Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/12661/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 8th February 2016	**On 16th February 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MICHAEL BREW
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana, born on 24 February 1975. By letter dated 16 February 2015 he asked for discretionary leave to remain in the UK based on his "special and compelling circumstances", namely residence in the UK for over 10 years; being let down by his university over extension of leave as a student; and alleged failure by the respondent to consider his position under her policy on discretionary leave.

2. The respondent refused the application by letter dated 13 March 2015, paragraph 4 of which conveniently summarises the appellant's immigration history. The following clarification was added by the respondent, and agreed by the appellant, at the outset of the hearing in

the Upper Tribunal. The appellant travelled to the UK from Ghana with entry clearance on 15/16 October 2001. He returned to Ghana on 15 December 2001 and remained there until 6 September 2002.

3. The decision letter declines to grant leave under reference to the ECHR Article 8, to the Immigration Rules, and to the best interests of the appellant's children (who would be returning to Ghana with the appellant and his wife), and finds no exceptional circumstances to justify a grant of leave outside the Rules.

4. The appellant's grounds of appeal to the First-tier Tribunal were as follows:

> 1 Decision contrary to law. Respondent failed to consider application pursuant to policy on discretionary leave.
>
> 2 Decision inconsistent with paragraph 276B of the Immigration Rules. At the time of "initial refusal in 2013" the appellant had completed 10 years continuous lawful residence in the UK.
>
> 3 Decision incompatible with appellant's Article 8 right to private and family life, there being "no countervailing circumstances"; the application "ought to have succeeded under the Immigration Rules and it would therefore not be compatible with his Article 8 right to private life for the application to be refused."

5. First-tier Tribunal Judge Fox dismissed the appellant's appeal by decision promulgated on 5 August 2015.

6. I do not find the appellant's grounds of appeal to the Upper Tribunal to be very clearly framed. Ground 1 appears to be an insistence that the appeal should have been allowed because the appellant qualified for leave under the Rules based on 10 years' residence. Ground 2 opens by submitting that if the appellant meets those Rules, that is relevant to Article 8 (although if so, there would be no need to rely on Article 8). The argument appears to be that because (a) the appellant might at some historical point have qualified for leave based on 10 years' residence, (b) there was a failure by his university to advise him of the refusal of a prior leave application, and (c) the Home Office failed to apply its [unspecified] policy on discretionary leave, those factors should have counted in the Article 8 proportionality assessment.

7. Mr Ndubuisi said that in the First-tier Tribunal two arguments were run for the appellant – firstly that his case should be allowed under the Rules on 10 years' residence, and secondly that he should have succeeded under Article 8 of the ECHR, outside the Rules. However, on the 10 years point I found the submission rather confused. It was not clear to me whether the argument either in the First-tier Tribunal or in the Upper Tribunal was that the appellant was entitled to succeed under the Rules, or that a missed opportunity to do so (due to previous errors in advice and failure to appeal on time, or to seek to appeal out of time) contributed to the Article 8 assessment. It was also not clear to me whether or not Mr Ndubuisi accepted that due to the gap in residence mentioned above, the appellant at no time was in a position to succeed based on 10 years' lawful residence. Eventually, the submission appeared to be that although the

appellant could never have succeeded under the Rules on the basis of 10 years' residence, the judge, in failing to apply his mind properly to the argument made in respect of the 10 year rule, went astray on a matter which ought to have led to a favourable outcome in terms of proportionality.

8. That is as much as I could make of the grounds and submissions.

9. Mr Matthews submitted that the reference to 10 years' residence had always been a "red herring". The appellant had never been in a position to meet the requirements of that Rule. The matter could have no bearing on proportionality. It was now accepted that the appellant could not meet any of the provisions of the Immigration Rules considered in the refusal letter – Appendix FM and/or paragraph 276ADE. The appellant made a student application on 20 October 2011 which was refused on 9 January 2012. That might have been through misguided actions on the part of the university sponsor, but no appeal had been taken and leave had come to an end on or around 20 January 2012. The appellant made a further application on 28 May 2012, while he had no leave, and so refusal gave no right of appeal. There was then a further gap until 16 February 2015 when he made the application leading to these proceedings. When his leave ended in January 2012 he was 8 months short of 10 years' residence. No such application could *ever* have succeeded. There were further reasons to attach no importance to the 10 years' residence argument. The appellant had not sought to show that he met the terms of the relevant rule, apart from length of residence. It was a requirement that an applicant should not have been an overstayer for more than 28 days, but he had been an overstayer for almost 3 years when he first raised the point. The First-tier Tribunal would have been bound to apply that provision of the Rules, and not to consider the matter on the basis of a fictitious earlier application. The appellant did not apply on the required form and did not pay the required fee. There was no application before the respondent at any time, made according to the requirements of the Rules. The judge did not appear to have directly addressed the matter of 10 years' residence, but that was beside the point, as it could have led to no other conclusion.

10. In terms of the appellant's reference to policy on discretionary leave, Mr Matthews pointed out that the grant of leave in this case was for a very particular compassionate reason, a child of the appellant having died. That was obviously by its nature a grant of a finite nature and not one which would normally lead to any extension.

11. Finally, Mr Matthews said that the judge was obviously correct to consider that removal of the appellant, with his family, involved no disproportionate breach of Article 8 rights.

12. Mr Ndubuisi in response at last directed attention to the respondent's discretionary leave policy, and to the representations made to the Secretary of State with the application. He submitted that having been granted leave as time to mourn the death of a child, the appellant should

then have been enabled to apply for further leave in the capacity of a student. It would have been reasonable in terms of the policy to grant further leave, not on the same discretionary basis, but to enable the appellant to resume his studies. That was a "very significant factor" in the Article 8 assessment which had been overlooked by the judge.

13. I reserved my determination.

14. The final point made by Mr Ndubuisi was extracted at a very late stage, and is not to be identified in the earlier written and oral pleadings. It is not mentioned in the letter of 16 February 2015 triggering the decision and subsequently these proceedings (page 88 of appellant's First-tier Tribunal bundle.) Nor is it the basis of the request for further leave dated 27 April 2011 (page 83). The respondent and the First-tier Tribunal are not to be faulted for dealing with the appellant's case as it was put, ie as one deserving a discretionary grant outside the Rules, and not as one where the appellant, due to the twists and turns of his immigration history, should have an exceptional opportunity to apply further as a student – in which direction he gave no indication of his hopes or intentions.

15. There is of course no reason why the appellant might not in future apply from outside the UK, if he is a position to meet the Immigration Rules as a student or in any other capacity.

16. The crucial part of the judge's assessment was that it was not disproportionate to expect the appellant and his family to leave the UK, there being no reason in terms of Article 8 why they should be entitled to remain, notwithstanding the requirements of the Rules. On the case put to the First-tier Tribunal, and in that outcome, I find that the appellant's grounds and submissions fail to disclose any matter which might require the decision to be set aside, or which might discernibly have led to any other rational outcome.

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

18. No anonymity direction has been requested or made.

11 February 2016
Upper Tribunal Judge Macleman