



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

Appeal Number: HU/25455/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons delivered ex
tempore at the hearing.**

On 7 February 2018

**Promulgated
On 8 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

ENTRY CLEARANCE OFFICER

Appellant

and

NQ

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: The Sponsors attended as litigants in person

DECISION AND REASONS

1. I make an anonymity direction as the appeal concerns a child. The Appellant had applied for entry clearance to join his parents in the United Kingdom for settlement under paragraph 301 of the Immigration Rules and that appeal had come for hearing before First-tier Tribunal Judge Colvin, sitting at Taylor House on 27 September 2017. By way of a decision and reasons promulgated on 11 October 2017 the Judge had allowed the appeal on Article 8 ECHR human rights grounds. The Appellant is

responding to this appeal, but to ease following this decision I shall continue to refer to him as the Appellant.

2. The Secretary of State has been granted permission to appeal by First-tier Tribunal Judge C. Andrew, by way of a decision dated 6 November 2017 and when she said as follows:-

“The Grounds complain that the Judge allowed the appeal on a presumption. The Sponsors do not have ILR and thus cannot be regarded as settled in the United Kingdom and, as such, the Immigration Rules cannot be met. Further, the Judge had no regard to the public interest in the maintenance of immigration control when coming to his decision.”

3. The Entry Clearance Officer’s grounds of appeal say, in part, as follows:-

“1. The judge erred in allowing the appeal based on an assumption. It is asserted that he cannot be certain that the Sponsor in this case will be granted either an extension of their current Discretionary leave or Indefinite Leave to Remain in the UK when they make any subsequent application. As such they cannot be said to be present and settled and therefore it is asserted that there can be no breach of Article 8 in refusing the Appellant entry clearance to join them, and to find otherwise is a misdirection in law. The Sponsors to the appeal have chosen to leave the Appellant in Ghana and have been absent from him for the majority of his 16 years having left him when he was an infant.

2. It is additionally submitted that the judge has based his conclusion on a misassumption that it was the Secretary of State who created the 10 year window of opportunity to allow the children of the Sponsors to gain British citizenship. ...

3. It is finally submitted that in allowing the appeal under Article 8 ECHR despite the Sponsors’ lack of settled status, the judge has simply used this provision as a general dispensing power and subsequently failed to adequately regard the public interest in the maintenance of a fair and just immigration system. ...”

4. In her submissions before me today Ms Everett said she relied on the grounds of appeal which were lengthy and did not require much elaboration. They were strong. She also submitted that at paragraph 18 of the judge’s decision the judge had failed to consider the proportionality exercise sufficiently. She had applied speculation as to what may happen in respect of a future application for leave to remain. There was no consideration of the public interest. She also said it was not adequate to rely on the delay and in any event it appeared that there had been a mistaken fact as far as the delay issue had been concerned. There were previous applications which had been made by the Sponsors, which had not succeeded.

5. The Sponsors attended the hearing and I explained the procedure to them. I referred to the grounds of appeal and the background to the case and I invited them to make their submissions. They said that the Home Office Presenting Officer was wrong and that the judge was right, that the judge had reached a reasonable and fair assessment of the whole of the case. The judge had been provided with all of the evidence. The Sponsor explained that he had come to this country in 2001 and that he had had, as he put it, "a couple of renewals". In 2008 he applied for leave to remain as a highly skilled migrant and something went seriously wrong but there was an allegation that he had used a fraudulent certificate but that was incorrect. He had reported the matter to the Metropolitan Police and ultimately the principals of the college were found guilty, not him. In short, it was being said that the judge had come to a fair decision and that I should uphold the judge's conclusions.
6. I had also invited the Sponsors to deal with paragraphs 15 and 18 of the judge's decision and I also invited them to assist me with the background to their son being in Ghana for so long without his parents.
7. Ultimately, in my judgment, it is quite clear that the judge did materially err in law. I have some sympathy for the judge because she was hampered in the assessment that she had to undertake because there was no Presenting Officer at the hearing but the position here is that the Sponsors at the time of the hearing in September 2017 had been given their first tranche of discretionary leave to remain (30 months) and they were to renew that further leave to remain in around October or November 2017. That would give them another 30 months' leave to remain and it was only after that period of time that they would then be entitled to consider making an application for indefinite leave to remain. Therefore, I do agree that there was significant speculation on the part of the First-tier Tribunal Judge as to whether or not indefinite leave to remain would ultimately be granted or not. It would be one thing if an ILR application had been made and the decision "was around the corner", perhaps in a month or two, but it is entirely a different thing when the first discretionary leave to remain had not even concluded and that at least another two and a half years would have to elapse before an ILR application could properly be made. There was just too long a period to wait before the ILR application.
8. Additionally, I take into account the issues in relation to the alleged delay. It appears that the judge was not fully apprised of the various applications that the Sponsors had made for leave to remain including failures in some applications as well. It was not simply a matter of the Sponsors having made an application and then then waiting. The delays and applications, including refusals were relevant.
9. Further, this is not a case in which the Sponsors were in a situation where they could not return to their country of nationality. The example given to me during submissions today is that this is not a case in which the

Sponsors had applied for asylum and that thereby they had to wait in this country for a decision on their asylum claim because they feared a return to their country of nationality. Quite simply, in reality, there was little stopping the Sponsors leaving the United Kingdom to be reunited with their son. These are all relevant factors which, in my judgment, were not adequately or at all taken into account by the judge when considering Article 8 and exceptional circumstances and indeed when considering the public interest which she was obliged to do. In the circumstances, although I have carefully listened to what the Sponsors have said to me, in my judgment there is a material error of law in the judge's decision. I therefore set aside the decision of the First-tier Tribunal. None of the current findings shall stand.

10. Having reflected on the matter, and having canvassed this with Ms Everett, in my judgment it is appropriate to remit the matter to the First-tier Tribunal and at the First-tier Tribunal the Appellant will be able to submit such further oral and written evidence as he considers appropriate. I have urged upon the Sponsors today that they should seek legal assistance.

Decision

The Decision of the First-tier Tribunal contained a material error of law and is set aside.

There shall be a re-hearing on all issues at the First-tier Tribunal

Anonymity direction made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Abid Mahmood

Date: 7 February 2018

Deputy Upper Tribunal Judge Mahmood