Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38763/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2015	**On 30 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DANIEL GEISLER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D S Walker, Home Office Presenting Officer
For the Respondent: Mr R Sharma, Counsel instructed by Kent Immigration & Visa Advice

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Blake promulgated on 13th January 2015, in which he allowed an appeal against the decision of the Secretary of State of 16th September 2014 to refuse an application by Mr Geisler for leave to remain in the UK on family and private life grounds.

2. This is one of two appeals that was filed by Mr Geisler and heard by First-tier Tribunal Judge Blake on the same date. The other appeal (IA/38039/2014) was an appeal against the decision of the Secretary of

State of 28th August 2014, to refuse to issue a Residence Card to Mr Geisler as confirmation of a right of residence as the family member of a British citizen who was previously working or self-employed in another EEA State.

3. The appellant in the appeal before me is the Secretary of State for the Home Department and the Respondent is Mr. Daniel Geisler. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this determination, refer to Mr. Daniel Geisler as the appellant and the Secretary of State as the respondent.

4. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 12th May 2015. Insofar as this appeal is concerned, he noted:

> "In respect of IA/38763/2014, at paragraph 61 the Judge refers to the same issues. Arguable error of law arises in the context of the consideration as to whether or not there would have been a breach of Article 8.
>
> An arguable error of law has arisen in relation to the consideration of the correct Regulations."

5. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Blake involved the making of a material error of law.

Background

6. The appellant is an Australian national. The factual background was not in issue before the First-tier Tribunal. It is useful to summarise the material chronology before I turn to the decision of the First-tier Tribunal and the grounds of appeal before me. I have decided both appeals separately, and I have set out my decision in relation to each appeal separately.

7. The appellant was born in Australia on 24th May 1989 and left Australia in October 2000 *(aged 11)* with his mother and siblings. The family had obtained Residence cards in France as dependant's of the appellant's stepfather, a British Citizen living in France and exercising treaty rights in France. The appellant started his schooling in France in January 2001 and graduated in France with an International Baccalaureate in May 2007.

8. On 27th September 2007, the appellant arrived in the UK with entry clearance as a student, valid from 21st September 2007 until 31st October 2011. In October 2008, the appellant's mother and brother came to the UK and they have remained in the UK since.

The decision of First-tier Tribunal Judge Blake in appeal IA/38763/2014 *("The Article 8 appeal")*

9. In his decision promulgated on 13th January 2015 in respect of the respondent's decision of 16th September 2014 to refuse the appellants application for leave to remain on Article 8 grounds, First-tier Tribunal Judge Blake sets out at paragraphs [4] to [19], the reasons why the application had been refused by the respondent. At paragraph [22], the Judge sets out the relevant provision of paragraph 276ADE(1) of the Immigration Rules that was at the heart of the appeal before him. At paragraphs [37] to [58] the Judge records the submissions made on behalf of the appellant. Counsel for the appellant submitted that the appellant's mother and siblings had been granted indefinite leave to remain on the basis of the appellant's stepfather's status whereas the appellant had not been considered at that time because he was already present in the UK having entered as a student. She submitted that the appellant should have been considered for the grant of indefinite leave to remain in the UK at the time of his family's arrival in 2008. She submitted that their arrival should have triggered the status of indefinite leave to remain for the appellant.

10. The Judge's finding and conclusions are set out at paragraphs [60] to [84] of the decision. Insofar as is material to the appeal before me, the Judge found:

> "61. … I found that he should have been considered for and granted indefinite leave under the EEA Regulations at the same time as his family when they entered the UK in 2008.
>
> 62. I accepted the submission that at the time the appellant's family entered the UK in 2008, that this should have triggered his status as an EEA dependent of a British citizen, and that he should have then been granted ILR along with the rest of his family."

The Judge notes at paragraphs [63], to [65], the fragmented immigration history of the family and the impact that has had upon the appellant. The Judge goes on to state:

> "66. I took into account the fact that the appellant had not lived in Australia since he had been 11 years of age. I noted that he had travelled with his family to France in 2000. I found that he had lived there with his family until his departure in 2007 when he had travelled to the UK in order to study.
>
> 67. I accepted that in 2008 he had been reunited with his family. I noted this was after a short period of time. In the circumstances I considered that the appellant had lived with his family in a family unit for the whole of his life.
>
> …
>
> 70. I accepted from all of the evidence that the appellant had no contact or ties with Australia. I found that he had left that country when he was very young at the age of 11 years.
>
> 71. In the circumstances of the appellant's case, and taking into account his medical background, I found that returning him to Australia, in his fragile state of anxiety and depression, would obviously have a bad effect on his overall health. I did not consider that such a course of action was necessary in the pursuit of a fair and from immigration control.

72. I was satisfied on the basis of all of the evidence and facts before me that the appellant qualified for leave to remain under the Immigration Rule 276ADE(1)(vi). I found at the time of the hearing he was over 18 and had lived continuously in the UK for some seven years.

73. I found that there were significant obstacles to his re-integration into Australian Society. I found that he had not been there since he was 11 and that he had nobody to turn to there. I found that the whole of his adult life had been spent with his family in France and in the UK. I also found that he was suffering with depression and anxiety.

74. In the course of my consideration I took into account section 117 of the Nationality, Immigration and Asylum Act 2002 as inserted by section 19 of the Immigration Act 2014.

75. In the light of my findings on the appellant's background, I found that he had no ties or connections with Australia that would assist with his reintegration into society there.

76. In the circumstances I found that he did qualify for leave to remain in the United Kingdom with reference to rule 276ADE(1)(vi) of the Immigration Rules HC395 (as amended).

77. I further considered the case exceptionally outside of the Rules. I found that there were circumstances that have not been considered by a straight application of the immigration rules.

…

82. I found the facts concerning the appellant's history and background were relevant. I noted the fact that the appellant's family had all been granted indefinite leave to remain in 2008 whereas he had not been granted leave. I noted that this was because he had not been considered at the time owing to the fact he was in the UK as a student. I found such background circumstances were all relevant to the overall Article 8 consideration.

…

84. I found on the facts before me that there were exceptional circumstances such as to require a consideration of the appellant's application outside of the immigration rules. I found on the evidence of the facts in the appellants case that there were grounds for granting leave to remain in the United Kingdom outside of the immigration rules and with reference to Article 8 ECHR.

85. In the circumstances I allow the appeal under the immigration rules. I further allow the appeal under Article 8 ECHR outside of the immigration rules."

<u>The Grounds of Appeal in appeal IA/38039/2014 *("The Article 8 appeal")*</u>

11. The respondent submits that the decision of the Judge is vitiated by the same errors as those made in the EEA appeal (IA/38039/2014). The respondent refers particularly to paragraphs [61] and [62] of the decision where the Judge finds that the appellant should have been considered for and granted "indefinite leave under the EEA Regulations at the same time as his family when they entered the UK in 2008. The respondent submits that the judge failed to apply the appropriate test under paragraph 276ADE(1)(vi) of the Immigration Rules. It is said that the Judge did not

take into account the fact that depression and anxiety are treatable in Australia, the appellant speaks the language of Australia, is educated and a national of Australia. The respondent submits that the Judge has instead concentrated on whether or not there would be ties that would assist the appellant on return.

12. Finally it is submitted on behalf of the respondent that in finding that the appellants Article 8 rights would be breached outside the rules, the Judge failed to identify the unjustifiably harsh consequences that would ensue.

The hearing before me on 25th September 2015

13. At the hearing before me, Mr Walker on behalf of the respondent adopted the grounds of appeal and submitted that the Judge had been misdirected as to the facts. He submitted that the Judge proceeds on the misunderstanding at paragraphs [61] and [62] that the appellant's family had been permitted to remain in the United Kingdom under the EEA Regulations and the appellant should also have been granted ILR at the same time. He reminds me that, unlike other members of the appellant's family, the appellant had not made an application in 2008 for leave to enter or remain in the UK as the dependent of his stepfather, a British Citizen.

14. In reply, Mr Sharma drew my attention to paragraph [63] of the decision and submitted that in reaching his decision as to the Article 8 appeal, the Judge has had regard to the particular facts of this case. He submits that the Judge considered the depression and anxiety suffered by the appellant, the close relationship he has with his brother, the fragmented immigration status of the family and importantly, the fact that the appellant has not lived in Australia since the age of 11. Mr Sharma submits that the Judge refers to the correct test at paragraph [73] and in considering whether there are compelling reasons for allowing the appeal on Article 8 grounds outside of the immigration rules, was entitled to reach the conclusions that he did at paragraphs [82] and [83].

Error of Law decision in appeal IA/38763/2014 *("The Article 8 appeal")*

15. I acknowledge that the Judge, at paragraphs [61] and [62] of his decision, begins his consideration of the appeal by accepting the submission made by counsel for the appellant, that the appellant's family were granted ILR under the EEA Regulations. That was plainly incorrect.

16. However, in my judgment it is clear that the First-tier Tribunal had the correct test in mind and applied it in substance. Paragraph 276ADE(1)(vi) is set out at paragraph [22] of the decision and at paragraphs [72] and [73] that is clearly the test being applied.

17. In my judgment, the extracts from the decision of the First-tier Tribunal set out above show that the Judge had sufficient evidence before him to

reach the conclusion that he did, that there were significant obstacles to the appellant's reintegration to Australia.

18. The Judge found that the appellant suffered from depression and anxiety *(for which he was receiving therapy from a Dr Barker)*, which had arisen out of his being separated with his family in terms of his immigration status. [63] and [69]. The Judge found that the appellant had lived with his family in a family unit for the whole of his life, and that he enjoyed a very close relationship with his younger brother, Mathew, and a close relationship with his mother and the rest of his family generally. [64] and [67] The Judge also found that the appellant had not lived in Australia since he had been in 11 years of age, had no contact or ties with Australia and that he had nobody to turn to there. [66], [67], [70], [73] and [75]. Those were all findings that were open to the Judge and are not challenged in the appeal before me.

19. The evidence of the appellant before the First-tier Tribunal was unchallenged. Reading the findings made as a whole, the decision that there were significant obstacles to the appellant's reintegration into Australia was one that was open to the Judge on the evidence before him. At the hearing before the First-tier Tribunal the Home Office Presenting Officer simply adopted the matters set out in the respondent's reasons for refusal letter dated 16th September 2014. The respondent simply relied upon the fact that the appellant had resided in Australia up to the age of 11, which included his childhood and formative years. The respondent considered that the appellant had retained knowledge of Australian life, language and culture and would therefore not face significant obstacles to reintegrating into life in Australia.

20. In essence, the respondent's argument is that the decision that there were significant obstacles to the appellant reintegration into Australia was not one reasonably open to a rational decision-maker. In my judgment, for the reasons set out above, the decision was one that was open to the Judge.

21. Having found that the appellant succeeds under paragraph 276ADE(1) (vi) of the Immigration Rules, the judge did not need to consider whether the circumstances of the case are exceptional so as to warrant the grant of leave to remain in the UK outside of the immigration rules on conventional Article 8 grounds.

22. Had the appeal before the First-tier Tribunal failed under the immigration rules but been allowed on Article 8 grounds for the reasons set out at paragraph [82] I would have had some sympathy with the respondents appeal. The exceptional circumstances identified in paragraph [82] appear to be the fact that the appellant's family had all been granted ILR in 2008. It is right to note that the appellant made no application in 2008. However, it is now well established that judges should proceed by first considering whether an appellant is able to benefit under the applicable provisions of the immigration rules designed to address

Article 8 claims. It is only where the appellant does not meet the requirements of the rules, that it is necessary to go on to make an assessment of Article 8 applying the criteria established by law. There is always the possibility of particular facts in individual cases to be of especially compelling force, such that the grant of leave to remain is appropriate notwithstanding the requirements of the Immigration Rules are not met. Paragraph 276ADE(1)(vi) specifically addresses application for leave to remain on the grounds of private life. Having found that the appellant succeeded under the rules, there was no need to make an assessment of Article 8. Any error in doing so was therefore in my judgment not material to the outcome of the appeal.

23. In those circumstances, there is no material error of law in the decision of the First-tier Tribunal.

Notice of Decision

24. The appeal is dismissed.

25. No anonymity direction is applied for and none is made.

Signed Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

1. The First-tier Tribunal made a fee award and that award shall stand.

Signed Date

Deputy Upper Tribunal Judge Mandalia