Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29753/2013
IA/29756/2013
IA/29754/2013
IA/29755/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24th February 2014	**On 10th March 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

PETER HAMMOND
AUGUSTINA ADDISON
BANJAMIN QUANSAH HAMMOND
BENADICTA HAMMOND DINEY

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E King of Counsel, instructed by Samars Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These are the Appellants' appeals against the decision of Judge Pickup made following a hearing at Bradford on 1st November 2013.

Background

2. The Appellants are citizens of Ghana. They are members of the same family and their appeals stand and fall together. The first Appellant arrived in the UK on 20th August 1998 with leave to enter for six months as a visitor and he overstayed. On 25th August 2000 he submitted an application under the Immigration Regularisation Scheme for Overstayers which was refused on 23rd February 2003. He attempted to appeal that decision on 5th May 2003 but his appeal was out of time and never considered further. The second Appellant arrived in the UK on 29th March 2011 again as a visitor and again never left. She met the first Appellant in 2010. They were married by proxy on 14th December 2011 and she gave birth to their twin children two weeks later.

3. The present application was made on 7th July 2012.

4. The Judge rejected the evidence of the first Appellant and the second Appellant in its entirety. He considered that they had fabricated their account in order to try to justify their failing to return to Ghana.

5. It was submitted that the application should have been considered by the Respondent under the fourteen years long residence provisions of paragraph 276B of the Immigration Rules. Because the application was made before the change in the Immigration Rules the relevant legal framework was the transitional provisions.

6. The Judge dealt with that argument as follows:

> "I reject the argument of Ms Solanki. This was not and could not have been an application made under the long residence Rules as at the date of the application 07/07/12 the Appellant had not completed fourteen years. It is obvious that the Appellant wanted to get his application in before the change in the Immigration Rules or 09/07/12 introducing Appendix FM, intended to deal with family life claims.
>
> The Appellant did not meet the requirements of the Rules for an application under long residence. The reference in the solicitors' covering letter was no more than part of a series of points addressing proportionality under Article 8. The opening of the letter states that the application was for indefinite leave to remain 'on the grounds that they have established private and family life in the UK under Article 8 of the ECHR'. The application itself at page 9 stated that the category under which ILR was sought was 'other purposes or reasons not covered by other application forms'. Specifically the Appellant explained

below that ticked box 'under Article 8 ECHR'. I note that that page has boxes for long residence in the UK. These were not ticked.

Had the application been made for and valid under the fourteen year long residence provisions, then the first Appellant would have been entitled to have his application determined under those provisions, notwithstanding the introduction of Appendix FM. The fatal flaw in Ms Solanki's argument is that it is absolutely clear that his application was not made under the fourteen year long residence Rules. Thus the Appellant cannot benefit from the transitional provisions. The Appellant cannot expect the Respondent to consider an application which was not made and for which the application was not qualified at the date of his application."

7. The Judge then considered in detail the claim under Article 8 principles and dismissed the appeal.

The Grounds of Application

8. The Appellant appealed on the grounds that the Judge had materially erred in dismissing the claim under paragraph 276B of the Immigration Rules. As at the date of decision the Appellant had accrued fourteen years and ten months' residence in the UK and he made his application before the fourteen year Rule was abolished. It follows that his application should have been considered under the Rule and he should have benefited from it. The Appellant relied on JH (Zimbabwe) v SSHD [2009] EWCA Civ 78 and AQ (Pakistan) v SSHD [2011] EWCA Civ 833 for the proposition that the fact that the Appellant had not accrued fourteen years as at the date of application was not fatal to his application. Indeed in MU (Statement of additional grounds – long residence – discretion) Bangladesh [2010] UKUT 442, the Tribunal wrote:

"As held in AS (Afghanistan) and NV (Sri Lanka) [2010] EWCA Civ 1076 there is no time limit on serving a statement of additional grounds in response to a Section 120 Notice. Thus an Appellant may accrue ten years' lawful leave (including leave extended by Section 3C of the 1971 Act) while his appeal is pending. The Tribunal may then be asked to decide whether the Appellant qualifies for indefinite leave under the long residence Rule."

9. The grounds argue that the decision in MU is consistent with the established concept of a continuing application until the date of decision. Whether the correct box was ticked on the application form is irrelevant and definitely not decisive because as at the date of decision the Appellant met the requirements of the Rule.

10. The Appellant argued that he had an expectation that the application would have been considered under the Rule at the date of decision and he relies on the transitional provisions which state that applicants who are granted or who applied for leave under the Rules before 9th July 2012 will remain subject to the Immigration Rules in force as at 8th July 2012 until settlement (the grant of indefinite leave to

remain) even where the application is granted on or after 9th July 2012. Transitional provisions will apply through to indefinite leave to remain to those persons who were granted in certain categories including fourteen year long residence.

11. Permission to appeal was granted by Designated Judge Shaerf on 5th December 2013 for the reasons stated in the grounds.

12. On 18th December 2013 the Respondent served a reply defending the determination.

Submissions

13. Ms King relied on her grounds. The Appellant had made his application 44 days short of fourteen years' residence and as at the date of decision had accrued fourteen years and ten months. She relied on the covering letter which accompanied the application which recorded that the applicant had resided in the UK for almost fourteen years. He had made a valid application which should have properly been considered under the old Rules and been granted under the transitional provisions.

14. She referred me to the Respondent's Guidance, both as it was as at the date of application and now. At paragraph 2.2.7 the Guidance states that an application for settlement which is considered 28 days or less before the fourteen years is completed, where the applicant meets all the other criteria, indefinite leave to remain may be granted. An application which is more than 28 days before the applicant completes the required qualifying period for long residence should be refused on the basis that they had not completed the required period of leave in the UK. The Guidance states that an applicant refused under the long residence Rules, due to submitting the application too early, can be considered for a grant of indefinite leave to remain if they reapply once they have completed their qualifying period or up to 28 days prior to it.

15. She accepted that the present Guidance, which requires refusal of applications received more than 28 days before the applicant completes the required qualifying period for long residence, was consistent with the case law. However she argued that the Guidance was not clear because it also referred to cases where an applicant completes fourteen years' continuous residence while waiting a decision on an application or appeal in certain circumstances where their leave is extended by Section 3C of the 1971 Immigration Act. In these circumstances, where there is a lack of clarity, statute should be interpreted in line with the Human Rights Act and the Appellant ought to be given the benefit of the doubt.

16. Mr Diwnycz defended the determination and submitted that since the application was never made the Appellant could not benefit from the transitional provisions and the Judge had made no error in dismissing the appeal.

Findings and Conclusions

17. First it is abundantly clear from the application form that the Appellant never applied for long residence under the fourteen year Rule. As the Judge stated, in the application form, he specifically ticked under Section B that he was applying for reasons not covered in the application form and that he was doing so under Article 8 of the ECHR. The covering letter states as follows:

> "We wish to make an application for Peter Hammond, his wife and two children to be granted indefinite leave to remain in the UK on the grounds that they have established private and family life in the UK under Article 8 ECHR."

18. It is correct to say that the letter does state that the applicant has resided in the UK for almost fourteen years but this is in the context of the application under Article 8, since it refers to the establishment of private life during his time here. The Appellant was assisted by professional legal representatives when he completed his form. I agree with the Judge - the Secretary of State cannot be criticised for failing to give the Appellant the benefit of consideration under the transitional provisions if an application was never made. The case law cited in the grounds is not relevant because it refers to continuing applications.

19. Furthermore, I do not accept that there is any ambiguity in the Guidance. It makes it perfectly clear that any application made, as this was, more than 28 days before the accrual of fourteen years, will be refused. No doubt this is why the legal advice was that it would be fruitless to make it. The reference to Section 3C leave is irrelevant because the Appellant has never had such leave.

20. No challenge is made in the grounds to the Judge's consideration of Article 8.

Decision

21. The original Judge did not err in law. The original decision stands. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor