



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08542/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2017

Decision & Reasons Promulgated
On 09 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

[R H]

~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Miss M Chowdhury, Counsel, instructed by Lisa's Law Solicitors

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Entry Clearance Officer is once more the Respondent and [RH] is the Appellant.
2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Colvin (the judge), promulgated on 4 May 2017, in which she allowed the

Appellant's appeal. That appeal had been against the Respondent's decision of 18 September 2015, which had refused her application of 18 June 2015 seeking entry clearance to join her mother and father in the United Kingdom.

3. At the time of the application the Appellant's mother had settled status in the United Kingdom. The Appellant's father was in the United Kingdom with only limited leave to remain. The Respondent decided to consider the application only under paragraph 297 of the Rules. In light of this it was said that because of the father's lack of settled status the application could not succeed. There was no suggestion that the mother had sole responsibility for the Appellant and it was said that there were no exceptional circumstances to justify granting entry clearance on wider Article 8 grounds.

The judge's decision

4. The Appellant and the Respondent were both represented before the judge. At paragraph 15 of her decision the judge notes the Respondent's representative's submissions. It is clearly stated therein that Counsel for the Respondent accepted that both parents were present and settled in the United Kingdom, that alternatively paragraph 301(1)(a) of the Rules were met, and also that E-ECC.1.6(a) of Appendix FM was met. In light of the position taken, the judge had not called upon the Appellant's representative to make submissions.
5. The judge then goes on to set out her findings and conclusions. She notes the Appellant's mother's settled status and then finds that the Appellant's father had limited leave to remain under Appendix FM as the partner of his wife. This leave ran until the end of 2019. The judge concluded that the father could be considered present and settled in the United Kingdom having regard to the interpretation section of the Rules. Alternatively, the judge concludes that the Appellant met the requirements of paragraph 301. The judge states that she accepted the Appellant to meet the relationship requirements under the child route of Appendix FM but did not reach a conclusion on the other requirements of this part of the Appendix. She finishes by purporting to allow the appeal under the Immigration Rules.

The grounds and grant of permission

6. The Secretary of State's grounds begin by stating that the judge had "remitted" the case to the Entry Clearance Officer. The grounds then assert that the judge was wrong in concluding that the father was present and settled in the United Kingdom. In relation to the paragraph 301 issue the grounds simply state that this "concerns a separate category of application". The grounds conclude by suggesting that the judge was wrong to have remitted the matter back to the Entry Clearance Officer to consider the issues of sole responsibility and the serious and compelling reasons test.

7. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 1 June 2017. The grant of permission refers to the paragraph 297 point but nothing is said in respect of paragraph 301.

The hearing before me

8. At the outset of the hearing I indicated my preliminary view on this case, namely that the judge was wrong in respect of her consideration of paragraph 297, but was entitled to have considered that paragraph 301 applied and its provisions satisfied. Mr Nath did not put forward any arguments against this preliminary view.
9. In all the circumstances I did not consider it necessary to call upon Miss Chowdhury for submissions.

Decision on error of law

10. There are no material errors of law in the judge's decision.
11. The judge did err in concluding that the Appellant's father was present and settled in the United Kingdom. Under paragraph 6 of the Rules (the interpretation section) there is reference to the term "present and settled". In the definition of this phrase, the word "settled" is used. When one goes back in paragraph 6 to the definition of the term "settled" it is clear that the person concerned must have no restrictions upon their right to remain in the United Kingdom. Clearly, the Appellant's father did have restrictions upon his leave: it was limited in its duration to the end of 2019. In light of this the father was not "present and settled" in the United Kingdom. Therefore, in the light of this particular Appellant's case, paragraph 297 could not be satisfied.
12. However, in my view, the judge was fully entitled to go on and consider the applicability of paragraph 301 of the Rules. This is so for the following reasons.
13. First, given the father's status at the time of the application it should have been quite obvious to the Respondent that paragraph 301 had potential application whether or not this was specifically stated in the application form itself. It was quite apparent that whilst he had limited leave to remain, the Appellant's mother had settled status. For some reason best known to the Respondent paragraph 301 was not considered when the application was refused.
14. Second, I note that in the grounds of appeal against the Respondent's decision, paragraph 301 is clearly raised. Notwithstanding this, on review the Entry Clearance Manager failed to consider this alternative provision.
15. Third, relevant case law confirms that in particular cases a judge is entitled to look at alternative Rules other than that specifically put forward with the application or

considered by the Respondent at first instance (see SZ (Bangladesh) [2007] UKAIT 00037 and CP (Dominica) [2006] UKAIT 00040). This is a case in which the alternative provision, namely paragraph 301, was obvious on the face of the undisputed evidence before the judge.

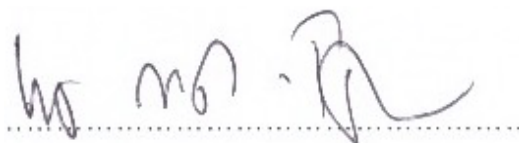
16. Fourth, the Respondent's own representative effectively conceded that paragraph 301 had application in this case.
17. No other substantive issues under either paragraph 297 or paragraph 301 had ever been raised by the Respondent, either during the decision-making process or at the hearing before the judge. In light of this it was entirely open to the judge to find that paragraph 301 was met in full.
18. In light of the above, the error relating to paragraph 297 is immaterial.
19. The judge purported to allow the appeal under the Rules. In fact this was and remains an appeal governed by the amended provisions of the 2002 Act. The only ground of appeal available to the Appellant was, and is, that the Respondent's refusal of her deemed human rights claim (i.e. the entry clearance application) breached her Article 8 rights and was therefore unlawful under Section 6 of the Human Rights Act 1998.
20. In my view, the specific terminology employed by the judge at the end of her decision is of no material consequence. She has found, as she was entitled to, that the Appellant met all of the requirements of the particular Rule. There has been no suggestion at any stage that the Appellant need show anything more than satisfaction of the relevant Rule in order to succeed in her human rights appeal. The Rules represent policy statements by the Respondent as to where the balance lies as between the interests of the public on the one hand and the rights of individuals on the other. In this case the Appellant has met all of the requirements of the Rule in question and on that basis she is able to show that the decision under appeal breached her Article 8 rights and is therefore unlawful.
21. The decision of the First-tier Tribunal shall stand.

Notice of Decision

There are no material errors of law in the First-tier Tribunal's decision.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.



Signed

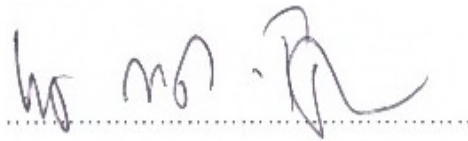
Date: 7 August 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. Although the Appellant has succeeded under a different Immigration Rule, the alternative provision was obvious from the very start, and the Respondent has failed to engage with it at all.

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 7 August 2017

Deputy Upper Tribunal Judge Norton-Taylor