Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/16223/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2016	**On 12 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

ENTRY CLEARANCE OFFICER – MANILA

Appellant

And

GLENN DELA PENA LANTO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Staunton a Home Office Presenting Officer
For the Respondent: No representation – his mother Gloria Lanto attended and made submissions on his behalf throughout

DECISION AND REASONS

Background

1. For the purpose of continuity with the determination in the First-tier Tribunal I will hereinafter refer to the Entry Clearance Officer as the Respondent and Mr Lanto as the Appellant.

2. To ensure Mrs Lanto was able to fully participate throughout the hearing, I ensured that no complex or legal language was used and all speech was clear and slowed down as English was not Mrs Lanto's first language. She did not request an interpreter and when she made representations, her English was very good albeit with an accent, slightly slow, and with a slightly truncated vocabulary. All the points she made were directly related to the matters put to her. I am satisfied she fully understood the proceedings.

3. The Respondent refused the Appellant's application for leave to enter as the dependent child of Mrs Lanto on 17 November 2014. His appeal against the refusal of that was allowed by First-tier Tribunal Judge Holmes ("the Judge") following consideration of the papers on 17 August 2015.

The grant of permission

4. Designated Judge Woodcraft granted permission to appeal (30 December 2015) on the following ground. It is arguable that the Judge materially erred by taking into account evidence that on 6 January 2015 (which was after the date of the Respondent's decision) Mrs Lanto was granted indefinite leave to remain here. At the date of decision he intended to come for longer than her then leave permitted in breach of paragraph 197 (v) of the Statement of Changes in Immigration Rules HC395 ("the rules").

Respondent's position

5. Mr Staunton submitted, as stated in the grounds seeking permission to appeal, that the Judge was wrong to take into account evidence that post dated the decision given Section 85 (5)(b) of the Nationality, Immigration and Asylum Act 2002.

Appellant's position

6. Mrs Lanto said that she wanted the Appellant to come here. It was implicit in what she was saying that she agreed with the Judge's analysis (paragraph [12] of the determination) that the grant of her indefinite leave to remain cast light on her and his reasonable expectation that he would not stay beyond her leave.

Discussion

7. The Respondent's decision was taken on 17 November 2014. At that date Mrs Lanto's leave to remain was due to expire on 31 January 2015. The Appellant's visa application discloses that he applied on 1 November 2014 for leave to enter as her child dependent, she having leave to be in the United Kingdom as a domestic worker. He intended to arrive on 15 November 2014 and come for 3 months, namely until 15 February 2015. By then her leave would have expired.

8. Section 85 (5)(b) of the Nationality, Immigration and Asylum Act 2002 is unambiguous.

> "(5)… in relation to an appeal under section 82(1) against refusal of entry clearance …—
> (a)…
> (b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse."

9. The Judge's reason fell outside the ambit of that which he was allowed to consider. It is unclear where the Judge sought authority for his analysis. The only case that may give a hint is DR (ECO: Post decision evidence) Morocco [2005] UKIAT 00038 which guides me to the view that a Judge is able to take post refusal evidence into account if it was a circumstance appertaining at the date of decision and casts light on the validity of the original information. This however plainly was not a circumstance appertaining at the date of decision as the subsequent grant post dated the Respondent's decision by 6 weeks. It did not cast light on their reasonable expectations.

10. As there was no basis for the Judge's decision to take subsequent evidence into account, I am satisfied that there was a material error of law. I therefore set the decision aside.

11. Both Mr Staunton and Mrs Lanto asked me to determine the matter rather than remitting it to the First-tier Tribunal given the lack of disputed facts, and un-necessary delay that would be consequent on that course of action. I agreed that in all the circumstances of the case, it was appropriate for me to do so.

Rehearing

12. Mr Staunton submitted that the rules were not met at the time of the Respondent's decision. There were no compassionate circumstances that enabled me to consider the case outside the rules (SSHD v SS (Congo) [2015] EWCA Civ 387).

13. Mrs Lanto told me that she wants the Appellant to come here. He is 17 ½ years old and lives with his brother who is 16 years old and sister who is 13 years old. They live in a house in the same compound as Mr Lanto's sister and all go to school. The Appellant can submit a fresh application which she would support. Mr Lanto is in the United Kingdom.

Discussion

14. The Appellant applied for leave to enter for a period beyond the leave that Mrs Lanto had been granted. His application was to come for 3 months from 14 November 2014 to 14 February 2015 which was after Mrs Lanto's then leave expired on 31 January 2015. That was in breach of paragraph 197 (v) of the rules.

The leave that was granted 6 weeks after the Respondent's decision should not be taken into account for the reasons I have given above.

15. I dismiss the appeal under the rules.

16. There is nothing compelling such as to mean I can consider the application outside the rules for the following inter-related reasons. The Appellant can reapply. He is living in accommodation with his siblings in conditions his parents felt was appropriate for him when they came here. He goes to school. His aunt lives in the same compound and can support him as required. Whilst it is generally best for him to be with his parents, by way of summary he can remain at school in a system he has been all his life and inevitably has friends, it is not necessarily best for him to be separated from his siblings or aunt, he is in a country where he speaks the primary language and understands the culture, and there is no evidence of there being neglect or abuse, unmet needs, or a lack of stable arrangements for his care.

17. I accordingly dismiss the appeal.

Decision:

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

I set aside the decision.

I remake the decision.

I dismiss the appeal.

Signed:
Deputy Upper Tribunal Judge Saffer
9 February 2016