



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/20010/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 20 June 2018

On 16 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**A M
(ANONYMITY DIRECTION MADE)**

Appellant

and

**ENTRY CLEARANCE OFFICER,
CHENNAI**

Respondent

Representation:

For the Appellant: Ms S Salfolahi of Counsel) instructed by Temple Gate Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Malcolm promulgated on 29 August 2017 in which he dismissed the Appellant's appeal against a refusal of entry clearance dated 26 July 2016.
2. The Appellant is a citizen of Sri Lanka born on 28 May 2008. He applied for entry clearance to join his mother, 'SG' ('the sponsor') in the United Kingdom. The sponsor holds indefinite leave to remain in the United Kingdom. The application was refused for reasons set out in a Notice of

Immigration Decision dated 26 July 2016 with reference to paragraph 297 of the Immigration Rules.

3. The Appellant appealed to the IAC.
4. Before the First-tier Tribunal the Appellant relied on Article 8 grounds but did so with reference to the provisions of the Immigration Rules. Counsel before the First-tier Tribunal expressly indicated that the Appellant's appeal stood or fell with the requirements of the Rules - even though Article 8 was formally being relied upon. In particular it was submitted that if the arguments on 'sole responsibility' or 'compelling reasons' under paragraph 297(i)(e) and (f) were not to be accepted then there were no further matters to be advanced in respect of Article 8: see Decision of First-tier Tribunal Judge at paragraphs 46 and 47.
5. The relevant provisions of the Rules that were the subject of consideration both before the First-tier Tribunal and now before me are in these terms:

"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."*

6. The Appellant's appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Malcolm.

7. The Appellant applied for permission to appeal which was granted by First-tier Tribunal Judge Osborne on 16 April 2018. In granting permission to appeal Judge Osborne acknowledged that the decision of the First-tier Tribunal was to a significant extent careful, nuanced, and focused; but nonetheless it was recognised that it was arguable that the Judge had failed adequately to reason "*why the [Appellant's] father's degree of neglect... was insufficient to allow the Judge to find that the sponsor had sole responsibility*". Further or alternatively it was also considered arguable that the Judge had misdirected herself in law in the interpretation of paragraph 297(i)(f) of the Rules by relying upon the possibility of the sponsor returning to Sri Lanka to care for the Appellant.
8. The Respondent has filed a Rule 24 response dated 21 May 2018. I shall return to an element of that response in due course.
9. I am grateful for the assistance of, and approach adopted by, Mr Duffy before me. In light of his approach I do not consider it necessary to rehearse all of the facts and circumstances by way of background. These matters are set out in some detail in the decision of the First-tier Tribunal and are in any event known to the parties.
10. What is particularly pertinent - as hinted in the quotation above from the grant of permission to appeal - is that the Appellant's father, who continued to live in Sri Lanka, was suffering from alcoholism which led to a significant degree of neglect, and indeed allegations of violent conduct and abuse, of which the Appellant and his brother had been victims. (The Appellant's brother, a haemophiliac, had applied for entry clearance at the same time as the Appellant; a refusal had resulted in his appeal initially being linked in these proceedings. However, sadly he died in March 2017 and his appeal has accordingly been treated as withdrawn.)
11. Mr Duffy conceded before me that in circumstances where the Judge had made findings in respect of the Appellant's father's alcoholism and neglect of the children, and bearing in mind the other evidence in the appeal, it was not a sustainable conclusion that the sponsor was not exercising sole responsibility for the Appellant within the meaning of 297(i)(e).
12. Mr Duffy was content to acknowledge that this was a material error of law that would require the decision of the First-tier Tribunal to be set aside. He also acknowledged that the logic of the Respondent's position was now such that the appeal required to be remade in the Appellant's favour.

13. I accepted Mr Duffy's concession - both as to error of law and outcome on re-making the decision - as being properly made. On that basis I found it unnecessary to trouble Ms Salfolahi for submissions.
14. I have noted above that permission to appeal was also granted with reference to paragraph 297(i)(f) of the Immigration Rules. I invited Mr Duffy's observations in this regard, notwithstanding his concession on paragraph 297(i)(e).
15. In context the Judge addressed this matter at paragraphs 69-72 of the Decision in the following terms

"69. I have gone on to give consideration to paragraph 297(i)(f). It was argued by Ms Pinder that the question of whether the Sponsor could return to Sri Lanka is not relevant to the consideration of 297(i)(f). I do not agree with this interpretation. In considering whether there are serious and compelling family or other considerations which make exclusion of the child undesirable I am being asked to consider the child's circumstances in Sri Lanka. In doing so I consider that whether the child could be looked after by his mother in Sri Lanka is a relevant consideration.

70. The child [is] presently residing with the Sponsor's mother. The Sponsor has over the years spent time in Sri Lanka and I consider that the Sponsor could return to Sri Lanka to live with her child.

71. I accept that clearly the Sponsor wishes to have her child living with her in the UK. The Sponsor has also given evidence that she does not wish to return to Sri Lanka as she is fearful of her husband.

72. I consider that the Sponsor could return to Sri Lanka (as she has done in the past) and if indeed she does not wish to live in the same area as her husband then there would be no reason why she would be unable to relocate to a different area."

16. Challenge was made to this aspect of the Decision of the First-tier Tribunal essentially along the lines of the submission advanced by the Appellant's counsel before the First-tier Tribunal (Ms Pinder) - to the effect that the possible return of the sponsor to Sri Lanka was not part of the consideration of 297(i)(f). In this context the Rule 24 response of the Respondent suggests *"the error at paragraph 69 is not material to the outcome of the decision"*. On its face this constitutes an acceptance that the First-tier Tribunal Judge misdirected herself with regard to paragraph

297(i)(f). Mr Duffy acknowledged that it was not the Secretary of State's understanding or approach to paragraph 297(i)(f) that an application could be answered by a suggestion that the settled sponsor could relocate to the country of the applicant.

17. To that extent Mr Duffy again conceded that the First-tier Tribunal Judge had fallen into error. Moreover – and contrary to the submission in the Rule 24 response – such an error would be material if the 297(i)(e) argument did not succeed.
18. I am again prepared to accept the Respondent's concession in this regard, which it seems to me is entirely in accordance with the natural wording of the Immigration Rule and my understanding of the law. Indeed I have never come across a circumstance in which it was suggested that an application made under 297(i)(f) was to be defeated on the basis that the settled sponsor should relocate. In my judgment it is clear that paragraph 297 of the Rules is premised on the presence of a parent or relative sponsor in the UK, and focused on the question of exclusion or admission of the applicant. It is no part of the consideration under the Rule that any issue or problem amounting to 'serious and compelling family or other considerations which make exclusion undesirable' are potentially to be resolved by the sponsoring settled parent or relative relocating - with the inevitable significant interference to the sponsor's private and/or family life. Mr Duffy confirms that this is also the Secretary of State's understanding of the Rules, which necessarily informs the practice adopted by entry clearance officers.
19. In such circumstances, even if it had not been for the concession made by the Respondent in respect of paragraph 297(i)(e) I would in any event have found material error in respect of 297(i)(f) and set aside the decision of the First-tier Tribunal on that basis. It would also follow that a proper application of 297(i)(f) would have resulted in the decision being remade in favour of the Appellant.
20. I am mindful of course that I am considering an appeal brought on Article 8 grounds, and not based on Immigration Rules grounds. However, I acknowledge and accept the thrust of the submission made before the First-tier Tribunal: refusal of entry clearance to the Appellant in circumstances where in substance he satisfies the requirements of a Rule designed to protect and promote family life in the best interests of a minor, results in a disproportionate interference with the mutual family life of the sponsor and the Appellant.

21. An anonymity direction is made in these proceedings on the basis that they involve a child and sensitive material in respect of the child's background and interrelationship with one of his parents.

Notice of Decision

22. The decision of the First-tier Tribunal contained material errors of law and is set aside.

23. I remake the decision in the appeal: the appeal is allowed on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represent a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **29 July 2018**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and in all of the circumstances make a full fee award.

Signed:

Date: **29 July 2018**

Deputy Upper Tribunal Judge I A Lewis
(*qua* a Judge of the First-tier Tribunal)