Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28407/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3 August 2017	**On 15 August 2017**

Before

UPPER TRIBUNAL JUDGE GILL

Between

ABDOOL RECHAD RUJBALLY
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Atcha, of Counsel, instructed by Ebrahim & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of Mauritius born on 8 August 1969, has been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal L M Shand QC who (following a hearing on 25 July 2016) dismissed his appeal under the Immigration Rules and on human rights grounds against the respondent's decision of 29 July 2015 to refuse his application of 2 April 2015 for leave to remain in the United Kingdom on the basis of his private and family life under

Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

2. There was no dispute before the judge that the appellant arrived in the United Kingdom on 31 March 1996 as a visitor and that, by the date of his application of 2 April 2015, he had lived continuously in the United Kingdom for a period of 19 years. However, by the date of the hearing, he had lived in the United Kingdom for a period in excess of 20 years.

3. At para 26 of her decision, the judge found that the appellant did not meet the requirements of para 276ADE(1)(iii) because he had not lived in the United Kingdom continuously for a period of at least 20 years as at the date of his application for leave, as required by the terms of para 276ADE(1). The grounds do not challenge the judge's decision in relation to para 276ADE(1).

4. At para 32, the judge said that she did not see anything in the appellant's case that had not already been adequately addressed in the Rules. However, she proceeded to consider proportionality.

5. In her consideration of proportionality outside the Rules, the judge took into account that s. 117B of the Nationality, Immigration and Asylum Act 2002 provided that little weight should be given to private life established when an individual is in the United Kingdom unlawfully or when their immigration status was precarious. She then considered the evidence about the appellant's immigration history, at para 34. At para 35, she reminded herself of the judgment of the Court of Appeal in VW (Uganda) [2009] EWCA Civ 5, that *"if removal is to be held disproportionate, what must be shown is more than mere hardship or a mere difficulty or mere obstacle".* At para 36, she said that she was satisfied that the public interest in the consistent enforcement of immigration control as a means of achieving the economic well-being of the country does outweigh the interference which will be caused to the appellant in relocating to Mauritius. She therefore found that the respondent's decision was a proportionate response.

6. The sole issue before me is whether, in her assessment of the Article 8 outside the Immigration Rules, the judge failed to take into account the fact that, by the date of the hearing, the appellant had lived in the United Kingdom continuously for a period in excess of 20 years and, if she did, whether any such error of law was material.

7. It was not in dispute before me that the period of residence that can be taken into account for the purposes of para 276ADE(1) was limited to the period of residence as at the date of the application in question, pursuant to the words "*at the date of the application*" in the opening sentence of para 276ADE(1). Para 276ADE(1) reads as follows:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK"

8. It was not in dispute before me that, in assessing the Article 8 claim outside the Rules, the judge was entitled to take into account, and should have taken into account, the entirety of the period for which the appellant had been resident in the United Kingdom.

9. Ms Atcha submitted that the Secretary of State had introduced the 20-year residence rule in 276ADE(1)(iii). If the appellant had made an application for leave on the basis of Article 8 at the time of the hearing, he would have been granted leave. By the date of the hearing, he had lived in the United Kingdom continuously for a period in excess of 20 years and did not have any criminal record. The judge should therefore have allowed the appeal on that basis. There was no need to consider the s.117B factors.

10. Mr Tufan submitted that, if such an application had been made or were to be made now, the appellant would be granted leave if he satisfied the suitability requirements. He submitted that the s.117B factors still fell for consideration even when an individual has lived in the United Kingdom for a continuous period of 20 years.

11. Ms Atcha and Mr Tufan agreed that, if I were to conclude that the judge had materially erred in law, I should proceed to re-make the decision on the material before me.

Assessment

12. I consider that, to some extent, Mr Tufan's submissions were ill-conceived. The Secretary of State's policy is contained in the Rules. In relation to private life, she has decided, by virtue of the requirements set out in para 276ADE(1)(i)-(iii), that if an individual has lived in the United Kingdom continuously for a period of at least 20 years, the strength of the public interest is such that it is no longer served by the individual's removal provided that he/she satisfies the requirements of 276ADE(1)(i) and 276ADE(1)(ii). This is a relevant consideration when the balancing exercise is conducted in assessing an Article 8 claim outside the Immigration Rules.

13. It is clear that the judge applied the s.117B factors in her assessment of the Article 8 outside the Rules. There is nothing to suggest that she was aware that the weight to be given to the public interest is such that it is no longer served by the individual's removal provided that he/she satisfied the requirements of 276ADE(1)(i)-(iii). The question is whether the judge's approach, in applying the s.117B factors, was correct.

14. The effect of the words "*at the date of application*" in the opening sentence of para 276ADE(1) is to limit the period considered in relation to para 276ADE(1)(iii) to the period of residence as at the date of application.

15. The requirement that an individual should make a valid application for leave is a procedural requirement. However, the suitability requirement is not. It is *only if* the suitability requirement is satisfied and (where para 276ADE(1)(iii) is relied upon) the individual has lived in the United Kingdom continuously for at least 20 years (discounting any period of imprisonment) that the weight to be given to the public interest is such that it is no longer served by the individual's removal from the United Kingdom. Unless both the suitability requirement and the 20-year continuous residence requirement are satisfied, the s.117B factors continue to apply in the assessment of proportionality outside the Rules.

16. Whether or not an individual meets the suitability requirement is an assessment that should be conducted, in the first instance, by the Secretary of State for the simple reason that the Secretary of State may have information about an individual which may not come to light at a hearing before a judge. Whether or not an individual meets the suitability requirement does not depend only on whether he or she has criminal convictions.

17. In my judgment, the reason for the phrase: "*as at the date of application*" taken together with the suitability requirement in 276ADE(1)(i) is that it enables the Secretary of State to conduct her enquiries in the first instance in order to ensure that she is satisfied that an individual satisfies the suitability requirement in 276ADE(1)(i) and, if she is not so satisfied, that the relevant material is placed before the First-tier Tribunal on appeal.

18. In my judgment, it is unobjectionable that it is the Secretary of State who should make the first assessment as to whether or not an individual meets the suitability requirement.

19. In the instant case, the respondent specifically stated in the decision letter that:

> "We accept that your application meets paragraph 276ADE(1)(i) and (ii)"

20. However, as at the date of the hearing before the judge, a period of one year had elapsed since the decision was made. The acceptance by the respondent in the decision letter that the appellant satisfied the requirements of para 276ADE(1)(i) only speaks to the circumstances existing as at the date of the decision. Anything could have happened in the period that elapsed between the date of the decision and the date of the hearing before the judge.

21. Given that there was nothing to show that the respondent accepted that the appellant satisfied the suitability requirement in para 276ADE(1)(i) as at the date of the hearing before the judge, I have concluded that the judge's approach, in applying the s.117B factors, was the correct approach. In the absence of confirmation from the respondent that the appellant satisfied the suitability requirement in para 276ADE(1)(i), it is incorrect to say that the public interest was no longer served by the appellant's removal simply because he had lived in the United Kingdom continuously for a period of at least 20 years as at the date of the hearing before the judge.

22. The judge therefore did not err in law when she applied the s.117B factors in her consideration of proportionality outside the Rules. The respondent had not confirmed that the appellant continued to satisfy the suitability requirement. Before me, Mr. Tufan submitted that, if the appellant were to make another application, he would only be granted leave if he satisfied the suitability requirement. In my experience, there

are occasions when the respondent's representative is prepared to confirm that the respondent does not have any concerns as to whether an individual meets the suitability requirement. This was not one of those occasions.

23. There is no reason to think that the judge did not have in mind the entirety of the appellant's period of residence as at the date of the hearing when she considered proportionality in relation to the Article 8 claim outside the Rules.

24. I have therefore concluded that there is no material error of law in the judge's decision.

Decision

The decision of Judge of the First-tier Tribunal L M Shand QC did not involve the making of any material errors of law.

Upper Tribunal Judge Gill Date: 14 August 2017