Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34441/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 8 April 2015	**On 14 April 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F N NDIRANGU

Respondent

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr C McGinley, of Gray & Co, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The SSHD appeals against a determination by a panel of the First-tier Tribunal comprising Designated Judge Murray and Judge Young, promulgated on 5 December 2014. The panel allowed the appellant's appeal against refusal of leave to remain under Article 8 of the ECHR, outside the Immigration Rules.

3. The appellant applied on 1 July 2012, when still a minor, for entry clearance to join his mother in the UK. That was refused on 16 August 2012. In case OA/16950/2012, determination promulgated on 13 May 2013, the First-tier Tribunal allowed his appeal under paragraph 297 of the Immigration Rules.

4. The panel records in the determination now under appeal that the appellant joined his mother and stepfather in the UK in June 2013. His visa was granted only until 28 June 2014. His further application leads to present proceedings. His mother was granted indefinite leave to remain on 29 October 2014.

5. The panel did not accept the submissions for the appellant on the question of ties with Kenya, but gave weight to the terms of the previous determination and to the current facts. The panel thought at paragraph 46 that the appellant had been "… led to believe he would be granted indefinite leave to remain but this did not happen because of the amount of leave his mother had remaining. She has now been granted settlement in the UK. It would seem fair because of Judge Kempton's decision that the appellant should be granted leave in line with this". The panel went on to find nothing in the public interest against the appellant remaining, and that it would be disproportionate to remove him.

6. The SSHD's grounds of appeal are that the panel failed to identify compelling circumstances not recognised by the Rules, or exceptional circumstances leading to an unjustifiably harsh outcome. The grounds maintain that the appellant was always on a precarious and temporary stay, that little weight should be given to his private life here, and that he can live an independent life in Kenya.

7. Mrs O'Brien submitted that the panel had fallen into the error of taking a merely sympathetic approach. They thought that because the appellant had once been allowed in, it followed that he should stay. There was no identification of any factor which was out of the ordinary and not catered for by the Rules. The appellant was returning to a familiar country and to ordinary circumstances. The panel had not followed the established approach on the strength of circumstances required to go beyond the Rules. They erred at paragraph 46 in saying that Judge Kempton should have looked at the case at that stage under Appendix FM. Although the ECO had applied Appendix FM, it was correctly agreed at the hearing before Judge Kempton that the case fell under the Rules prior to amendment. The determination gave the impression that the appellant was to be compensated for being caught by amendment of the Rules, which was not the case. On the correct legal approach the outcome might have been different. Part 5A of the 2002 Act did not benefit the appellant. The decision should be remade and reversed.

8. Mr McGinley pointed out that in response to the previous successful appeal the appellant was granted a visa "to join his parents" (his mother and stepfather, a UK citizen) until the expiry of his mother's then current leave. That grant of leave should have been indefinite, in line with the general scheme of the Rules prior to amendment. Mr McGinley said that a judicial review challenge, being a remedy of last resort, would not have been appropriate at that stage. The point was the basis for the panel's view at paragraph 46 of what the appellant had been led to expect and the fairness of the outcome.

9. I indicated that the SSHD's appeal failed.

10. The ECO should have issued a visa carrying indefinite leave to remain in consequence of the determination of Judge Kempton. The point was perhaps not fully crystallised in the First-tier Tribunal, but I accept the submission that it would have been premature to pursue the issue by way of judicial review rather than by further application to the respondent. The panel was entitled to conclude that under those very unusual circumstances it would be disproportionate to refuse the appellant further leave to remain. The slip about whether Judge Kempton should have applied Appendix FM rather than paragraph 297 is immaterial. That tended against rather than in favour of the appellant and so would not be a reason for the respondent to have the determination set aside.

11. The determination of the First-tier Tribunal shall stand.

12. No anonymity direction has been requested or made.

8 April 2015
Upper Tribunal Judge Macleman