsibility”.

7. On a renewed application for permission to appeal, on 12 January 2018 Judge Macleman concluded that the grounds raised were at least arguable. He pointed out that the appellant had applied just before his 18th birthday to join his father but that it was arguable that the judge had erred in concluding that his father did indeed have sole responsibility. Accordingly, he gave permission to appeal.

8. At the hearing I heard submissions by both representatives. The respondent’s representative Ms Ahmad relied on the leading case of **TD Yemen [2006] UKAIT 0049**. She pointed out that the test was conclusively stated in that case. Both parents must be involved in the upbringing of the child and it would be an exceptional case for one parent to have “sole responsibility”. The test was one of control and direction of the child’s upbringing. Ms Ahmad pointed out that that test was plainly not satisfied on these facts.

9. Mr Chohan, on the other hand, pointed out that the case was indeed an unusual one. There was such frequent contact between father and child that this satisfied the “sole responsibility” test in paragraph 297 of the Immigration Rules. The frequency of contact was such because the family had been separated involuntarily. The father had settled with the mother but the mother had had to return to Pakistan due to a bereavement. The appellant's father made all decisions of any importance including which school he should attend and paid the school fees. The control and direction of his upbringing was plain. Accordingly, the test was satisfied.

10. Sections 117A–B of the 2002 Act do not apply because the appellant had not been a burden on taxpayers and would be supported financially by his father. He also had learned some English.

11. At the end of the hearing I reserved my decision as to whether there was a material error of law.

My conclusions

12. Having carefully considered this matter and applied the case law including the case of **TD Yemen** referred to above, I find that the appellant did not fall within the exceptional category of a person whose upbringing was solely controlled and directed by his father. The reasons the Immigration Judge gave for so finding are set out, according to him (see paragraph 14), in paragraphs 4 and 8 to 9 of his decision. However, when one reads those paragraphs, the only really relevant findings are at 8, where the Immigration Judge finds the sponsor to be the sole breadwinner, not an unusual situation and in paragraph 9, where he finds that the sponsor made "… All important decisions concerning his education and health". He also found that the sponsor paid all the costs on the Pakistan property, where the appellant's mother lived with the appellant another brother, together with the costs on the English property, where the appellant's father lived with an elder son. He found that the sponsor "made all important decisions concerning education health" but gave no reasons for that finding. However, as the respondent points out in her grounds of appeal, elsewhere in his decision the Immigration Judge found the responsibility to have been shared, pointing out that other family members were involved in the upbringing of the appellant. In paragraph 14 the Immigration Judge found that the mother "assisted… in day-to-day matters". The lack of any reasoning to support the conclusion that the sponsor was solely responsible for the appellant's upbringing and indeed responsible for all education and other decisions suggests that this conclusion was not one the Immigration Judge could properly reach on the evidence. More specifically, the grounds of appeal contend that the First-tier Tribunal had failed to address the extent of the mother's input into the appellant's life. He had after all lived with the mother continuously for approximately 10 years by the date of the hearing in the Upper Tribunal. The conclusion that the sponsor was solely responsible for the appellant was not supported by clear findings but in any event I doubt on these facts that the conclusion was one of properly open to the Immigration Judge on the evidence given the high threshold set by paragraph 297 (1) (e).

13. Therefore, I do not hesitate to find that the requirements of paragraph 297 (1) (e) were not met on the balance of probabilities at the date of the application. It follows that this order to have been the starting position for consideration of the human rights appeal.

14. The Immigration Judge then embarked on a long analysis of the current state of human rights law. However, in my view, Article 8 did not save the appellant. As the Immigration Judge rightly observed, it is only if the appellant met the requirements of the Immigration Rules that it would be proper to address the appeal under Article 8 (see paragraph 17). The fact

that the appellant appeared not to a friend the public interest considerations in sections 117A – D of the Nationality, Immigration and Asylum Act 2002 did not mean that his application ought to succeed. They were merely neutral factors. Success or failure under the rules was closely aligned to the question whether the appellant to succeed under Article 8. The appeal under Article 8 was the sole appeal ground before the Immigration Judge.

15. There is a plethora of recent authority, for example **Kopoi [2017] E R (D) 58** and **Onuorah [2017] EWCA Civ 1757**, that tends to suggest that there is no obligation on the state to grant entry clearance to a foreign national to commence or resume family life in the UK. I appreciate the circumstances in which this family came to be divided were unfortunate and accidental, but that does not mean there is an obligation on the respondent to grant clearance in this case. The case of **Onuorah** emphasises the states right to control entry clearance into its territory and effective immigration control means refusing those who do not qualify under the rules from entering. It is a mistake to confuse the question whether the "gateway" has been gone through with the issue of proportionality which is only considered if that gateway is gone through. The Tribunal need only consider the proportionality of the decision if the applicant established the right to form a family life in the UK in the first place.

16. I am not satisfied on these facts that the appellant has shown he had any right to come into the UK to form or re-form family life with his father. Even if he had, it would be proportionate for the respondent to enforce immigration controls by insisting that he satisfied the requirements of the Immigration Rules. He has lived with his mother for many years. The appellant did not qualify within rule 297 of the Immigration Rules.

17. A limited interference with the family life formed between members of this family was surely justified by the need to enforce and maintain effective immigration control. The respondent was rightly not satisfied on a balance of probabilities that the Immigration Rules were met and in the circumstances the appellant did not qualify under Article 8 of the ECHR.

18. For these reasons I have concluded there was a material error of law in the decision of the First-tier Tribunal and I have decided to set aside that decision and re-make the decision.

Notice of Decision

The respondent's appeal against decision of the First-tier Tribunal is allowed. I substitute a decision to dismiss the appellant's appeal against the respondent's refusal of entry clearance.

No anonymity direction is made.

Signed Date 24 April 2018

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

The Immigration Judge made no fee award.

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 24th of April 2018

Deputy Upper Tribunal Judge Hanbury