IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48614/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2015	**On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANNA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr. I. Khan of Counsel, instructed by PGA Solicitors LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge K. Lester in which she allowed Miss. Begum's appeal against the decision of the Secretary of State to refuse to grant indefinite leave to remain as the child of parents present and settled in the United Kingdom.

2. For the purposes of this appeal I refer to the Secretary of State as the Respondent and to Miss. Begum as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "The decision records that the Respondent was not represented at the hearing. It appears to have been a skeleton argument by the Appellant's counsel that misled the judge into believing that the Appellant's mother had been granted indefinite leave to remain when, in fact, she had only been granted limited leave. It is arguable that if the judge had received the correct information her decision would have been different."

4. At the hearing I heard submissions from both representatives following which I reserved my decision. The Appellant attended the hearing along with members of her family.

Submissions

5. At the outset of the hearing Mr. Khan accepted that there had been an error of fact regarding the Appellant's mother's leave to remain. However he submitted that counsel had not misled the judge. I was referred to the skeleton argument (5A of the Appellant's bundle). On page 5B this states that the Appellant's mother's appeal had been remitted back to the Respondent for a review and lawful decision.

6. Ms Sreeraman submitted that the error of fact was material. Had the judge applied the correct facts the Appellant could not have met the requirements for indefinite leave to remain under paragraph 298(i)(a) to (d).

7. Mr. Khan submitted that the error was not material. Paragraph 301 of the immigration rules should have been considered, which was the original immigration rule considered by the Entry Clearance Officer when the Appellant was granted leave to enter the United Kingdom. He submitted that the original assessment by the Entry Clearance Officer was that she met the requirements of paragraph 301 and that therefore she was given leave to enter the United Kingdom under paragraph 302. He submitted that therefore limited leave should continue under paragraph 301. I was referred to the decision of First-tier Tribunal Judge Miles promulgated on 19 January 2012 in which the Appellant's appeal against the Entry Clearance Officer's decision to refuse leave to enter was allowed under paragraph 297.

8. Ms Sreeraman submitted that the decision of First-tier Tribunal Judge Miles was not wrong. He had looked at the applicable rule, which was paragraph 297 not paragraph 301. In paragraph [10] of this decision the judge found that the Entry Clearance Officer had assessed the application incorrectly against paragraph 301 when, given the fact that the Appellant's father was a British citizen, the appropriate rule was paragraph 297. She submitted that under the transitional arrangements correct leave had been granted under paragraph 297, so now the Appellant needed to show that she met the requirements of paragraph 298, but she could not do.

9. She submitted that paragraph 298(i)(d) was a high threshold and, in any event, meeting that in isolation would not lead to paragraph 298 being satisfied. On the facts, as her mother was not settled in the United Kingdom, she could not satisfy the requirements of paragraph 298.

10. In relation to paragraph 301, the Appellant was not under 18. In order to avail herself of paragraph 302 she needed to have been granted leave under paragraph 301 when she entered the United Kingdom and she had not been. She could meet the requirements of paragraphs 301 or 302.

11. Mr. Khan submitted that whether it was paragraph 297 or 301 it did not make a difference. He submitted that paragraph 302 applies if paragraph 301(i)(v) is met. He submitted that limited leave should continue under paragraph 301.

Error of law decision

12. The Respondent was not represented at the First-tier Tribunal. I have considered Mr. Khan's submission that he did not mislead the First-tier Tribunal judge. The skeleton argument does not contain a submission that the Appellant's mother had been granted indefinite leave to remain. However paragraph [19] of the decision clearly states "Mr. Khan argues that the fact that the Appellant's mother has been granted indefinite leave should be an end of the matter". It therefore appears that the skeleton argument is rather different to the record of submissions contained in the decision.

13. This appeal has been somewhat muddied by the fact that it is now submitted on behalf of the Appellant that she should have been granted leave to enter under a different paragraph of the immigration rules. However no challenge was made to the decision of First-tier Tribunal Judge Miles who allowed her appeal on the basis that she met the requirements of paragraph 297. Neither the grounds of appeal, the skeleton argument before the First-tier Tribunal, nor the Rule 24 response before me make any reference to the fact that there was an error when the Appellant's appeal against refusal of entry clearance was allowed on the basis that she met the requirements of paragraph 297. The Respondent refused this application on the basis that the Appellant did not satisfy the requirements of paragraph 298(i)(a) to (d). The Rule 24 response submits that the Appellant meets the requirements of paragraph 298 of the immigration rules, as was argued before the First-tier Tribunal. This is the rule which the Respondent considered, and it was not submitted at the hearing in the First-tier Tribunal that the Appellant's application should have been considered under any other paragraph.

14. I find, given this, that the Appellant was granted entry clearance on the basis that she met the requirements of paragraph 297, as found by First-tier Tribunal Judge Miles. There is no evidence before me to show that the Appellant was granted entry clearance on the basis that she met the requirements of paragraph 301.

15. I find that there is no merit in the submission that the Appellant should be granted continuing leave under paragraph 301. As set out above, she was not granted leave to enter the United Kingdom on the basis that she met the requirements of paragraph 301. She is over the age of 18 and was when she made her application for leave to remain. In order to avail herself of paragraph 302, she needed to have been granted leave to enter on the basis that she met the requirements of paragraph 301, which she was not.

16. It is submitted that the Appellant should have been granted leave to remain under paragraph 298. Paragraph 298(i)(a) to (d) provides:

> "The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:
>
> (i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
>
> (b) one parent is present and settled in the United Kingdom and the other parent is dead; or
>
> (c) one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing or the child normally lives with this parent and not their other parent; or
>
> (d) one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;"

17. I find that the Appellant's appeal should not have been allowed on the basis that she met the requirements of paragraph 298(i)(a) as both of her parents were not present and settled in the United Kingdom. This is accepted by Mr. Khan. I find that this error of fact has led to the making of an error of law. However in order to establish whether or not it is material, I need to consider whether the Appellant would have met the requirements of paragraph 298(i)(b) to (d), which are alternatives to paragraph 298(i)(a).

18. I was referred by Mr. Khan to the Respondent's guidance dated July 2012, paragraph 2.3. This states:

> "Where a child who is given leave to enter or remain with a view to settlement under paragraph 302 and paragraph 319XA applies for settlement (or further leave to remain with a view to settlement) on the basis of his parents or sponsor's application/status, the fact that he has reached the age of 18 since been granted limited leave with a view to settlement is not a basis for refusing the application."

19. It was submitted that on this basis the application should have been allowed. However, the Appellant made her application on 21 May 2014 when she was 21 years old, and the Respondent did not refuse the application on the basis that she was over 18. The application was refused because the Respondent considered that the Appellant did not meet the requirements of paragraph 298(i)(a).

20. I find that the Appellant cannot meet paragraphs 298(i)(b) or (c). In order to meet the requirements of paragraph 298(i)(d) she would need to show that there were "serious and compelling family or other considerations" which made her exclusion undesirable, and that suitable arrangements had been made for her care. The Respondent did not specifically consider whether the Appellant met the requirements of paragraph 298(i)(d). She states "as both of your parents are not present and settled in the United Kingdom you do not satisfy the requirements of paragraph 298(i)(a) to (d)." However it is not a requirement of paragraph 298(i)(d) that both parents be present and settled in the United Kingdom but, given that the Appellant's mother's application was refused at the same time, it is reasonable to consider that the Respondent envisaged the Appellant returning to Bangladesh with her mother.

21. It was submitted at the hearing that the Appellant met the requirements of sub-paragraph 298(i)(d) as she would be returning alone to Bangladesh where there would be nobody there to look after her. It was submitted that her mother, father and siblings were all in the United Kingdom, except for two siblings who live in Bangladesh. However, as stated above, at the date of the decision, the Respondent had also refused the Appellant's mother's application, so the Appellant would be returning to Bangladesh with her mother. At the date of the hearing before the First-tier Tribunal the Appellant's mother had not been granted any leave. I therefore find that at the date of the decision and hearing, although the Appellant's mother was in the United Kingdom, she did not have leave to remain here. Additionally, the Appellant has two siblings living in Bangladesh, and no evidence was provided to suggest that there had been any family rift or disagreement, or that their circumstances were such that they would not support the Appellant on her return there.

22. At the time of the Respondent's decision, the Appellant's mother did not have leave to remain. At the time of the hearing it would appear that the Appellant's mother's application had been remitted for lawful consideration by the Respondent. This was not made clear to the judge who was under the impression that the Appellant's mother had been granted indefinite leave to remain as reflected in the submissions made by Mr. Khan (paragraph [19] of the decision). The family had already been split up, with some siblings living in the United Kingdom and some remaining in Bangladesh. Neither at the date of the Respondent's decision, the hearing in the First-tier Tribunal, nor at the hearing before me, has the Appellant shown that there are serious and compelling family or other considerations which make her exclusion from the United Kingdom undesirable.

23. I find that the Appellant does not meet the alternative requirements of paragraph 298(i), and therefore the error of law in the decision of the First-tier Tribunal was material. I set the decision aside.

24. As the judge allowed the Appellant's appeal under the immigration rules, she did not proceed to consider it under Article 8. The grounds of appeal before the First-tier Tribunal submitted that the decision was a breach of the Appellant's rights under Article 8.

Notice of Decision

The decision involved the making of an error of law and I set it aside. The appeal is remitted to the First-tier Tribunal for consideration of the Appellant's rights under Article 8.

25. No anonymity direction is made.

Signed Date 14 January 2016

Deputy Upper Tribunal Judge Chamberlain