Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01595/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 June 2013	**On 11 July 2013**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MASTER KG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: His father Mr AG
For the Respondent: Ms M Tanner

DETERMINATION AND REASONS

1. The appellant is a minor child and is a national of Antigua and Barbuda. It appears that he entered the United Kingdom on a valid entry visa on 26 June 2011. An application was then made on 14 October 2011 to vary his leave to remain in the United Kingdom as a child of his father who is

present and settled here. The application was refused by the respondent on 21 December 2012 because the respondent was satisfied that the appellant's removal would not breach his rights in respect of his private and family life under paragraph 276ADE and Appendix FM of the Immigration Rules as amended. In fact the judge decided that paragraph 276ADE (requirements to be met by an applicant for leave to remain on the grounds of a private life) did not apply because the date of application was long before the Rules came into force. Whether the judge is right about that or not was not raised in the Rule 24 response or before me. The judge did, however, proceed to consider the appeal under Article 8 of the European Convention on Human Rights but dismissed the appeal.

2. The appellant sought permission to appeal that decision. In essence he states through his father (hereafter referred to as "Mr AG") that he provided all documents requested by the Home Office to his lawyer who then forwarded them to the Home Office. Those documents included Mr AG's British passport. The initial application was refused on the basis that Mr AG did not have indefinite leave to remain but this was incorrect. He has had such leave since 2003. This error was pointed out in a letter which was sent with the appeal form when the first application was refused. It was because the Secretary of State pointed out that Mr AG did not have indefinite leave to remain that the decision was adverse to the appellant.

3. The grounds seeking leave to appeal state that the appeal has been refused based on the lack of sufficient evidence but this totally ignores the Secretary of State's error. The appellant was never asked to submit any financial evidence or proof of his (the appellant's) grandmother's illness. There was also other evidence to which the appellant could have referred including that he does not know where his mother is and that he has not heard from her either.

4. Permission to appeal was granted. The judge granting permission noted that the Secretary of State not only refused to vary the appellant's leave as a visitor but within the same notice stated that she had decided to remove the appellant from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. That decision to remove was made other than in accordance with the law. The judge granting permission then went on to state that as there was no valid decision to remove the appellant from the United Kingdom Article 8 was not engaged and it was therefore an arguable error of law that the First-tier Tribunal Judge dealt with the appeal on Article 8 grounds.

5. In the Rule 24 response the respondent's position is that the judge granting permission was in error because as explained by the Court of Appeal in **JM (Liberia) [2006] EWCA Civ 1402** the Tribunal is empowered to consider an assertion that removal in consequence of the decision to refuse to vary leave breaches protected human rights. No removal decision is required.

6. I agree with that submission. As was said in the case referred to the short, but important, position is that once a human rights point is properly before the Tribunal the Tribunal is obliged to deal with it.

7. At this juncture I make the further point that the Secretary of State accepts that the decision to remove the appellant is an unlawful one and it will be for the respondent to decide if and when to make such a removal decision.

The Hearing before me

8. I explained to Mr AG the purpose of the hearing. I read to him the grounds seeking permission to appeal and the respondent's Rule 24 response. I told him that although the point that he raised about being a British citizen was a valid one in that part of the decision refusing the application was on the basis that Mr AG did not have indefinite leave to remain, that was not the main reason for refusal and did not feature as one of the reasons given as to why the appeal was dismissed. The judge in paragraph 16 was perfectly aware that Mr AG is a British citizen.

9. I informed Mr AG that I found that the judge has considered all that was required of him in what is effectively an Article 8 claim. The judge took into account that the appellant is a child and that the best interests of the child must be a primary consideration – see paragraph 15 of the determination. This was an appeal that was heard on the papers and there was very little information before the judge that might have persuaded him to view differently such evidence as was before him. The lack of evidence is referred to in paragraph 16 of the determination. The judge notes that it is said that the appellant's grandmother is extremely ill and can no longer look after the appellant. There is no evidence as to what has happened to the appellant's sister or evidence in support of the contention that the appellant's mother has left home. Neither was there any evidence that the appellant has been solely financially dependent on his father while living in Antigua. If further and better evidence had been before the judge there is little doubt that he would have considered it, and if in fact he did not he would have been in error.

10. I pointed out to Mr AG that it was not appropriate for me to look at any further evidence that he might be able to produce now as this was a hearing to decide whether or not the judge made legal errors on the information and evidence that was before him at the time of the original hearing.

11. I noted also that Mr AG blamed his lawyers for failing to provide what was required. The original application was made on form FLR (O) for limited leave outside the Rules and not for settlement under paragraph 298 of the Immigration Rules.

Decision

12. On what was before the judge I can see no error such that the Upper Tribunal should revisit the decision. In those circumstances the decision of the First-tier Tribunal stands.

13. The appellant is a minor and an anonymity direction has been made previously. In the circumstances it is to continue. Therefore 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 his 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.

Signed Date

Upper Tribunal Judge Pinkerton