Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/04322/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On June 20, 2014	**On June 23, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TERENCE YVES IBALA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Mr Saunders (Home Office Presenting Officer)
For the Respondent:	Mr Adewole (Legal Representative)

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I will refer below to the parties as they were identified at the First-tier Hearing namely the Secretary of State for the Home Department will from hereon be referred to as the respondent and Mr Terence Yves Ibala as the appellant.

2. The appellant, born October 21, 1994, is a citizen of the Congo. He arrived in the United Kingdom and claimed asylum on September 22, 2011 but his application was refused on December 13, 2011. He was however granted limited leave on discretionary grounds starting November 28, 2011 and ending on April 21, 2012. He then submitted an application on April 17, 2012 for leave to remain under paragraph 298 HC 395. When he submitted his application he was 17 ½ years of age.

3. The respondent refused his application on January 17, 2013 and at the same time issued directions to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006.

4. On February 5, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

5. The matter was listed before Judge of the First-tier Tribunal Iqbal (hereinafter referred to as "the FtTJ") on February 4, 2014 and in a determination promulgated on March 12, 2014 he allowed the appeal under paragraphs 298 and 276ADE of the Immigration Rules.

6. The respondent appealed that decision on March 20, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Lever on April 25, 2014 who found in particular merit to ground one of the grounds. He further states that he felt the FtTJ had given adequate reasons for allowing the appeal under paragraph 276ADE HC 395.

7. The matter was listed before me on the above date and the appellant was in attendance.

SUBMISSIONS

8. Mr Saunders submitted the FtTJ had erred in his approach to the paragraph 298 application. In order to be granted indefinite leave to remain under this paragraph the appellant had to show amongst other requirements that he was under the age of 18 (paragraph 298(ii)(a) HC 2395). At the time the application was submitted the appellant was under the age of 18 but at the date of decision he was over the age of 18. The refusal letter pointed out that as his discretionary leave had not been granted under paragraph 302 or paragraph 319R or Paragraph 319X or Appendix FM he could not satisfy paragraph 298(ii). The FtTJ had been addressed on this issue and found the appellant was exempt under paragraph 27 HC 395.

9. However Mr Saunders submitted paragraph 27 HC 395 did not apply to this application because paragraph 27 states-

> "An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 *or paragraph EC-C of Appendix FM* solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it."

Chapter 8 Section 5a paragraph 2.3 of the IDI made it clear that applications for leave or further leave to remain should be considered in light of the circumstances existing at the date of the decision and where the child was over 18 at the date of decision but his application had been lodged before he reached 18 the application should be decided as if he was still under 18. Mr Saunders submitted that this had to be read alongside the next paragraph that made it clear it applied to applications under paragraphs 320 and 319XA.

10. Mr Saunders further submitted that if the Tribunal upheld the application of paragraph 27 the FtTJ had still erred in his approach to paragraph 298 and in particular:

    a. His failure to give reasons why the exclusion of the appellant would be undesirable.
    b. His finding there are serious and compelling family or other considerations.

11. As regards the third ground of appeal Mr Saunders did not wish to address me on that as he accepted the judge who gave permission had stated that the FtTJ appeared to have given adequate reasons for allowing the appeal under paragraph 276ADE HC 395.

12. Mr Adewole submitted that paragraph 27 of the Immigration Rules did cover the appellant. He referred to the IDI guidance and he submitted that as the application was submitted when he was under the age of 18 the respondent should have treated him as under 18 even though the decision was taken after he was 18 years old. Paragraph 298 (ii) HC 395 applied to appellants who were seeking indefinite leave to remain and already had limited leave to enter or remain and were under the age of 18.

13. Mr Adewole further submitted that the FtTJ had given careful consideration to the whole case and had given reasons why he found exclusion would be undesirable and why there were serious and compelling family or other considerations. He submitted there was no error in law.

ERROR OF LAW ASSESSMENT

14. There are in effect two primary grounds of appeal. The first relates to whether the appellant should be considered to be under the age of 18 at the date of decision.

15. Whilst Mr Saunders' arguments had been found to have merit by Judge of the First-tier Tribunal Lever I am satisfied that his argument in respect of paragraph 27 HC 395 has no merit. I reach that conclusion for the following reasons:-

    a. The IDI's clearly envisage applications other than entry clearance because section 2.1 (Chapter 8 Section 5A) relates to guidance on entry clearance, 2.2 relates "on entry" and 2.3 relates to "After entry". I do not believe that the first paragraph of 2.3 has to be read in conjunction with the second or third paragraphs.

    b. In SO (Nigeria) v SSHD 2006 EWCA Civ 76 the Court of Appeal confirmed that the Tribunal was correct that, if paragraph 27 of the Immigration Rules was read in conjunction with guidance set out in the IDIs, an application for leave to remain as a child could not be refused solely on account of a claimant attaining 18 years of age since the date of lodgement.

16. I therefore find that ground one has no merit.

17. I turn to the second ground of appeal. This relates to the FtTJ's assessment of whether there any serious and compelling circumstances that made exclusion undesirable.

18. The Court of Appeal in SO stated that a claimant's age, maturity and independence had to be relevant factors in assessing whether "serious and compelling reasons" existed in terms of paragraph 298 and on that issue the Adjudicator did not err in law by taking into account the fact that the claimants had reached the age of 18 by the date of the hearing.

19. The FtTJ considered the evidence between paragraphs [23] and [36] and made a number of findings. He had regard to the appellant's age and circumstances and also considered the authority of Mundeba [2013] UKUT 88 (IAC). The FtTJ noted:-

    a. He had no family to return to in Congo.
    b. His half-sister and cousin live in the United Kingdom and he lives with them and she takes care of him.
    c. He has completed a number of subjects at college and now had a conditional offer to study computer science at two different universities.
    d. The circumstances that prevailed when he arrived in the country continued to apply namely there was no adequate accommodation or reception facilities for him in Congo.
    e. The appellant has lived in Gabon since the age of three and his mother lived in Congo and is retired and it would e difficult for her to look after him.
    f. The appellant has no ties to Congo be they social, cultural or family because he has lived in Gabon since the age of three.

20. Whilst the FtTJ did not specifically consider the appellant's position as a 19½ year old male he did have regard to all the relevant factors and he had the benefit of hearing the appellant's oral evidence and he made findings that were open to him. In those circumstances I find there has been no material error.

DECISION

21. There is no material error of law. The original decision shall stand.

22. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.


Signed:
Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the fee award made in the First-tier Tribunal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis