Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03859/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2016	**On 8 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

A D W
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Presenting Officer
For the Respondent: Ms C Litchfield, counsel instructed by A & A Solicitors LLP

DECISION & REASONS

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1. The Respondent, to whom I shall refer as the Claimant, is a national of Tanzania born on [ ] 1997. He arrived in the United Kingdom on 14 July 2002 with his mother, as a dependent of his father. His parents' marriage broke down in 2009 and the Claimant was granted further leave to remain as his

father's dependent on 13 August 2009 to 13 August 2014. On 26 August 2009, the Claimant was taken by his father to live in Tanzania against his wishes and without the knowledge of his mother. During this time he was sent to boarding school and was badly treated. On 16 April 2011, the Claimant was brought back to the United Kingdom by his father, who abandoned him in August 2011. By that time, his mother had been detained in Yarls Wood IRC as an overstayer. The Claimant was taken into the care of Social Services in September 2011, having been found living on his own, without food or money. In May 2012, the Claimant's mother was released upon the recommendation of Social Services and the Claimant has resided with his mother and a Mr Kumah, a British citizen, since that time.

2. On 11 August 2014, the Claimant applied for an extension of his leave to remain on the basis of his private life. This application was refused on 8 January 2015. An appeal was lodged against this decision on 23 January 2015 and the appeal came before Judge of the First tier Tribunal Malins for hearing on 24 August 2015. In a decision and reasons promulgated on 16 September 2015, she allowed the appeal, both in respect of paragraph 276ADE(iv) and paragraph 276A-D of the Immigration Rules.

3. The Secretary of State sought permission to appeal, in time, on 23 September 2015. The grounds in support of the application asserted that the Judge had erred materially in law: (i) in that it is a requirement of paragraph 276ADE that at the date of application a claimant has lived continuously in the UK for at least 7 years and this must be read as being at least 7 years prior to the date of the application; (ii) she failed to set out to which Home Office guidance she was referring when allowing the appeal on the basis of 10 years long residence in the UK; (iii) the current long residence guidance makes clear that an application should normally be refused if a claimant has been absent for more than 18 months in total and the claimant could not meet the requirements of the rule because he was outside the UK for more than 18 months. The Judge does not identify in what way and to what extent she has jurisdiction to give effect to that policy and all she could do it that circumstances was to allow as "otherwise not in accordance with the law" if the Secretary of State had not considered her discretion on this point.

4. Permission to appeal was granted by Judge of the First tier Tribunal Hollingworth on 27 January 2016, on the basis that an arguable error of law has arisen in relation to the construction placed by the Judge on the provisions of the Rules set out in paragraph 276ADE in relation to the question of living continuously in the UK for at least seven years at the date of the application.

Hearing – Part 1

5. At the hearing before me, Mr Clarke handed up the decision in AG Kosovo [2007] UKAIT 00082 and paragraph 276A of the Rules. He submitted that there were two substantive complaints: (i) the Judge's approach to paragraph 276ADE and (ii) her approach to how the tribunal exercised discretion in the Claimant's favour pursuant to paragraph 276A of the Rules. At [16.2.] of the

decision the Judge asserts that the definition under paragraph 276ADE(iv) does not qualify the required period of 7 years but he submitted that, looking at the wording of the provisions, the claimant must have lived continuously in the UK at the date of application nor prior to the application. At [16.4.] the Judge found "compelling circumstances" within the Home Office guidance but the problem with that is that whilst it might be a criteria for the exercise of discretion what the guidance actually says is that if absent for more than 18 months the application should normally be refused. He drew my attention to the guidance on long residence dated 8 May 2015 at page 14. This was the guidance in force at the date of hearing rather than the date of decision but the parties agreed that the wording of the exercise of discretion had not changed. He drew my attention to paragraph 276A (v) and submitted that continuous residence shall be considered to have been broken if an applicant has spent a total of more than 18 months absent from the United Kingdom during the period in question.

6. Mr Clarke drew my attention to the decision in AG Kosovo and submitted that the reality is that the refusal letter does not address the 10 year rule and it is quite clear that discretion was not exercised. Therefore, the appropriate course would have been to find the exercise of decision had not been in accordance with the law and to remit the appeal to the Secretary of State. Mr Clarke expressly accepted, in light of page 14 of the guidance, that there is a discretion where there has been an absence for more than 18 months in total.

7. In response, Ms Litchfield accepted that it was arguable that the appeal should have been remitted back to the Home Office. She submitted that the application for permission to appeal had been granted on one ground only in relation to the construction of paragraph 276ADE(1)(iv) and she submitted that this did not amount to a material error of law. I pointed out that nowhere in the decision had the First tier Tribunal Judge addressed the second aspect of paragraph 276ADE(iv) and that was whether it was reasonable to expect the Claimant to leave the United Kingdom. She responded that if one looked at the findings of fact, although the Judge has not specifically said it is not reasonable for the Claimant to leave the UK it was clear that this was her view at 15(b) (i)-(iii) and (d).

Decision regarding error of law

8. In find that First tier Tribunal Judge Malins did not err materially in law with regard to the ground of appeal in respect of which permission to appeal was granted. It is clear from the wording of paragraph 276ADE(1) and (iv) of the Rules that the requirements set out therein are that: (i) at the date of application an applicant is under the age of 18, (ii) had lived continuously in the United Kingdom for at least 7 years (discounting any period of imprisonment) and (iii) it would not be reasonable to expect him to leave the United Kingdom. The Claimant was born on 13 May 1997 and the date of his application for leave to remain on the basis of his private life was 11 August 2014, at which time he was 17 years of age. There is no requirement on the face of the Rule that the 7 years must immediately precede the making of the application and I find that the Judge did not materially err, therefore, in finding that this aspect

of the Rule was met, given that the Claimant resided continuously in the UK from 14 July 2002 until 22 August 2009 [15 refers].

9. However, I find that the Judge erred materially in law in failing to consider the third aspect of paragraph 276ADE(iv) *viz* whether or not it would be reasonable to expect him to leave the United Kingdom. Ms Litchfield gamely attempted to argue that the Judge had done so implicitly by way of her findings of fact at 15(b) and (d) but it is the case that nowhere in those sub-paragraphs nor else in the decision and reasons does the Judge give express consideration to this question.

10. I further find that First tier Tribunal Judge Malins erred materially in law in allowing the appeal outright at [17] on the basis that the Claimant met the requirements of paragraph 276A of the Rules with regard to ten years continuous long residence. As Mr Clarke submitted, the Claimant was and is unable to meet the requirements of paragraph 276A(v) because the continuity of his residence is considered broken by virtue of the fact that he has spent a total or more than 18 months absent from the United Kingdom during the period in question. The Judge found as a matter of fact that the Claimant was absent for 20 months less 6 days [15(d)(i)]. The only basis, therefore, upon which the Claimant could succeed with regard to paragraph 276A of the Rules is if the Secretary of State chooses to exercise her discretion in this regard, bearing in mind her guidance on Long Residence (8 May 2015) which provides at page 16:

> "I**f the applicant has been absent from the UK for more than 6 months in one period and more than 18 months in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances.**
>
> **This must be decided at senior executive officer (SEO) level with a grant of leave outside the Immigration Rules being the appropriate outcome.**
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> **Things to consider when assessing if the absence(s) was compelling or compassionate are;**
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> - **for all cases - you must consider whether the individual returned to the UK within a reasonable time once they were able to do so**
> - **for the single absence of over 180 days:**
>   - **you must consider how much of the absence was due to compelling circumstances and whether the applicant returned to the UK as soon as they were able to do so**
>   - **you must also consider the reasons for the absence …**
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> **All of these factors must be considered together when determining whether it is reasonable to exercise discretion."**

It is clear from the decision in AG Kosovo [2007] UKAIT 00082 that the correct course is to remit the appeal back to the Secretary of State in order for her to consider the exercise her discretion whether or not to grant ILR on the basis of ten years continuous residence.

Hearing – Part 2

11. I announced my decision at the hearing which was that the First tier Tribunal Judge had made material errors of law and that I proposed to re-make the decision. I invited the parties to make submissions on the question of whether or not it would be reasonable to expect the Claimant to leave the United Kingdom.

12. Mr Clarke stated that he had nothing to add. Ms Litchfield drew my attention to paragraph 25 of her skeleton. She stated that the Claimant has lived in the UK since 2002 aged 5 and he is now aged 18. He has spent his formative years in the UK: all his education has been in the UK albeit he was forcibly taken to Tanzania, which is a factor to consider as to whether it is reasonable for him to go to Tanzania. He went to a boarding school where he was beaten and abused and then brought back to the UK by his father and found by a family friend living on his own. The Claimant was then taken into social services care and has since been supported financially and emotionally by Koji Kumar. He had a very difficult experience in Tanzania but was reunited with his mother when she was released from Yarls Wood in May

13. In terms of whether the Claimant should return to Tanzania, she submitted that he has very strong ties with the United Kingdom in terms of the length of time and his education and he has a settled life with his mother and Mr Kumar. She pointed out that the Claimant has suffered abuse from his father at [4]-[5] of his witness statement and Kent Social Services assessment at E19. She said that he has no contact with his siblings in Tanzania; that it is not clear where his father is but he may still be living in Tanzania. She submitted that it was not reasonable to expect him to return and it was possible that his father may try to locate him. The only period of time he spent there after the age of 5 is when he was forcibly detained in at boarding school in Tanzania where beaten and abused. In respect of the Claimant's education he has academic achievements to his credit and he has managed to do that despite everything. He has aspirations to study engineering at university but is currently unable to do so because he has no leave. In all the circumstances it was not reasonable to expect him to leave.

14. In response, Mr Clarke clarified that the Claimant's mother has no immigration status or applications outstanding that he was aware of. He relied upon the decision in EV Philippines. He submitted that the Claimant's circumstances should be considered in their own right.

Decision

15. No challenge was made by the Secretary of State to the First tier Tribunal Judge's findings of fact in respect of the Claimant's circumstances consequently I adopt these as part of my decision. Her findings material to my assessment of whether or not it would be reasonable to expect the Claimant to return to Tanzania are as follows:

(i) the Claimant is a wholly credible witness [14];

(ii) the Claimant has resided in the United Kingdom from 14 July 2002 until 22 August 2009 and then from 16 April 2011 to date [15];

(iii) the Claimant was absent from the United Kingdom from 22 August 2009 until 16 April 2011, during which time he had extant leave to remain in the United Kingdom [15];

(iv) he was at this time a minor and not responsible for his international travel or his immigration situation. He was without power and was literally taken by his father and deposited in boarding school [15];

(v) he has attended primary and secondary school in the United Kingdom and has achieved 4 GCSE's and 8 level 2 BTEC certificates plus he has enrolled on a number of sports/fitness based course and obtained various awards [15];

(vi) he has clear goals for his future education involving building on qualifications going upwards and has a clear strategy for funding higher education and gives the impression of a person who will succeed in his plans [15];

(vii) despite the many dreadful events in his life he has risen above the all and has at no stage in any way "gone off the rails". Social services stated: "*Amos is a well behaved and polite young person who is mature and very ambitious about his future.*" They further found that he was integrated well into the community at large and attended the local church [15].

16. It is clear that the Claimant is a young person who has spent the majority of his childhood from the age of 5 and his youth in the United Kingdom, bar the period of just under 20 months when he was taken by his father to Tanzania and placed in a boarding school. He has been educated in this country and has hopes for further higher education and for his future, also in the United Kingdom.

17. Whilst he is close to his mother, she does not have any form of immigration status in the United Kingdom. However, he is now an adult and his case has not been put on the basis of his family life but rather on the basis of his private life in the United Kingdom. There is a statement at 9-10 of the Appellant's bundle from Mr Kodjo Kumah, a British citizen, in which he states that the Claimant has become like a son to him, having lived with him for 4 years and he would personally be completely shattered should he be removed from the UK: "*I consider myself his carer and surrogate father to him.*" I find that the Claimant has strong private life ties with the United Kingdom, based

on his length of residence, his education and his relationship with Mr Kumah. The evidence, which the First tier Tribunal Judge accepted, is that the Claimant has not maintained any family or private life ties with Tanzania.

18. Mr Clarke drew my attention to the judgment of the Court of Appeal in EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874. However, this decision was essentially concerned with the best interests of children in a proportionality assessment and so is not material to the decision that I have to make, namely whether it would be reasonable to expect the Claimant, who is now 18, to return to Tanzania. I have had also regard to the decision of the former President of the Upper Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) where he states at 13:

> **"iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.**
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> **iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable."**

19. The question of whether or not it would be reasonable to expect the Claimant to return requires a fact based analysis of his particular circumstances, bearing in mind the unchallenged findings of fact made by the First tier Tribunal Judge. The Claimant resided in the United Kingdom from the age of 5 to the age of 12 and then from the age of almost 14 to date. He did not choose to leave the United Kingdom in the intervening period, indeed it was against his will. He has spent more 11 years as a child residing in the United Kingdom and has clearly developed social, cultural and educational ties which I find it would be inappropriate to disrupt in the absence of any compelling reason to do so. For these reasons I find that it would be unreasonable to expect him now to leave the United Kingdom.

Notice of Decision

20. The Claimant's appeal with regard to paragraph 276ADE(iv) of the Rules is allowed.

21. The Claimant's appeal with regard to paragraph 276A of the Rules is allowed to the extent of being remitted back to the Secretary of State on the basis that the decision of 8 January 2015, at which time he was still a minor, was not in accordance with the law because the Secretary of State did not

consider paragraph 276A of the Rules at all nor consider the exercise of her discretion with regard to her guidance in respect of Long Residence. When considering the length of leave to be granted, I draw the Secretary of State's attention to the findings of fact made by the First tier Tribunal Judge at 16.3 of her decision and reasons and to page 16 of the guidance, set out at [10] above. I would also request that a decision is made with relative expedition, given that the Claimant is a young person in limbo and unable to pursue his education in the absence of leave to remain in the United Kingdom.

Deputy Upper Tribunal Judge Chapman

21 March 2016

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Deputy Upper Tribunal Judge Chapman

21 March 2016