



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19111/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2018

Decision & Reasons Promulgated
On 5 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR SIVENKOSI KAMLANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Miss S Akhtar, Counsel.

For the Respondent: Mr T Melvin, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of South Africa born on 19 January 1999 who appealed against the decision of the Respondent dated 30 June 2016 refusing his application for entry clearance to join his mother in the United Kingdom under paragraph 297 of the Immigration Rules and on human rights grounds. His appeal was heard by Judge of the First-tier Tribunal Agnew who, in a decision promulgated on 16 August 2017, dismissed it.
2. The Appellant sought permission to appeal and that application was granted by Judge of the First-tier Tribunal Beach in a decision dated 30 January 2018. Her reasons for granting were: -

“1. The Appellant seeks permission to appeal, (in time), against a Decision of First-tier Tribunal Judge Agnew who, in a Decision and Reasons

promulgated on 16th August 2017 dismissed the Appellant's appeal against the Entry Clearance Officer's decision to reject his application for entry clearance.

2. The grounds assert that the Judge erred in findings that the decision was a proportionate decision even though she found that the Appellant met the requirements of the Immigration Rules at the date of his application. The grounds further assert that the Judge erred in considering the Appellant's age as at the date of the hearing rather than at the date of the application give that it was an application under Paragraph 297 of the Immigration Rules.
3. At Paragraph 33 of the decision, the Judge finds that the Appellant met the requirements of the Immigration Rules as at the date of his application for leave to enter the UK. At Paragraph 30 the Judge finds that neither party made representations about the relevant date to consider Article 8 but that Section 85(4) of the Nationality, Immigration and Asylum Act 2002 allowed her to take account of a matter arising after the date of the decision. She makes reference to the Respondent's guidance and states that the relevant date in accordance with that policy was the date of the decision. However, in cases involving children under Paragraph 297 of the Immigration Rules, Paragraph 27 of the Immigration Rules confirms that entry clearance will not be refused simply because an applicant has reached the age of 18 by the date of the decision. This has not been considered by the Judge when making her proportionality assessment. Whilst the appeal is a human rights appeal, it is arguable that the Judge erred in finding that despite the appellant meeting the requirements of the Immigration Rules at the date of the application, the decision to refuse entry clearance was a justified and proportionate decision.
4. Permission to appeal is granted".

3. Thus, the appeal came before me today.
4. At the outset Ms Akhtar handed up a skeleton argument and the authorities of **MA (Pakistan) and others v Upper Tribunal (Immigration and Asylum Chamber) and another [2016] EWCA Civ 705** and **SE (Mauritius) and another v SSHD [2017] EWCA Civ 2145**.
5. Mr Melvin, without wishing to make any concession whatsoever, acknowledged that the Appellant met the requirements of paragraph 297 of the Immigration Rules and that the Sponsor has had sole responsibility for the Appellant. He also acknowledged paragraph 27 of the Immigration Rules and that an application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an Appellant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FM solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it. That being the case Mr Melvin had to acknowledge that the Judge had materially erred in law.

6. I find that to be the position. In her skeleton argument Ms Akhtar identified two issues for consideration. Firstly did the Judge err in considering that Section 85(4) of the Nationality, Immigration and Asylum Act 2002 allowed her to take account of a matter arising after the date of the decision including the age of the Appellant at the date of the hearing on 7 August 2017 and secondly did the Judge err in her decision that the Respondent's decision was a justified and proportionate interference with the Appellant's applicable Article 8 rights despite finding that the Appellant met the requirements of paragraph 297 as at the date of the application for entry clearance.
7. In the individual circumstances of this appeal I find that the Judge has erred on both issues asserted by Ms Akhtar. For all the reasons put forward in the grounds seeking permission to appeal the Judge has materially erred.

Decision

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

I set aside the decision.

I remake the decision in the appeal by allowing it.

No anonymity direction is made.

Signed

Date 4 July 2018.

Deputy Upper Tribunal Judge Appleyard

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140 / to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason. The Appellant has been successful in her appeal.

Signed

Date 4 July 2018.

Deputy Upper Tribunal Judge Appleyard