



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/03787/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 February 2016

Decision and Reasons Promulgated
On 1 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AKWASI DJAN
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Ms R Akther, counsel (instructed by Genga and Co Solicitors)

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 25 August 2015 allowing the claimant's appeal for leave to remain in the UK under the Immigration Rules. At [24] he stated that he was persuaded that the claimant “... comes within the relevant immigration law, as amended”.

3. In her application for permission to appeal, the secretary of state contended that it was unclear on what basis the appeal had been allowed. It was uncertain whether it was allowed under the Rules or under the Human Rights Convention. There was a lack of clarity as to what law the Judge was referring to when he stated that the claimant was "benefiting from the rule of law" [23].
4. In addition, it is contended that the Tribunal made no findings of fact and as a result, it is not possible to determine on what basis the appeal was allowed. No findings were made as to how long the claimant had been in the UK, nor the circumstances of that residence. There was moreover no reasons as to why there was anything compelling preventing his removal.
5. On 23 December 2015, First-tier Tribunal Judge Davidge granted the secretary of state permission to appeal on the basis that there had arguably been vague and inadequate references to the claimant's "coming within the rules" without explicit expression of any relevant rule. There were no findings of fact made by the Judge and when considering "evaluative matters" he failed to set out any reasoning as to why the factors weighed in the balance for or against the claimant or the weight attached.
6. Ms Akther, who had not represented the appellant before the First-tier Tribunal, referred to the Rule 24 response presented by counsel, who had represented the appellant. That response is dated 21 January 2016.
7. In the response it is contended at paragraph 3, that the claimant's "principal submission" is that at the hearing it had been conceded by the presenting officer that the appeal be allowed because of the failure of the secretary of state to consider that the claimant had previously been granted leave to remain. There was however no evidence produced by counsel to support those assertions.
8. Mr Bramble was not prepared to accept that such concession had been made on the grounds referred to in paragraph 3 of the Rule 24 response.
9. In the Rule 24 response, there is reference to counsel's attendance note at the hearing on 5 August 2015, in which it is stated that the presenting officer accepted that the refusal letter did not consider the content of the previous grant letter and ought to have. It is further contended that the presenting officer stated that she agreed that the appeal ought to be allowed because of the failure to consider the previous grant letter.
10. Ms Akther referred to the skeleton argument presented to the First-tier Tribunal by counsel, dated 5 August 2015.

11. There it was noted that the claimant is a national of Ghana born on 20 June 1980. He arrived in the UK on a visit visa on 17 July 1999 when he was 19 years old. He has been living with his father, a British citizen. His leave to remain expired on 10 December 1999. He has worked since 2000 and has lived here since his arrival.
12. He is in a relationship with Ms Evelyn Addai, a national of Ghana. They have three children, born in 2007, 2009 and 2013. His application dated August 2012 for leave to remain on the basis that his partner and two elder children had limited leave to remain was refused in May 2013. Various representations were then made to the secretary of state to reconsider that application. The claimant was asked to complete a statement of additional grounds by letter dated 13 June 2014.
13. On 18 September 2014, the claimant was granted limited leave to remain until 21 November 2014 in line with his partner and children.
14. In the decision letter it was stated that he failed to meet the eligibility requirements of Appendix FM of the rules. However, it was considered that exceptional circumstances applied to his case, in relation to his two children. Therefore, in accordance with the "exceptional circumstances" section of the Home Office "guidance on application of EX.1 – consideration of a child's best interests under the family rules and in Article 8 claims where the criminality threshold in paragraph 399 of the rules do not apply" it had been decided to grant him limited leave to remain on account of the exceptional circumstances of his particular case.
15. At that stage he was granted leave to remain in line with the current leave granted to his partner and three children.
16. However, in the same refusal letter dated 18 September 2014, the secretary of state noted that he would be issued with a biometric residence permit card stating that he had limited leave to remain in the UK "initially for 30 months." However, instead of being granted leave to remain for 30 months, he was in fact granted leave to remain valid from 18 September 2014 until 21 November 2014.
17. In a letter from his solicitor to the Home Office seeking clarification, the Home Office responded on 7 October 2014 stating that the claimant had been granted leave to remain in line with the rest of his family.
18. In the meantime the claimant's partner and children applied for an extension of their leave to remain in the UK which was expiring on 21 November 2014.
19. Accordingly, on 28 October 2014 the claimant himself applied for further leave to remain. On 11 December 2014, his partner and three children were in fact granted limited leave to remain until 11 December 2017.

20. Despite the grant of leave to remain to his family, the claimant's application was refused on 14 January 2015. It was considered that whilst his eldest child had lived in the UK for seven years, it would not be unreasonable to expect him and the other children to return to Ghana and there would not be significant obstacles for the claimant in re-integrating back into society in Ghana.
21. It is evident that the decision letter dated 14 January 2015 did not make any reference to the previous grant of leave to remain to the claimant or to the decision letter of 18 September 2014 granting him leave to remain.
22. As already noted, counsel who represented the claimant at the First-tier Tribunal contended that the presenting officer accepted that the refusal letter did not consider the content of the previous grant and ought to have. There is however no proper evidence adduced by counsel in support of that contention.
23. It is accordingly contended that the failure by the secretary of state to have regard to the concession allegedly made by the presenting officer at the hearing constituted an abuse of process and unfairness to the claimant. The challenge to the Judge's determination is accordingly said to be unsustainable in the light of the concession.
24. In the First-tier Tribunal Judge's determination, he records that the presenting officer invited him to dismiss the appeal, particularly indicating that the burden of proof was on the claimant [11]. The Judge then records that counsel for the claimant emphasised the fact that the best interests of the children should permit him to allow the appeal. There was accordingly no reference in the determination to the concession referred to in the Rule 24 response.
25. It is acknowledged in the Rule 24 response that the determination by the First-tier Tribunal Judge did not identify any immigration rule under which the appeal was allowed, or whether it was in fact allowed under Article 8 ECHR. However, it is contended that the error is not material "because of the concession made."
26. It is further contended that even if the determination is found to be flawed the appeal should nevertheless have been allowed and the claimant should have been granted limited leave to remain for the same reasons as set out in the decision letter dated 18 September 2014 granting him leave in line with his family. There had been no change in circumstances. The secretary of state has a public duty of consistency.
27. In addition, consideration must be given as to whether the decision to refuse to vary leave to remain and to remove the claimant is contrary to the best interests of his children pursuant to s.55 of the 2009 Act and in breach of Article 8 ECHR - IQ and Others (s.55 duty) Nigeria [2014] UKUT 00517 (IAC). The rights of the family as a unit must be considered.

28. Ms Akther is contended that there is no sensible reason for the claimant to leave the UK in order to make an entry clearance application to enter the UK. That would involve a separation from his partner and children, with whom he shares a family life. Nor would it be proportionate to expect his partner and children to leave the UK.
29. In reply, Mr Bramble stated that he was “happy to accept that the circumstances of the case showed that the claimant had been granted leave to remain in line with his family members”. The decision letter dated 14 January 2015 acknowledged that his partner had limited leave to remain in the UK until 11 December 2017. That applied to his children as well.
30. Mr Bramble accepted that the subsequent extension of his family's leave to remain should also have been taken into account and should have been revisited.
31. He accepted that it is on that basis that the decision of the First-tier Tribunal was not in accordance with the law as no consideration had been given to the claimant's submission that his partner and three children were granted leave to remain until December 2017 and that he had been granted limited leave to remain in line with their grant in the earlier decision.
32. In considering “exceptional circumstances” (including Article 8 and human rights) the secretary of state should have considered and taken into account the fact that his partner and children's application had been extended until December 2017.

Assessment

33. For the reasons set out in the grounds seeking permission, I find that the decision of the First-tier Tribunal Judge did contain a material error on a point of law. In particular, no findings of fact were made. Nor is it possible to determine on what basis the appeal was allowed. Nor was any consideration given or reasons provided as to why the claimant should be entitled to remain in the UK or whether there is anything compelling to prevent his removal.
34. As noted by Judge Davidge when considering evaluative matters, the Judge failed to set out any reasoning as to the factors which weighed in the balance for and against the claimant or the weight attached.
35. In the circumstances, I set aside the decision and re-make it.
36. I have referred to the history of the claimant's various applications for leave to remain as well as those made by his partner and family members.

37. On 18 September 2014 the claimant was granted limited leave to remain until 21 November 2014 in line with his partner and children. The secretary of state noted that although he failed to meet the eligibility requirements of Appendix FM, it is considered that exceptional circumstances apply to his case in relation to his children. Therefore in accordance with those circumstances, and in accordance with Home Office guidance, it was decided to grant him limited leave to remain due to such exceptional circumstances.
38. It was also stated in the same decision (at page 2) that "... we will issue with a biometric residence permit (BRP) stating that you have limited leave to remain in the UK initially for 30 months."
39. On 11 December 2014, the claimant's partner and three children were granted limited leave to remain until 11 December 2017. The claimant himself had applied on 28 October 2014 for further leave to remain.
40. Despite the grant of leave to his family to remain until 11 December 2017, the claimant's application was refused on 14 January 2015.
41. In the absence of any proper foundation or evidence from counsel who represented the claimant before the First-tier Tribunal Judge, I am unable to find that the concession relied upon had in fact been made at the hearing. It is in conflict with the recording by the First-tier Tribunal Judge that the presenting officer in fact invited him to dismiss the appeal, indicating that the burden of proof was on the claimant.
42. As accepted by Mr Bramble however, the decision letter of 14 January 2015 made no reference to the earlier grant of leave to remain to the claimant or indeed to the decision letter of 18 September 2014 granting him leave to remain. The secretary of state thus failed to consider the previous grant of leave to remain which had been taken pursuant to the "exceptional circumstances" section of the refusal letter.
43. In the "exceptional circumstances" section of the refusal letter dated 14 January 2015, there was no reference at all to the secretary of state's recent decision dated 18 September 2014 where the claimant was granted limited leave to remain in line with that of his partner and children. There the secretary of state stated that when considering Home Office policy in respect of his children, he would be granted limited leave to remain due to exceptional circumstances.
44. However, that was not revisited and as accepted by Mr Bramble, it should in the circumstances have been. There had been no change in circumstances relied on by the secretary of state. The inconsistent approach, which remained unexplained, results in the decision not being in accordance with the law.

45. Having set aside the decision of the First-tier Tribunal, I remake it and allow the claimant's appeal to the extent that he be granted limited leave to remain in the UK until 11 December 2017 in accordance with the leave granted to the claimant's partner and three children in their decision dated 11 December 2014.

Notice of Decision

The secretary of state's appeal is dismissed.

No anonymity direction is made.

Signed

Date 16 March 2016

Deputy Upper Tribunal Judge Mailer