



Appeal Numbers: OA125842013
OA125852013
OA125862013
OA125872013
OA125882013
OA125892013
OA125902013
OA125912013

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

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2013**

**Determination
Promulgated
On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**B- M- B-
O- B-
S- A- B-
N- B-
B- N- B-
B- A- B-
B- Z- B-
S- A- B-**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms B Asanovic, Counsel instructed by Makka Solicitors Ltd.
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. I continue the anonymity order made in this case by the First-tier Tribunal.

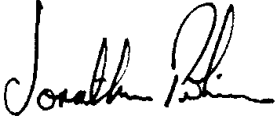
2. There are a total of eight appellants in this case. They are all members of one family. They and are the wife and children (as the case may be) of their sponsor, Mr A.
3. They applied for entry clearance to the United Kingdom as the dependant relatives of their sponsor. The applications were refused for a variety of reasons including things that were discreditable. They appealed to the First-tier Tribunal and, in a detailed and considered determination, the First-tier Tribunal Judge ruled in the appellants' favour on the disputed points. The respondent has not challenged those findings.
4. However the First-tier Tribunal Judge was very concerned that the appellants had not shown that the sponsor was present and settled in the United Kingdom as is required by the rules. The judge took the point on her own initiative and the parties were not really prepared to deal with it. The decision was made to continue without an adjournment. That may or may not have been the best decision but it is very easy to be wise after the event. The difficulty was that the papers before the Tribunal had not addressed that point taken by the judge and there was little chance to bolster the case with oral evidence.
5. The First-tier Tribunal was particularly interested in the fact that, for the purposes of tax law, the sponsor was described as "not resident and not ordinarily resident" in the United Kingdom. The phrase "not ordinarily resident" is particularly significant because it is a requirement of the Immigration Rules if they are read carefully that the sponsor is ordinarily resident in the United Kingdom (see below HC395 rule 6 "settled in the United Kingdom" (b)(i).)
6. I agree with Ms Everett for the respondent that the sponsor's status for tax purposes was a wholly pertinent avenue for enquiry in determining whether or not the sponsor was ordinarily resident in the United Kingdom for the purpose of the immigration rules.
7. I find that the First-tier Tribunal Judge erred when, having noticed the requirement of the rules that the sponsor was "ordinarily resident" in the United Kingdom and noticed that for the purposes of taxation law he was not "ordinarily resident", the First-tier Tribunal Judge made no further enquiry or investigation into his circumstances but regarded that finding as determinative of the status of the sponsor for the purposes of the immigration rules. This, I find, was a clear mistake in what is otherwise a very careful determination. There is no reason at all why these concepts of ordinary residence should have precisely the same meaning when applied to quite different areas of law and it is certainly not the case that a person's status for tax law is determinative of their status under the Immigration Rules. I do not find it necessary to say very much about that because Ms Everett, I find wholly correctly and in accordance with her professional duty to the Tribunal, conceded that an error of law had been established essentially for the reason given. I note that the need for a full and fact sensitive inquiry into a person's status in the United Kingdom was spelled out by Collins J in R v SSHD ex parte Chungtai [1995] Imm AR 559 which decision was before me.

8. Having found an error of law I decided to permit the Sponsor to give oral evidence. I reminded myself that he was “wrong footed” before the First-tier Tribunal because a point was taken that he had not anticipated. He adopted statements made in July and November 2013 and answered some supplementary questions. He was not cross-examined at great length because, as Ms Everett said at several stages in the course of the hearing, the point taken by the judge had not been taken by the respondent and there was nothing in her papers that encouraged her to investigate the point or make very much of it. Nevertheless it had been raised and had to be answered.
9. It is requirement of paragraph 281(i)(a)(i) of HC 395 that an applicant seeking to join her husband is joining a person “present and settled” in the United Kingdom. Paragraph 297(i)(c) requires a child seeking permission to enter the United Kingdom for settlement is a child of a parent “present and settled” there. Rule 6 of HC 395 gives definitions. A person is “settled” in the United Kingdom if he is “ordinarily resident” there (see rule 6 “settled in the United Kingdom” (b)(i)) and is “present and settled” if he is “settled” when the application is made and either physically present there or “is coming here with or to join the applicant and intends to make the United Kingdom their home with the applicant if the application is successful” (see rule 6 “present and settled”). Clearly the rules do not require the sponsor’s actual physical presence in the United Kingdom when the application is made provided there is an intention to join the applicants.
10. In order to be “settled” a person must be entitled to be in the United Kingdom (which this sponsor certainly is, he is a British national), and ordinarily resident there without falling foul of certain conditions that do not apply in his case.
11. The reasons for thinking that he is not ordinarily resident are that he spends a considerable amount of his time, and in the recent past a great deal of his time, out of the United Kingdom. He has asked for some discretion to be shown about the precise nature of his employment and there is an anonymity order made by the First-tier Tribunal which I continue. He has been working for NATO forces in a place of conflict. His particular skills are well rewarded. At the date of decision he had no intention of being in the United Kingdom for more than 91 days in any particular tax year. However he had a house in the United Kingdom. It is a rented property. It has five bedrooms and had been his home in the United Kingdom since 2002. He has inherited a house in his country of origin which is in a state of disrepair and he owns a house in its capital where the appellants live. The sponsor spends very little time there. He said, and I accept, that during his most recent tour of duty he made two visits there. Usually he stayed on the military base where he worked. I do not think it would be suggested that accommodation on a military base however comfortable it may be is ordinarily regarded as a person’s home.
12. I am satisfied that he is not a man who has a home anywhere but in the United Kingdom in any meaningful sense of the word “home”. The gist of the evidence clearly is that he his country of birth some years ago, made a home for himself in the United Kingdom and wants his family to join him.

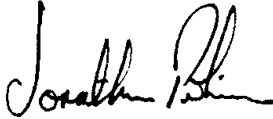
On an earlier occasion he had applied for children to join him. That application was unsuccessful, but one child came and settled with him and made his home there. That child is now an adult and is of very little relevance to these proceedings except that his story adds to the picture of the sponsor as a man whose home now is in the United Kingdom.

13. I accept the sponsor's evidence that he intended to join the family. The "date of decision" is only a very short period of time before the sponsor's contract of employment came to an end. The expectation was that the sponsor would, at least for a while, have come back to the United Kingdom and I have no hesitation at all in accepting that he would very soon have joined his family if they had travelled as soon as entry clearance had been granted. In reality the sponsor and appellants they would probably have travelled together as it they would all have been ready to travel at about the same time.
14. I find that the interpretation of "ordinarily resident" is essentially a matter of fact and since 2002 ordinarily this sponsor has been resident in the United Kingdom. He has worked away in order to provide money to look after his family - that is entirely to his credit and in no way changes the fact that he is ordinarily resident and for the purposes of the Immigration Rules, settled in the United Kingdom.
15. I do not think this case is of any relevance whatsoever except to the parties as a decision on its own facts and on its own facts I am persuaded on the balance of probability that the appellants met the requirements of the Rules at the material time because their sponsor was ordinarily resident in the United Kingdom and for that reason having set aside the decision of the First-tier Tribunal error of law I re-make the decision and allow the appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 10 December 2013



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