Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34983/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reason Promulgated**

On 9 January 2018 **On 25 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANKILKUMAR JAGDISHKUMAR PATEL
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms Aboni, Senior Home Office Presenting Officer
For the Respondent: Ms B Asanovic, instructed by Zahra & Co, Solicitors

DECISION AND REASONS

1. On 26 October 2017, FtT Judge Foudy granted the appellant Secretary of State w permission to appeal against the decision and reasons statement of FtT Judge Khawar that was promulgated on 19 April 2017.

2. Judge Khawar decided the decision to refuse a human rights claim was unlawful under s.6 of the Human Rights Act 1998 and therefore allowed the appeal. The appellant Secretary of State alleges Judge Khawar gave too much weight to delays in the Home Office in processing an application by the appellant's father under the "legacy policy", on which the appellant had been a dependant. The appellant argues that the judge confused issues relating to private and family life rights under article 8 ECHR.

© CROWN COPYRIGHT 2018

3. There was no rule 24 response but Ms Asanovic provided a skeleton argument in lieu.

4. At the outset of the hearing I raised three potential issues on which I would like to be address. The first was whether the Secretary of State was relying on the reported case *MNM (Surendran guidelines for Adjudicators) (Kenya)* * [2000] UKIAT 00005 since it would appear that Judge Khawar was concerned about his role in the absence of a presenting officer. The second was whether paragraph 3 of the grounds was accurate in terms of the relevant date in the appeal. The third was the fact Judge Khawar appeared to have relied on more than mere delay when assessing proportionality.

5. Ms Aboni relied on the grounds and added the following points. She reminded me that the application made to the Secretary of State had initially been on the basis of the respondent's private life. It was varied to take account of his family life. This is where the error of law appears to have arisen because the judge took the delay in processing the private life issues into consideration when he considered family life. This meant the decision was unsound because the judge failed to give adequate consideration to the relevant issues, particularly the need for the respondent to leave the UK to leave the UK to make an entry clearance application as a partner under appendix FM. Ms Aboni said the judge's decision failed to give appropriate weight to the public interest in maintaining effective immigration controls.

6. As to the issues arising under *MNM*, Ms Aboni recognised that Judge Foudy appears to have had these in mind when granting permission. It was not raised by the appellant Secretary of State. Ms Aboni suggested that Judge Khawar could have investigated more during the hearing as required under the Surendran guidelines. Ms Aboni was candid, however, that she had no intention of raising this issue herself and did not seek to amend grounds to include it.

7. Ms Aboni reminded me that at [41], Judge Khawar refers to "undue harsh consequences" rather than "insurmountable obstacles". This was arguably the wrong legal test and was another reason why the Secretary of State said the decision and reasons statement was flawed because it failed to have proper regard to the public interest.

8. Ms Asanovic relied on her skeleton argument (headed, Note on Error). She reminded me that a judge must take into account all relevant factors when assessing proportionality. In this case, the length of delay, was a very relevant factor since it was during that time the respondent's relationship developed. It had to be recalled that the respondent arrived in the UK in February 2004 and that since 8 August 2006 there had been no progress on his status despite relevant applications being made. His parents' applications remained unresolved. It was reasonable for the respondent to move on with his life (see *Agyarko* and *EB (Kosovo)*).

9. Ms Asanovic also reminded me that Judge Khawar began his consideration with the earlier judicial findings of another judge, as required by *Devaseelan*. The respondent provided a voluminous bundle which

included full details of his immigration history, his educational achievements and employment.

10. As to the other matters, there was no material difference between the unduly harsh and insurmountable obstacles tests. They have similar thresholds. The severity of separating the family meant the public interest in this case was outweighed.

11. Ms Aboni had nothing more to add.

12. Having heard the arguments, I decided there was no legal error and announced my decision at the hearing. Judge Khawar was faced with an appeal against a refusal of a human rights claim. He carried out the necessary balancing act, assessing first the personal circumstances of the respondent and then the public interest factors. He then weighed them and came down in favour of the respondent. In so doing he did not rely on one factor above all others. He recognised that the delay meant the respondent had got on with his life, as might be expected, and started a relationship. It was no longer proportionate to treat the respondent and his wife as if the respondent had only recently arrived in the UK. The failings of the Home Office to deal with a case in a reasonable time was a reasonable factor to consider and was not given undue prominence.

Decision

There is no legal error in the decision and reasons of Judge Khawar and I uphold his decision.

Signed Date: 25 January 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal