



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/13557/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

On May 4, 2018

**Decision & Reasons
Promulgated
On May 11, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR DANIEL AIWUYOR
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, Counsel, instructed by GMIAU
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity order in this appeal.
2. The appellant had made an application for entry clearance under paragraph 352D HC 395. The respondent refused his application on October 22, 2015 and grounds of appeal were lodged on December 9, 2015 with the Tribunal. The appeal was thereafter listed before Judge of the First-tier Tribunal Smith on June 13, 2017 and in a decision promulgated on June 21, 2017 the Judge accepted that the appellant satisfied the requirements of paragraph 352D HC 395 but concluded the public interest outweighed his right to be given entry clearance.

3. The appellant appealed that decision on July 4, 2017 and the matter was then considered by Judge of the First-tier Tribunal Hodgkinson on December 29, 2017 who found it arguable there had been an error in law for the reasons raised in the grounds of appeal.
4. The matter came before me on the above date and Mr McVeety accepted that the Judge had erred by finding the appellant was not a minor at the date of decision and he also accepted that the Judge had erred by finding the public interest required entry clearance to be refused even though the Immigration Rules were met.
5. However, Mr McVeety submitted that any reconsideration would had to consider whether that Immigration Rule had been met because unfortunately when making her finding at paragraph 27 of her decision the Judge had stated, “having considered the evidence before me I am satisfied to the lower level of proof that the appellant and sponsor lived together between 1989 and 2004.”
6. The standard of proof in an appeal of this nature is on the balance of probabilities which is not the “lower level of proof”.
7. Mr Holmes sought to persuade me that the appeal should be allowed outright because the respondent had not challenged anything in the Judge’s decision.
8. I pointed out that as the only appealable decision was the human rights decision the only party who could appeal that decision was the appellant because the Judge had dismissed the appellant’s appeal.
9. Mr Holmes submitted that the respondent should have put a response in writing raising this issue but I pointed out that Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 clearly states that a party responding to a permission to appeal may file a response. There is no mandatory requirement for this to be done but in the event that a response was filed the onus is on the filing party to comply with Rule 24(3) of the 2008 Rules.
10. I indicated to Mr Holmes that I was not persuaded that the respondent could have either appealed a decision or was required to file a response.
11. Having found the Judge’s approach amounted to an error in law I was obliged to set the decision aside and either remake it or adjourn for a further hearing.
12. In light of the fact the FTT Judge had applied the wrong standard of proof in her decision I indicated that the Tribunal would need to make a finding on whether paragraph 352D HC 395 was met-applying the correct standard of proof.
13. Both Mr McVeety and Mr Holmes submitted that findings would had to be made afresh because of my ruling and both invited me to remit this matter to the First-tier Tribunal.

14. Having found there was an error in law in which the Judge also inadvertently applied the wrong standard of proof I remit the decision back to the First-tier Tribunal for a de novo hearing.
15. Any Judge hearing this appeal should concentrate on whether the Immigration Rules were met, applying the correct standard of proof. It appears conceded by the respondent that if that Rule was met then this appellant should succeed under article 8 ECHR bearing in mind it is a family reunion case.

DECISION

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
17. I set aside the decision.
18. I remit the decision to the First-tier Tribunal to be heard by a Judge other than Judge of the First-tier Tribunal EMM Smith.

Signed

Date May 5, 2018

A handwritten signature in blue ink that reads "SPAR" with a flourish underneath.

Deputy Upper Tribunal Judge Alis