



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/01723/2014

THE IMMIGRATION ACTS

Heard at Field House, London

**Determination
Promulgated**

On 15 April 2015

On 17 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

JIAYI ZHENG

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr W Tan, West 12 solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of China, appealed to the First-tier Tribunal against the decision of the ECO dated 7 January 2014 to refuse her application for entry clearance to settle in the UK as the child dependant of her parents. The ECO considered the application under paragraphs 297, 301 and 320 of the Immigration Rules. First-tier Tribunal Judge Oxlade dismissed the appeal under the Rules and on human rights grounds and the appellant now appeals with permission to this Tribunal.
2. There are two main issues in this appeal. Firstly whether the appellant's mother, having Discretionary Leave to remain, meets the

requirements of paragraph 301 (i) (a) of the Immigration Rules which provides;

“301. The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:

(i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:

(a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement;...”

3. The second issue is whether the appellant *‘can, and will, be accommodated adequately without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively’* in accordance with paragraph 301 (iv).

4. The evidence before the First-tier Tribunal was that the appellant's father came to the UK in 2002 and claimed asylum. His application was refused but he was granted Indefinite Leave to Remain in 2011. In the meantime his wife, the appellant's mother, left China in 2008 to join her husband, leaving the appellant behind in China with her grandmother. The appellant's parents subsequently had three children born in the UK. The appellant's wife was granted Discretionary Leave to Remain in the UK in 2012 on the basis of their children who were born in the UK who are British nationals [10]. Her leave to remain was due to expire in February 2015. The appellant's parents bought a house in the UK in 2013.

Error of Law

5. In the First-tier Tribunal it was contended on the appellant's behalf that her mother's Discretionary Leave to Remain amounts to limited leave to remain. The Judge found as follows at paragraph 30;

“It was accepted by both representatives that “limited leave” was not defined in the definition section of the Rules; no authority was drawn to my attention. I note that the Rules themselves provide for a range of circumstances where a successful application could give rise to either leave to enter/remain *for settlement* and in others *limited* leave. Logically it follows that limited leave is something which is granted under the Rules themselves. In the Appellant's mother's case, her leave was discretionary, and so, outside the Rules. I am not satisfied that this could properly be described as “limited” leave, so that the Appellant cannot meet r301 (i) (a).”

6. It is contended on the appellant's behalf in the grounds of appeal to the Upper Tribunal that the Judge erred in deciding that Discretionary Leave could not be limited leave to remain. The respondent submits in the

Rule 24 response that Discretionary Leave is not limited leave given 'with a view to settlement' and that this clearly refers to spousal leave where subsequent applications will likely lead to ILR. This was the view taken by Mr Melvin in his written submissions and at the hearing before me.

7. The grounds of appeal to the Upper Tribunal rely on the decision in SM & Another v SSHD [2013] EWHC 1144 (Admin) where Holman J said;

"15. Section 3(1)(b) of the Immigration Act 1971, which it is not necessary to reproduce verbatim, provides that where a person is not a British Citizen (which these claimants are not) "he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period". It is pursuant to section 3 that the Secretary of State may give leave to remain in application of the Immigration Rules, and also, as in this case, by exercising a discretion outside the rules.

...

36. The exercise of the overall discretion under section 3(1)(b) of the Immigration Act 1971 involves making at least two discrete discretionary decisions: whether to give leave to remain at all; and if so, whether for a limited or for an indefinite period. If the decision is to give leave for a limited period, then a third discretionary decision is how long that limited period should be. Further discretionary decisions may fall to be made under section 3(1)(c) which relates to attaching conditions but it is not in point in the present case."

8. Mr Tan also relied on the details of the respondent's policy on Discretionary Leave set out at paragraphs 24-27 of the decision in SM. He submitted that this shows that the respondent's policy on Discretionary Leave details different standard periods of Discretionary Leave and non-standard periods. He submitted that the appellant's mother was granted Discretionary Leave for a period of three years which is in line with the standard period for a grant of Discretionary Leave under Article 8. The guidance states that a person normally becomes eligible for consideration for settlement after completing six continuous years of Discretionary Leave. Mr Tan submitted that the prospect of settlement is within the architecture of the Discretionary Leave policy.

9. The version of the guidance cited in SM is from 2009. Whilst Mr Melvin submitted that this is not the current guidance or that applicable at the time of the appellant's mother's grant of Discretionary Leave he did not produce the relevant policy and submitted that there was nothing on this issue before the First-tier Tribunal Judge and that it was for the appellant to submit the appropriate version of the guidance.

10. In considering this matter I rely on section 3 of the Immigration Act 1971 from where the power to grant leave to remain is derived. Limited leave to remain is leave to remain which is for a limited, as opposed to an indefinite, period. There appears to be no further definition of limited leave to remain. The First-tier Tribunal Judge cannot therefore be right in her conclusion that limited leave can only be something that is granted under

the Rules as it relates to the duration of the leave rather than the source of the leave. I am therefore satisfied that the First-tier Tribunal Judge erred in law in reaching that conclusion. As this is goes to the heart of the appellant's case the error is material and I therefore set aside the decision of the First-tier Tribunal and remake it.

Remaking the decision

11. When I indicated my decision that the First-tier Tribunal Judge made an error of law Mr Melvin requested that I consider adjourning to convene a panel to consider this issue. I have considered his request but I am satisfied that the respondent has had sufficient notice of this issue and sufficient time to prepare submissions. I am also satisfied that the issue is sufficiently clear and that I have enough evidence before me on which to remake this decision.
12. At the hearing before me Mr Tan said that he had been given a letter addressed to the appellant's mother which appeared to indicate that she had been granted leave to remain as a refugee. However Mr Melvin said that this does not accord with the status document or Home Office records. Mr Tan indicated that he was content to proceed to the basis that the evidence before the First-tier Tribunal as to the appellant's mother's status was correct.
13. In considering whether the appellant's mother in this particular case has 'limited leave to enter or remain in the United Kingdom with a view to settlement' under paragraph 301 (i) (a) I take account of the nature of the Discretionary Leave granted. The evidence before the First-tier Tribunal Judge was that the appellant's mother was granted Discretionary Leave on the basis of her children born in the UK who are British citizens. This is not disputed by the respondent. Mr Melvin submitted that the appellant's mother should apply for limited leave to remain as a spouse. However he indicated that she could not switch to that status but would have to make such an application out of the country.
14. In her witness statement the appellant's mother said that she planned to convert her status to settled status when she is able to. I am satisfied that, in the absence of a definition to the contrary, the ordinary meaning of the phrase 'limited leave to remain' 'with a view to settlement' must encompass Discretionary Leave where it is issued in circumstances such as these and where there is a structure for the grant of settlement, an intention to apply for settlement and a likelihood, in the absence of a change of circumstances, that settlement would be granted on the basis of the appellant's mother's family circumstances.
15. I am therefore satisfied that the appellant's mother has limited leave and that the appellant's parents therefore meet the requirements of paragraph 301 (i) (a).

16. The First-tier Tribunal Judge also found that the appellant could not meet the accommodation requirement in paragraph 301 (iv). I have considered the evidence before me in relation to the accommodation issue. The appellant's parents own their own home. They submitted a letter and report from Property Link E17 dated 5 February 2015. The report states that the property is in good satisfactory condition externally and internally with two reception rooms, a kitchen/diner and a bathroom on the ground floor, two bedrooms and a bathroom on the first floor and a third bedroom in the loft. The report confirms that the property will provide sufficient accommodation for the appellant on her arrival in the UK. I am satisfied on the basis of this evidence that the appellant can be adequately accommodated in the UK in accordance with paragraph 301 (iv).
17. As I am satisfied that the appellant can meet the requirements of paragraph 301 of the Rules I need not consider the other provisions of the Rules referred to in the ECO's decision.
18. The appellant also appeals on the basis that the decision breaches her right to family life under Article 8. As I have allowed the appeal under the Rules I do not need to consider Article 8 as the appellant's circumstances are covered by the Rules. However in the event that I am wrong in my interpretation of 'limited leave' as encompassing the Discretionary Leave granted to the appellant's mother I consider Article 8 for completeness in accordance with the guidance given by Lord Bingham in R v SSHD ex parte Razgar [2004] UKHL 27.
19. Given the appellant's age I accept that there is family life between her and her parents and siblings. I accept on the basis of the evidence of ongoing contact, financial support and visits from her parents that the family life is subsisting. The decision to refuse entry clearance interferes with that family life. In light of my findings above I find that such interference is not in accordance with the law.
20. In considering proportionality I attach weight to the fact that the appellant's age, she is 15 years old and has been separated from her family since her father left China in 2002 and her mother in 2008. I acknowledge that this was the choice made by her parents, in particular when her mother left in 2008. There is no evidence before me to suggest that it is not in the appellant's best interests to be with both parents. Whilst she has been living with her grandparents in China and doing well, the appellant's mother said in oral evidence in the First-tier Tribunal that she worries about the appellant and the ability of her grandparents to take care of her. The evidence before the First-tier Tribunal is that the appellant would prefer to be with her parents and is sad that she is not with them. I acknowledge too that it may be difficult for the appellant to adapt to a new culture and education system in the UK. But she will have the support of her parents and siblings and there is no evidence that it would be in her best interests to be separated from them against her wishes. I am

therefore satisfied that it is in the appellant's best interests to be with her parents and siblings.

21. I also consider that very significant weight should be attached to the fact that either there is a lacuna in the Rules in terms of the definition of 'limited leave' or an overly narrow interpretation has been applied by the ECO in this case. This has led to significant delay for the appellant in that a decision was made over a year ago to refuse her application for entry clearance to join her family in the UK. I also attach weight to the fact that the appellant's mother may not be able to obtain 'limited leave' with a view to settlement under the Rules (if that is what paragraph 301 requires) without leaving the UK and therefore leaving her husband and three children. This cannot be a reasonable expectation in the circumstances.
22. In all of the circumstances I am satisfied that the decision of the respondent to refuse entry clearance in this case is not proportionate to the legitimate public aim in this case.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law.

I set the decision aside and remake it by allowing the appeal.

Signed

Date: 16 April 2015

A Grimes
Deputy Judge of the Upper Tribunal