Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09018/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 May 2016	**On 27 May 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Joseph Roman Ocampo
[No anonymity direction made]

Claimant

Representation:
For the claimant: No attendance
For the respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Brown promulgated 7.5.15, allowing the claimant's appeal against the decision of the Secretary of State to refuse his application for entry clearance to the United Kingdom as the child of a parent settled in the UK. The Judge heard the appeal on 5.5.15.

2. First-tier Tribunal Judge Ransley granted permission to appeal on 1.4.16.

3. Thus the matter came before me on 26.5.16 as an appeal in the Upper Tribunal.

4. There was no attendance by the sponsor or otherwise on behalf of the claimant. I am satisfied that notice of today's hearing was sent to the sponsor at the same address as appears on all documentation in the file and there is no explanation for her absence. In any event the claimant did not have an appointed representative. In the circumstances, I found that the overriding objective was best met in this case by proceeding to hear the case as I am permitted to do by virtue of the Tribunal Rules.

Error of Law

5. For the reasons set out herein, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Brown to be set aside and remade by dismissing the appeal.

6. The relevant background to the appeal can be summarised briefly as follows. The claimant applied for entry clearance to join his sponsoring mother, Luzviminda Roman, now a British citizen. The relationship has been confirmed by DNA analysis. The sponsor claimed that she had three cleaning/housekeeping jobs, with a total income of £1,600 per month, paid in cash. The Entry Clearance Officer noted that the claimed income was not shown in the submitted bank statements or the Class 2 NI contributions, but, curiously, the bank account did show receipt of Job Seekers Allowance (JSA). In consequence, the Entry Clearance Officer was not satisfied of the income claimed and thus the claimant failed to establish that he would be maintained adequately in the UK without recourse to public funds, pursuant to paragraph 297(v) of the Immigration Rules.

7. In granting permission to appeal, Judge Ransley found it arguable that the First-tier Tribunal Judge erred by failing to give adequate reasons for finding that the sponsor was able to meet the adequate maintenance requirements under paragraph 297 of the Immigration Rules.

8. Judge Ransley also found it arguable that the judge failed to resolve a key issue raised by the Entry Clearance Officer, namely the credibility of the JSA paid into the sponsor's bank account. I am satisfied that this issue was resolved. It is implicit if not explicit that by accepting the sponsor's evidence in its entirety, the First-tier Tribunal Judge also accepted the explanation for the JSA.

9. Before the First-tier Tribunal, the sponsor relied on very limited documentary support to establish her cleaning/housekeeping work, namely letters purporting to be from the household employers. Whilst they do not match the weekly or monthly income, the bank statements do show an overall credit balance with occasional cash deposits.

10. As far as the JSA payments are concerned, the sponsor gave evidence to the First-tier Tribunal that she had made her account available to a friend from the Philippines whose own account had been frozen, and that the friend's name and NI number was used for the payments. The appeal bundle contains a copy of the passport and visa vignette of this person, showing that until 2011 she had leave to remain as a domestic worker. Evidently this person had no leave to remain at the time of the JSA payments

in question. The payments were made in September and October 2013, but the claimant said she had not been able to contact her friend and heard that she had returned to the Philippines. Judge Brown accepted this explanation, noting at §12 that the NI number relating to the JSA payments is different to that of the claimant.

11. The decision was reviewed by the Entry Clearance Manager, who pointed out that there is no evidence to support the claim that the JSA was for another person and that the DWP would not in fact make such payments to a 3rd party account.

12. The sponsor stated that she did not receive payslips and had not retained a copy of her hand-completed tax return for the year ending April 2014. However, the decision was made in July 2014 and the sponsor thus had several months before the appeal in which to produce documentary evidence. The judge accepted that the sponsor had made some NI contributions, as confirmed by the submitted HMRC documentation. The sponsor claimed that she paid cash from her earnings into the account when she had time.

13. It evident that the First-tier Tribunal Judge accepted in their entirety the claimant's evidence as to her employment, regarding her at §19 as an honest and reliable witness and finding her evidence consistent with the documentary evidence, namely letters from the three employers. In the circumstances the judge allowed the appeal, being satisfied that her net income exceeded the requirements of the Rules so that the claimant would be adequately maintained.

14. Most would have found the sponsor's explanations highly suspicious and less than credible. I accept, however, that the First-tier Tribunal Judge had the opportunity to consider not only the documentary evidence, which is limited, but also the sponsor's oral evidence. A judge is not bound to reject the account because of absence of documentary support. The judge believed the sponsor and thus her account was accepted.

15. However, I find that the judge has failed to properly address the absence of evidence which might reasonably have been obtained and to provide cogent reasons for accepting the sponsor's assertions without actually engaging in any way with the detail of the claimed income and whether the sponsor had sufficient means to support the claimant. For example, there was no reference to the income support threshold. The sponsor produced no evidence, and the judge made no calculation, of the sponsor's income and expenditure. The judge referenced submissions of the claimant's representative that there was a net income of £210, but there was in fact no evidence before the Tribunal that she paid any tax at all on the cash in hand earning she had, though it would have been open to her to do so. Further, the claimant's bundle contained no household utility bills, or any form of breakdown or calculation.

16. I also find that there is inadequate reasoning for the conclusion that the claimant would be adequately maintained, noting that the judge did not grapple with this issue and merely made a blanket acceptance of the sponsor's evidence. Case authorities have made clear that the burden is on the (claimant) to establish by

cogent evidence that he will be adequately maintained in the UK, so that he does not become a burden on the state. On the present evidence it was impossible to reach any objectively justified conclusion that he would be adequately maintained.

17. There is no adequate evidence that the identity of person she claims she was allowing to use her account to bank her JSA is the same person as the passport and visa vignette produced by the sponsor, as opposed to the sponsor using that identity to falsely claim JSA whilst working at the same time. There is no explanation as to how the sponsor came to have those identity documents when she said lost contact with this person who has now, according to the sponsor, perhaps conveniently, returned to the Philippines. The judge does not resolve this issue of the JSA, which is highly relevant to the sponsor's credibility, and for that reason the decision is flawed and cannot stand.

18. In considering the remaking of the decision, I find that the sponsor has failed to demonstrate the truth of her account not only in respect of the JSA but also her claimed income. Her circumstances were clearly capable of more cogent proof than mere assertions and the few documents in the claimant's bundle are woefully inadequate so that it is far more likely that the sponsor was working whilst dishonestly claiming JSA in a false name and identity, and not declaring the cash income.

19. In the circumstances, and for the reasons stated, the appeal under the Immigration Rules must fail. However, I have gone on considered the claimant's and the sponsor's article 8 rights.

20. Article 8 provides that:

> "*Everyone has the right to respect for his private and family life, his home and his correspondence*.
>
> "*There shall be no interference by a public authority with the exercise of this right* ***except*** *such as is* ***in accordance with the law*** *and is* ***necessary*** *in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

21. At paragraph 17 of Razgar v Secretary of State for the Home Department [2004] UKHL 27, Lord Bingham of Cornhill stated:

> *"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the Tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:*
>
> > *(1) Will the proposed removal be an interference by a public body with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> > *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
> > *(3) If so, is such interference in accordance with the law?*

> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
>
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

22. However, before article 8 ECHR can be considered outside the Rules the claimant must demonstrate that there are compelling or exceptional circumstances insufficiently recognised in the Rules so as to justify granting leave to remain outside Rules under article 8 ECHR, on the basis that the decision is unjustifiably harsh. In SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, the Court of Appeal re-stated the context and considered the role of public policy as expressed in the Rules in the proportionality assessment. The decision maker is entitled to decide that Article 8 considerations have been fully addressed in the Rules when dealing with 'stage two'. If they have, it is enough to say so. This will necessarily involve deciding whether there is a 'gap' between the Rules and Article 8, and then whether there are circumstances in the case under consideration which take it outside the class of cases which the Rules properly provide for. Whether these circumstances are described as 'compelling' or 'exceptional' is not a matter of substance. They must be relevant, weighty, and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional, but this is not a legal requirement. The first stage, therefore, is to assess how completely the Rules reflect Article 8 considerations.

23. Whilst I accept that the claimant is the child of the sponsor, and there is a limited family life between them that they wish to develop, I find no such compelling circumstances in this case insufficiently recognised in the Rules so as to render the decision to refuse the application unjustifiably harsh. There is a route for entry clearance as a child within the Rules, which are the Secretary of State's proportionate response to private and family life claims, balancing those against the public interest. Article 8 is not a dispensing power for those who fail to meet the Rules.

24. Any consideration of article 8 has to be seen through the prism of the Rules, in respect of which it is highly relevant that the claimant has been unable to meet, by the failure to produce sufficient credible evidence. I am satisfied that the Rules as applied in this case is an adequate proportionality assessment. If the circumstances are as the claimant and the sponsor claim, it will be open to make a further application addressing the reasons for refusal and properly documenting the income. As it stands, even if I conducted a Razgar stepped approach, the decision of the Secretary of State is entirely proportionate, balancing as it does the rights of the claimant and the sponsor on one hand against on the other the legitimate and necessary aims of protecting the economic well-being of the UK through immigration control.

Conclusions:

25. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remake the decision in the appeal by dismissing it on immigration grounds and on human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup
Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: It was not wrong for the Entry Clearance Officer and Entry Clearance Manager to be sceptical of the application, evidence and explanation. The claimant should have provided clearer evidence with the application.

Signed

Deputy Upper Tribunal Judge Pickup
Dated