Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48681/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 4th March 2015	**On 6th March 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

STEPHEN KWARTENG OPPONG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant on 28th August 2013 applied for limited leave to remain in the UK on the basis of family and private life and exceptional circumstances. The respondent refused his application for reasons explained in a letter dated 5th November 2013. Judge David C Clapham SSC heard the appellant's appeal in the First-tier Tribunal on 22nd September 2014 and dismissed it by determination dated 7th and promulgated on 8th October 2014.

2. The Presenting Officer in the First-tier Tribunal undertook that the appellant would not be removed until an asylum claim made by his wife and children had been resolved. The judge said at paragraph 21 that in view of that undertaking he could not consider Article 8 grounds. The appellant's first ground of appeal to the Upper tribunal is that the judge should not have declined to consider Article 8 on the basis of accepting the undertaking of the Secretary of State.

3. I indicated in course of submissions that the first ground is well founded. The most relevant authority is *MS (Ivory Coast) v SSHD* [2007] EWCA Civ 133. It was not cited by either party although Mr Ndubuisi was able to recall part of the reference when I mentioned the principle involved. In *MS* the Court of Appeal held that the Tribunal should have decided whether removal of an appellant while she had an outstanding case seeking contact with her children would violate Article 8 of the ECHR. An undertaking not to remove until contact was resolved did not avoid the question. In that light, this appellant's removal would be disproportionate prior to resolution of the status of his wife and children.

4. In terms of the Immigration Rules the appellant argued in the First-tier Tribunal that his appeal should be allowed because he would have achieved ten years' continuous residence by 2nd October 2014 and Home Office policy permitted applications to be made within 28 days prior to completing the qualifying period. The judge held that the appeal could not succeed because at the date of the hearing the ten year period had not been completed. This is the subject of the second ground of appeal.

5. Mr Ndubuisi argued that the policy was for applications to be allowed within the 28 day period prior to the completion of the qualifying period. That is wrong. The policy envisages that applications may be *made* within those 28 days but that they will not be *granted* unless and until they satisfy all the requirements of the Rules.

6. Mr Ndubuisi sought to make a further point which is not in the grounds. He said that the judge should have allowed the appeal because although the ten year period had not been completed by the date of the hearing it had been reached before the determination was signed and promulgated. He was unable to refer to any reported authority that cases may be decided on circumstances later than the date of the hearing. He produced a copy on an unreported case, IA/40854/49730/13 *Samba & Maharajan.*

7. I did not think there was any merit in the second ground.

8. At this stage of the hearing Mr Ndubuisi advised that he had tendered further evidence within the last few days, although it had not yet been placed on the file before the Upper Tribunal nor received by the Presenting Officer. This is to show that the appellant's wife and children have now been granted refugee status.

9. Although that information suggests that there may be little further point in these proceedings, Mr Ndubuisi nevertheless sought a decision on the second ground. He further argued that on the basis of the Article 8 ground the determination should be set aside in its entirety and allowed under the Immigration Rules, because the appellant has now completed the ten year residence period.

10. I could see no reason why the determination should be set aside in respect of the Immigration Rules if there were no error on that issue, in order to make a decision on a different basis.

11. Having intimated my decision to the extent above, I formally reserved my determination.

12. The Tribunal considers matters arising after the date of the respondent's decision where permitted by section 85(4) of the 2002 Act. The leading case is *LS (Gambia)* [2005] UKAIT 00085. Since that case the general understanding has been that where s. 85(4) applies circumstances are considered at the date of the hearing, as stated in *Macdonald's Immigration Law & Practice,* 9th ed., vol. 1, at ¶20.15(8) and at ¶20.114.

13. Cases are decided on what is before the parties and the judge at the hearing. A moving target at later dates would have odd and unmanageable results. I remain of the view that the second ground discloses no legal error.

14. Since preparing this determination up to this stage, Mr Ndubuisi has submitted further written submissions based on the unreported case referred to above.

15. The requirements for reliance upon unreported cases are not addressed.

16. Neither in the FtT nor in the UT should appeals be argued on a series of afterthoughts. This issue was not mentioned in the First-tier Tribunal and even if that were to be overlooked it came too late in the Upper Tribunal.

17. In any event, the parties in the unreported decision did not debate whether circumstances were to be considered at the date of hearing or at a later date. In so far as the judge may have allowed that appeal on the basis of residence short of the qualifying period at the date of the hearing, he appears to have gone wrong.

18. The appeal as originally brought under the **Immigration Rules** stands as **dismissed**.

19. The determination of the First-tier Tribunal in respect of **Article 8** of the ECHR is **set aside**. The appellant's appeal as originally brought under Article 8 is **allowed** to the extent that he should have such leave as may be appropriate in light of the current status of his family members and subject to the usual checks and requirements.

20. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman
5 March 2015