Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14375/2015

THE IMMIGRATION ACTS

Heard at Manchester
on 5 December 2017

Decision & Reasons promulgated
on 6 December 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AMHAD OTHMAN
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Arthur Decka, who appeared to provide assistance to the appellant by speaking on his behalf as a friend.
For the Respondent: Mr McVeety Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Shergill promulgated on 31 January 2017 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

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2. The appellant is a national of Jordan born on 10 May 1980 who currently has extant leave as a Tier 1 (Entrepreneur) valid until 5 August 2018. The appellant lives in the United Kingdom with his wife and children. The appellant applied for indefinite leave to remain on the grounds of ten years continuous residence. The Judge notes the appellant's immigration history before setting out findings of fact from [12] of the decision under challenge.
3. In relation to the decision under the immigration rules; the Judge was satisfied that the respondent correctly established a gap of four months and twenty-eight days in the appellant's continuous lawful residence. The appellant tried to contact previous solicitors who he had blamed for errors and delay, in addition to an alleged delay blamed upon the Secretary of State, all of which were considered by the Judge.
4. The appellant asserts a legitimate expectation but no such argument was established before either the Judge or Upper Tribunal when considering the correct test for establishing a claim on this basis. A legitimate expectation will only arise in limited circumstances. Lord Justice Simon Brown in *R v Devon County Council ex p Baker [1995] 1 All ER 73* set out three sets of circumstances where such may arise being:

    a. Where the decision maker has made a clear and unambiguous representation regarding a substantive right which it is reasonable for the claimant to rely on. The claimant may be entitled to that benefit.
    b. Where the claimant has an interest in some ultimate benefit that he hopes to retain (or possible attain), fairness may require the claimant to be given an opportunity to make representations about the withdrawal of that benefit; and
    c. Where the decision maker has promised that he will adopt some form of procedure that he would not otherwise be required to adopt, the claimant may be entitled to require the decision maker to adopt that procedure.

5. None of the above criteria were satisfied.
6. The Judge considered the respondent's policy relied upon by the appellant in support of his case which is dealt with at [24] in the following terms:

> 24. I note the policy relied upon but I am not satisfied that the appellant's situation falls into the examples of gaps in lawful residence. The period to be met as a gap is fairly significant and much more than the twenty-eight days that is ordinarily permitted. I am not satisfied when looking at the immigration history of the appellant; the various applications which were made; and the late pursuance of the solicitors alleged misconduct sufficient to bring this case within the realms of 'exceptional circumstances' as envisaged in the policy document. I would echo

> the same rationale for the issues raised with regards the Home Office processing the applications.

7. The Judge concluded that the evidence supported the finding that the appellant did have a break in residence as set out in the refusal letter and could therefore not meet the ten years continuous residence requirement either under the Rules or as per the exceptions set out in the policy [25].
8. Thereafter the Judge considered the issue outside the Immigration Rules, concluding at [26 – 27]:

> 26. I am not satisfied that there are sufficient grounds to look outside the rules given that the appellant has extant leave until 05/08/18. If I was required to go outside the rules I would note the following which would not take the appellant's case any further in any event.
>
> 27. I am not satisfied that there are any article 8 rights being interfered with at the present time. He is with his wife and children in this country enjoying family life. There are no removal direction; he is running his business; he has eighteen months left to run on his leave; and all the evidence suggests he could make a future in time application.

9. The appellant sought permission to appeal on a number of grounds which has been granted by another judge of the First-tier Tribunal on the basis that "*In an otherwise focused and nuanced decision and reasons it is nonetheless start arguable that the judge failed to take account of the public interest consideration in Section 117B of the Nationality, Immigration and Asylum Act 2002 as amended. The public interest considerations are statutorily mandatory. The arguable failure to take account of the public interest considerations is an arguable material error of law*".

Discussion

10. It was agreed between the parties that the only ground of appeal available to the appellant is that pursuant to article 8 ECHR. There is no ground of appeal under the Immigration Rules. It was also conceded on the appellant's behalf that the finding of the Judge that there had been a break in the appellants lawful residence and that the appellant was unable to succeed under the Rules is a legally correct finding.
11. The task facing the appellant therefore was to establish arguable legal error material to the decision to dismiss the appeal by making out an arguable breach of article 8.
12. The appellant in his challenge relied upon four grounds the first being that the Judge erred in failing to address or give any consideration to the core of the appellant's complaint which is that delay in making the new application was partly as a result of the respondent taking seven weeks to return his documents and the fees he had paid for the application therefore rendering him a unable to make the new

application until his documents were returned on 27 December 2011 which was said to also be a factor relevant to the respondent's policy. This ground is without arguable merit as the Judge was clearly aware of the chronology of events and did not find that even taking the appellant's case at its highest in relation to the date the respondent returned the paperwork, that this provided an explanation for all of the period of delay which was found to be for a considerable period. The Judge clearly considered the application of the policy but did not find this ground relied upon by the appellant established 'exceptional circumstances'.

13. It is also not made out that the period taken by the respondent to consider the application, which was declared invalid, was in any way unlawful or unreasonable. The appellant did not pay for the expedited 24-hour service but made a normal application which was dealt with by the respondent within an arguably reasonable period.
14. As stated, there is no appeal under the Rules and the appellant fails to make out any arguable merit on this ground.
15. Ground two asserts the First-tier Tribunal erred in criticising the appellant for not complaining about his solicitors sooner but this is a matter relating to the Rules against which the appellant has no right of appeal and does not establish arguable legal error in the manner in which the Judge considered this aspect of the case in any event.
16. Ground three asserts the Judge erred in the proportionality assessment under article 8 ECHR by making a series of factual errors. As stated above, the only ground of appeal the appellant has is that relating to article 8 ECHR.
17. When considering an appeal on this basis any decision-maker should consider the structured approach set out by the House of Lords in *Razgar [2004] UKHL 27* which requires consideration of five questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. The complaint in Ground three that the Judge erred in the proportionality assessment jumps straight to the fifth of the *Razgar* questions without properly considering the other four steps.
19. The alleged errors of fact set out in the grounds do not arguably establish legal error material to the decision when all aspects are considered as a whole.
20. Ground four should perhaps have been pleaded as Ground three as in this ground the appellant asserts the Judge erred in the assessment of article 8 stating there was no interference with the appellants Convention rights and that even if there was the interference was justified although at this point it is claimed there was no regard for Part 5, section 117B of the 2002 Act.
21. In light of the limited scope of the appellant's appeal and the findings under challenge it was necessary to repeatedly draw Mr Decka's attention back to those issues the Upper Tribunal needed to be addressed upon, namely whether the finding by the Judge that article 8 ECHR was not engaged as there will be no interference with a protected right, was infected by any arguable legal error.
22. It is not disputed by either party that the decision will not interfere with the family life the appellant enjoys with his wife and children as they will continue as they have within the United Kingdom during the period of any extant leave and there is no direction for the removal of any family member from the United Kingdom.
23. Mr Decka sought to argue on the appellant's behalf that there would be a disproportionate interference with the appellant's private life.
24. When asked what private life was being relied upon the Tribunal were advised that it was the appellants accommodation and issues in relation to renting accommodation. It was submitted that landlords were not grant long leases to individuals who only have short periods of leave. The written grounds refer to both the letting issue and also the inability of the appellant to secure a mortgage to enable him to purchase a property.
25. It is accepted that an individual's home forms part of their private life. The home occupied by the appellant is rented accommodation under the terms of an Assured Shorthold Tenancy the duration of which mirrors the appellants grant of leave to remain in the United Kingdom.
26. It is not made out that there is a right recognised by article 8 for an individual to be able to occupy a property with a long-term rent of his or her choice or a right to purchase a property with the assistance of a mortgage. The appellant has accommodation and it is not suggested that he will have to vacate or lose that accommodation or that he or his family members will not be able to remain as they currently are in their accommodation as a result of the respondent's decision.
27. Article 8 does not allow a person to choose where they wish to live and does not arguably allow a person to circumvent the immigration rules or difficulties that may be experienced as a result of the letting practices of private landlords or lending criteria of the financial institution's which they have a lawful right as businesses to impose upon any potential customers.

28. The appellant has a home. That home will not be lost. The duration of the tenancy may not be that the appellant wishes to have but it is not made out the appellant will not be able to apply for further leave in the future and if he is able to succeed in relation to the same it is likely he will be able to secure a longer lease as he has been able to do to date. If the appellant cannot secure a longer lease because he no longer has leave to remain in the United Kingdom as he is unable to satisfy the requirements of the Immigration Rules or because any interference with any family or private life at that stage is found to be warranted, it cannot be said that will be a disproportionate consequence.
29. The appellant also sought to rely upon his work and connections in the community which it is accepted he has formed. It was not made out that these are rights protected by article 8 as this is a fact sensitive assessment. The evidence before the Judge was not as strong as it might have been but, again, it is not suggested or made out that there will be any interference with the appellant's ability to continue working or maintaining connections within the community.
30. The appellant also argued that the Judge did not consider the impact upon the children. The Judge was aware of the existence of the children and when considering the best interests of the children by reference to section 55 it is clearly a case that the best interests of the appellant's children are to remain with their mother and father, namely the appellant and his wife. There is no suggestion there will be any interference with the children's ability to do so and to continue to be educated in the United Kingdom and to live at home as they do now.
31. Whether the children acquire a right to make an application on their own behalf or as part of an application made by their parents on a later occasion is a matter for which the appellant will be able to take proper advice.
32. Mr Decka's reference to the respondent's policy does not establish arguable legal error as this was an aspect clearly taken into account by the Judge who found that it did not establish the existence of circumstances warranting a grant of leave on that basis.
33. The finding by the Judge that all factors have been considered under the Rules is a finding within the range of those reasonably open to the Judge on the evidence. The Judge, however, did consider the matter outside the Rules by reference to article 8 ECHR but concluded that article 8 was not engaged as there will be no interference with any protected right, family or private, sufficient to engage article 8. This primary finding is fully within the range of those available to the Judge on the evidence. The purpose of article 8 is to prevent unwarranted interference with a protected right. In this case there is no interference. It was therefore not necessary for the Judge to consider section 117B as that is relevant to assessing the proportionality of any interference with a view to considering whether it is warranted or not.
34. It is well established that where the appellant is in the UK and removal will interfere with the family life/private life he, and since *Beoku-Betts*

v SSHD 2008 UKHL 39 his family, already enjoy in the UK, then Article 8 can be engaged but in this case no removal directions have been set and the appellant and his family continue to enjoy extant leave. The appellant and members of his family are able to continue to enjoy their family and private life in the United Kingdom with no interference in the same having been made out.

35. The appellant has failed to establish any legal error, material or otherwise, in the decision of the Judge to dismiss the appeal.

Decision

36. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

37. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Judge of the Upper Tribunal Hanson

Dated the 5 December 2017