Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16319/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2nd July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MASTER GEORGE HAYES EL-HADDAD

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:

For the Appellant: Mrs Elvira Gutierrez (Sponsor)
For the Respondent: Mr S. Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of the Philippines born on 27th May 2005. He appealed against a decision of the Respondent dated 9th July 2013 to refuse his application for entry clearance to settle in the United Kingdom with his parents pursuant to paragraph 297 and 301 of the Immigration

Rules. The Appellant wished to join his mother Mrs Elvira Gutierrez ("the Sponsor") and his father Mr Sami El-Haddad who was originally a citizen of the Lebanon who has been granted discretionary leave to remain which is valid until 2017.

2. The Appellant's parents began living together in the United Kingdom in or about 1994. They were working full-time as live-in domestic workers. In 2004 the Sponsor fell pregnant with the Appellant but due to their immigration and working status she decided to return to the Philippines to give birth to the Appellant as it was not possible for the couple to keep the Appellant here when he was a baby due to work commitments. The Appellant was born on 27th May 2005 and was looked after by an uncle (the Sponsor's brother) and his family in the Philippines. Both of the Appellant's parents however continued to provide the Appellant with financial and emotional support and took decisions regarding the Appellant's upbringing such as which school he was going to, his religious practice and his day-to-day care. They supported the uncle financially in return for him looking after the Appellant.

3. In or about 2010 the Appellant's father was granted discretionary leave for three years and in December 2012 the Sponsor was granted a settlement visa thus acquiring a permanent right of residence in this country. A month later in January 2013 the Appellant's father applied to extend his discretionary leave for a further three years. On 30th April 2013 before the Appellant's father's application was decided application was made for the Appellant to join his parents in the United Kingdom.

4. In order to satisfy paragraph 297 the Appellant had to show that he was seeking leave to enter to join his parents in one of the following circumstances:

   (a) both parents were present and settled in the United Kingdom, or

   (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement, or

   (f) one parent is present and settled in the United Kingdom 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.

5. The alternative was for the Appellant to satisfy the requirements of paragraph 301 of the Immigration Rules which prescribes the requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of parents given limited leave. The requirement under paragraph 301(i)(a) is that one parent should be present and settled in the United Kingdom and the other parent "is being given or has been given limited leave to enter or remain in the United Kingdom with a view to settlement". Sub-

paragraph (c) has similar provisions with regard to serious and compelling family or other considerations as are contained in paragraph 297. The burden of establishing that the requirements of either paragraph are met rested upon the Appellant and the standard of proof was the usual civil standard, the balance of probabilities.

6. The Respondent issued his decision on 9th July 2013 to refuse the Appellant's application. The Respondent was aware that the Appellant's father had made an application to extend his discretionary leave which had been valid until February 2013. However the Respondent concluded that there was no indication that the father's application would be approved as a result of which he "currently does not hold any leave for the UK and there is no indication that he will be granted leave in the UK".

7. The Appellant appealed against that decision and the matter was considered at first instance by Judge of the First-tier Tribunal Baldwin sitting at Hatton Cross on 21st March 2014. He heard evidence from the Appellant's parents who were not legally represented. He considered that the Respondent had failed to refer to Section 55 of the Borders, Citizenship and Immigration Act 2009 and had failed to address the welfare of the Appellant. The child was entitled to be brought up by his parents who had worked for the same employer in London for many years. The Appellant's father had been in the United Kingdom for about 24 years and had been granted discretionary leave to remain until 2013. The Judge accepted that it was highly likely that the father's application for further leave would be granted (as indeed it subsequently was).

8. The Judge did not consider it right that the Appellant's best interests could be frustrated by a failure to make a decision on his father's application. Over a year had passed by the time the Judge heard the appeal since the father's application was received by the Secretary of State. He added at paragraph 18:

> "There must come a time when it is wholly wrong to rely solely on a refusal of a child's application based solely on the continued failure of the Secretary of State to address the father's application. That time I find has come particularly given that it is a case where it is exceptionally difficult to see how or why the father's application might not succeed."

9. At paragraph 19 he decided that the appeal could not be allowed under the Rules but should be allowed on Article 8 grounds outside the Rules. At paragraph 20 the Judge wrote:

> "On the totality of the evidence before me I find that the Appellant has discharged the burden of proof and that the reasons given by the Respondent do not justify the refusal. Therefore the Respondent's decision is not in accordance with the law and the applicable Immigration Rules."

10. Having found that the decision was not in accordance with the law, the Judge at that point no longer had a valid decision before him and the correct course would have been to have said that the matter remained outstanding for the Entry Clearance Officer to decide. Instead at paragraphs 21 and 22 the Judge went on to say:

> "The appeal under the Immigration Rules is dismissed. The appeal is allowed on human rights grounds."

11. The Respondent evidently chose to interpret the Judge's decision as being to allow the appeal outright. The grounds of onward appeal noted that the Judge had erred in finding that Section 55 of the 2009 Act applied (**FT [2011] UKUT 00483**). The Respondent took issue with the decision of the Judge to allow the appeal outside the Rules citing the case of **Gulshan [2013] UKUT 640.** Only if there may be arguably good grounds for granting leave to remain outside the Rules was it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under them.

12. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cox on 9th May 2014. In granting permission to appeal he wrote:

> "I find that I have to allow that the grounds have arguable merit notwithstanding that the conclusion the Judge reached is very understandable in the circumstances. The determination does not altogether inspire confidence, particularly when paragraphs 20 and 21 appear to be in conflict. More specifically in allowing the appeal on Article 8 grounds outside the Rules it is not apparent that the Judge applied his mind to the guidance in **Gulshan**. The point made in the grounds about Section 55 of the 2009 Act is also technically correct. The grounds disclose an arguable material error of law in the determination and permission is granted."

13. On 16th June 2014, shortly before the hearing was due to take place the Appellant's father wrote to the Tribunal enclosing a copy of the residence permit issued to him by the Secretary of State on 3rd June 2014 valid until 26th May 2017 (as the Judge at first instance had predicted it would be).

The Hearing Before Me

14. The matter came before me to decide firstly whether there was an error of law in the Judge's determination such that it fell to be set aside. If there was then I would proceed to re-hear the matter and remake the decision. The Presenting Officer submitted that the Judge had erred in law by indicating that Section 55 should have been considered when it did not apply as the child was out of the country. The Appellant had not been able to meet the Rules as, although the Appellant's mother was present and

settled in the United Kingdom, she did not have sole responsibility for the Appellant. Although the Appellant's father had been given a second grant of discretionary leave valid until 2017 it would only be when he obtained a third grant that he would be deemed to be settled.

15. The obstacle to the Appellant's appeal was whether the Appellant's father had limited leave to remain leading to settlement. He had 3C leave at the time of the decision on the Appellant's application by virtue of the Immigration Act 1971. However an extension of his leave by reason of Section 3C would not be an extension with a view to settlement. Arguably now that the Appellant's father had a second grant of leave he was granted leave with a view to settlement but that would not be to look at the case at the date of decision. The preferential course of action would be for the Appellant to submit a new application which might have reasonable prospects of success. It was not disproportionate to refuse the application.

16. For the Appellant his father said that he had downloaded from the Home Office website the provisions in the Immigration Directorate Instructions relating to the grant of discretionary leave. These stated that those who before 9th July 2012 had been granted leave under the discretionary leave policy in force at the time would normally continue to be dealt with under that policy through to settlement if they qualified for it, normally after accruing six years' continuous discretionary leave. It appears that that has been followed in the case of the Appellant's father since he was given a further period of three years albeit over a year after he lodged his application.

17. Furthermore he said that his brother-in-law, the Appellant's uncle, had put the uncle's plans on hold whilst the Appellant's application for entry clearance was being resolved. There was a mistake in the decision of the Entry Clearance Officer. The decision was made in July, five months after he, the Appellant's father, had made his own application for further discretionary leave and therefore the Entry Clearance Officer was not in a position to know what the outcome of that was. The Secretary of State should not have taken as long as she did in deciding his, the father's, application for discretionary leave. He was unlucky that it took so long because of a backlog at the Home Office. It was agreed that there were no objections over finances.

Findings

18. Although the decision at first instance is not entirely clear, it does appear that the Judge was satisfied that the Appellant could not meet the Immigration Rules. If that is wrong and in fact the Appellant can meet the Rules, then there is a material error of law in the determination such that it falls to be set aside and I should remake the decision in this case by allowing the Appellant's appeal. Whether there is an error of law depends on the meaning of the expression in paragraph 297 that a parent "is being admitted on the same occasion for settlement". The difficulty in this case

was that although there were two applications at the same time, one for the Appellant and one for his father, they were being considered by two quite different entities, the Entry Clearance Officer in the case of the Appellant, the Secretary of State in the case of the father. As a result they were not decided together. There was a considerable gap after the Appellant's application was refused before his father's application was granted. It is difficult to see therefore how the Appellant's father could bring himself within paragraph 297(i)(c) as being admitted on the same occasion as the Appellant for settlement.

19. The Appellant's argument is that the Respondent was wrong to treat his father's application as of no importance to the Appellant's own application. The Respondent's reason was that the father's application had not yet been decided upon and therefore the Appellant's father did not hold any leave for the United Kingdom at the date of the Appellant's decision. That is not quite right because the Appellant's father had 3C leave whilst his further application for discretionary leave was being considered and it was within the terms of the Respondent's own policy that that discretionary leave ought to be granted. The Respondent however was obliged to decide the Appellant's application and as at the date of decision the Secretary of State had not decided the father's application and thus the Appellant could not bring himself within the Rules.

20. In dismissing the appeal under the Immigration Rules the Judge was also indicating that he did not consider that there were serious and compelling family or other considerations which made exclusion of the Appellant undesirable. The information regarding the Appellant's personal circumstances was somewhat sparse. He was evidently being looked after by an uncle in the Philippines with considerable input into his care from his parents in the United Kingdom. However the Judge was right not to find that there were serious and compelling family or other considerations on that evidence. I find therefore that the Appellant could not bring himself within the Rules and in consequence it was open to the Judge to dismiss the appeal under the Rules. There was no error of law in that aspect of the decision.

21. Although the determination was muddled, in that the Judge referred to the decision as being not in accordance with the law, I take the view that as the Judge went on to decide the matter under Article 8, he did not intend to mean that there was no valid decision before him. Certainly the Respondent has not treated the Judge's decision in that way. For the purposes of this appeal I do not find that the Judge did intend to say that the Respondent's decision was not in accordance with the law. Unless it could be shown that the Respondent had failed to take into account his own policy, it could not be seriously argued that the decision was not in accordance with the law. To that extent if the Judge did mean that he was in error and I would set that aspect of his decision aside. The decision clearly was in accordance with the Immigration Rules.

22. This means that the only remaining part of the decision to consider whether it was or was not in accordance with the law is the Judge's decision in relation to Article 8. The Judge's assessment of Article 8 was clearly influenced by his mistaken belief that Section 55 applied in this case as the Appellant was a minor. The Appellant was out of the country and therefore Section 55 did not apply. The second factor which influenced the Judge was the length of time the Secretary of State was taking to consider the father's application for further leave. It was indeed a very long time, well over a year and in that time the family were unable to make a successful application for the Appellant to come and join them. That was unfortunate but the purpose of Article 8 is not to rewrite the Immigration Rules (see **CDS Brazil**) rather, as explained in authorities such as **Gulshan**, once the Appellant has raised the fact that there is an arguable case under Article 8, it is only where there are compelling circumstances such that the appeal should be allowed outside the Rules that Article 8 can come into play.

23. It is difficult to see how the Judge could have found such circumstances if he had dismissed the appeal under the Rules which also talk about serious and compelling family or other considerations. Although the Judge talked about a child being entitled to be brought up by his parents, the reason why the child was not being brought up by his parents was because of the decision of the parents to leave the child in the Philippines whilst they continued to work in the United Kingdom. The disruption to the family was caused by the family's decision to separate rather than by a decision of the Respondent. Even if the Secretary of State had decided the father's application before the Entry Clearance Officer had decided the Appellant's application, the Appellant would still not have been able to satisfy paragraph 297 because the father still was not settled in the United Kingdom, he would only have had a second period of discretionary leave.

24. It is only when the Appellant's father is granted settlement that the Appellant will be able to join them under the Immigration Rules. Until that time what the Appellant's parents are seeking to do is to use Article 8 to avoid the requirements of the Immigration Rules. That is not permitted and only if there are compelling reasons can an appeal be allowed outside the Rules. The Judge did not assess the proportionality of the interference with family life caused by the Respondent's decision correctly. That would have involved giving due weight to the legitimate aim being pursued. He was in error and I therefore set the decision aside.

25. I proceed therefore to remake the decision. As Judge Cox remarked in granting permission to appeal, the Judge's conclusion to allow the appeal under Article 8 was very understandable in the circumstances. The Appellant's parents are a hardworking couple who have lived and worked in the United Kingdom for a very long time. The Appellant's father is on the way to achieving settled status just as the Sponsor has achieved. The frustration of the family in those circumstances of being separated from their child is understandable but it is not in my view such a compelling

circumstance that the appeal should be allowed outside the Rules. The interference with family life has been caused by the decision of the Appellant's parents to leave the Appellant in the Philippines and for them both to return to the United Kingdom to work. Whilst the Appellant and his parents undoubtedly have a family life, that family life could be pursued elsewhere since his parents could return to the Philippines and live with the Appellant. The Respondent's decision is in accordance with the legitimate aim of immigration control since the Appellant cannot meet the Rules itis proportionate to that decision in the circumstances of this case.

26. Given that the Appellant's father's application for further discretionary leave has now been granted, it is a matter for the Respondent whether he chooses to nevertheless grant entry clearance to the Appellant on a purely discretionary basis given the significant change in the factual matrix since the refusal decision was made. That is not a matter on which I can direct the Respondent and I leave it to the Respondent. It would presumably require another application to be made by the Appellant. What I can say in the meantime is that the decision of the Respondent does not breach this country's obligations under Article 8 and having set aside the decision at first instance I remake the decision by dismissing the Appellant's appeal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I remake the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant entry clearance.

Appeal dismissed.

Signed this 31st day of July 2014

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Deputy Upper Tribunal Judge Woodcraft