Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00174/2016**

THE IMMIGRATION ACTS

Heard at : UT(IAC) Birmingham	**Decision and Reasons Promulgated**
On 18 July 2017	**On 24 July 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHOAIB IMTIYAZ PATEL

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr D Balroop, instructed by Bond Adams LLP Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Watson allowing Mr Patel's appeal against the respondent's decision to refuse his human rights claim.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Mr Patel as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of India born on 29 August 1986. He entered the United Kingdom together with his parents, in May 1999, as visitors. He was 12 years of age at the time. Prior to the expiry of their visitor visas, the appellant's father applied in form FLR(O) for leave for to remain as a businessperson. The

application was refused on 27 November 2000 on the basis that switching to that category was not permitted within the UK. Further representations were refused and the appellant's father was advised to leave the UK and apply for entry clearance under the relevant immigration rules. The appellant's father then completed and signed a SET(O) Form dated 17 January 2005 which he believed was submitted to the Home Office as an application for leave to remain in the UK on human rights grounds. The Home Office claimed not to have received such an application and, at an interview on 25 August 2005, served the appellant and his father and mother with enforcement papers as overstayers.

4. On 25 July 2013 the appellant made a fresh application for leave to remain on family and private life grounds, on Form FLR(O). That application was refused by the respondent on 19 August 2103 with no right of appeal. The appellant made a further application on Form FLR(FP) on private life grounds on 15 October 2014, but that was refused on 17 December 2014, with no right of appeal. Following the settlement, by consent, of judicial review proceedings challenging that decision the respondent reconsidered the application and refused it again on 22 December 2015, but with a right of appeal.

5. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Watson on 27 October 2016 and was allowed in a decision promulgated on 10 November 2016. There was no appearance on behalf of the respondent at the hearing. The judge accepted that the appellant had been in the UK since 1999 and that he had attended school and college and formed bonds with his siblings and uncles and school friends without any knowledge that he was in the UK unlawfully. She noted that the appellant had been offered a job by his uncle if he obtained legal status and that he was therefore likely to be self-supporting and not a burden on the tax payer. The judge accepted that the appellant had been reporting to the Home Office on a regular basis since 2006 up until 2016 and she noted that the respondent had not taken any steps to remove him since the service of a removal notice in 2005. She considered that the appellant or his parents had taken action through solicitors in an attempt to obtain lawful status from 2005.

6. Judge Watson found that there were no very significant obstacles to the appellant's integration in India and that he could not meet the requirements of the immigration rules. She went on to consider the position outside the rules and concluded that his circumstances were exceptional, as he could not be held responsible for any breach of immigration laws when he was a child and was not responsible for the subsequent ten year delay in dealing with his situation, from 2006, as he relied upon his parents and believed that there was an application before the Home Office. The judge found that the Home Office was fully aware of the appellant's presence in the UK and did nothing to remove him from 2005 onwards, and that the appellant was unaware of his immigration problems until 2012. She therefore gave weight to his private life in the UK and found that the public interest in his removal was considerably lessened by the delay in the respondent's steps to remove him. She concluded that the respondent's decision was disproportionate and allowed the appeal under Article 8.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the failure to remove the appellant was, at best, a neutral factor and not one which reduced the weight to be given to the public interest; and that judge had erred by failing to take as a negative factor the fact that the appellant was not financially independent at the time of the hearing.

8. Permission to appeal was granted in the Upper Tribunal on 5 May 2017 on the grounds that it was arguable that the judge's Article 8 balancing exercise was unlawful because she gave weight to the respondent's inertia in removing the appellant without considering what the appellant had done to secure his own departure.

9. The appeal came before me on 18 July 2017.

10. Mr Mills accepted that the respondent's position was not assisted by the fact that there was no representation before the judge but he submitted that the judge had erred in law by speculating on the question of the respondent's inertia, particularly when there was evidence before her, at pages 153, 167 and 170 of the appellant's appeal bundle, suggesting that the respondent had made efforts to arrange the removal of the appellant and his family. Mr Balroop relied on the evidence in the appellant's bundle showing that an application had been made by the appellant's father for leave to remain in January 2005 and that the family's solicitors had been in correspondence with the Home Office chasing up that application. He submitted that the appellant had been reporting to the Home Office and was therefore not living in the UK clandestinely. The Home Office could have detained the family with a view to removing them but did not do anything. The judge was entitled to give that considerable weight and to allow the appeal on the basis that she did.

Consideration and findings

11. Whilst, as Mr Mills submitted, the respondent did not assist matters by failing to send a representative to the hearing, it is the case that there was in fact evidence before the judge within the appellant's appeal bundle indicating that the respondent had not been completely inactive in resolving the appellant's and his family's situation, contrary to the judge's belief. There was a failure by the judge to give consideration to that evidence.

12. As Mr Mills submitted, the appellant's bundle contained evidence at pages 153/154, 167 and 170 confirming that the respondent was continuing to request information and documents from the appellant's father about his Indian nationality and identity and his links to India, following the interview at which enforcement notices were served on the family. There was therefore an indication in the evidence that enquiries were being undertaken with the Indian authorities in order to document the appellants. In the light of that evidence, to which no reference was made in the judge's decision, I find myself in agreement with Mr Mills that the judge was unduly speculating that the respondent had failed to take any steps to seek to remove the family from 2001.

13. Furthermore, as Upper Tribunal Judge Perkins stated in his decision granting permission, there was a failure by the judge to consider what the appellant had done to secure his own departure. The judge, at [33], considered that the appellant bore no responsibility in the matter as he was reporting as required and was relying on his parents to sort out matters and thought that he had an outstanding application before the Home Office. However, as the judge acknowledged, the appellant was an adult from 2004 and there was therefore no reason why he should have borne no responsibility for his own situation. Further, with regard to the application of 17 January 2005, the evidence in the appellant's bundle indicates that the respondent repeatedly advised the family's solicitors that they had no record of such an application and noted that no further action would be taken in regard to investigating the application as the solicitors had failed to produce any proof of submission of the application (page 159, 161). No consideration was given by the judge to that evidence and to the fact that it was not until some seven years later that the appellant then sought to regularise his stay by way of a further application for leave to remain.

14. In the circumstances it seems to me that the judge failed to take account of relevant and material matters, and unduly speculated, when attributing weight to factors undermining the public interest in the appellant's removal. Accordingly I agree with the assertion in the grounds that the judge's assessment of proportionality under Article 8 was vitiated by error and has to be set aside.

15. It seems to me that the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh. It may well be that the appellant's appeal ought to be linked with his parents' appeal, which I understand is listed for hearing next month, in August.

DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

17. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Watson.

Signed Date: 19 July 2017
Upper Tribunal Judge Kebede