Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13749/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 4 October 2018	**On 20 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATRICK LEONARD BENNETT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Mr I Ali, Counsel instructed by Brys Immigration Consultants

DECISION AND REASONS

1. I refer to the Appellant as the Secretary of State and to the Respondent as the Claimant in this decision. The Claimant is a national of Jamaica who was born on 17 January 1974. He entered the United Kingdom on 16 July 2001 on a visit visa valid until 31 August 2001. On 14 November 2002 he submitted an application for leave to remain in the United Kingdom as a student which was granted until 30 September 2003. On 22 July 2009 he submitted an application for leave to remain in the

United Kingdom on the basis of his human rights which was refused on 5 April 2011. On 16 May 2011 he was served with a notice informing him of his liability to removal. On 7 September 2012 he submitted an application for leave to remain in the United Kingdom on the basis of his human rights which was refused on 4 October 2013. On 17 September 2016 he made a human rights application for leave to remain in the United Kingdom on the basis of his relationship to a British national. That application was refused on 12 May 2016.

2. The Claimant appealed against that decision to the First-tier Tribunal under Section 82(2) of the Nationality, Immigration and Asylum Act 2002 (NIA 2002) and alleged that the Respondent's decision breached his human rights. That appeal came before First-tier Tribunal Judge Hawden-Beal who in a decision and reasons promulgated on 27 June 2017 allowed his appeal on human rights grounds.

3. The Secretary of State sought permission to appeal against that decision and permission was granted by First-tier Tribunal Judge Hodgkinson who considered that it was arguable that the Judge erred as follows: first, having indicated, at [26-31] of her decision, that family life could be conducted in Jamaica, and then concluding that the decision was disproportionate; second, in allowing the appeal outside the rules, in failing to identify exceptional factors which warranted such consideration and in misapplying the question of, and the applicable facts relating to, delay when considering proportionality; third in failing to consider the viability/reasonableness of the appellant returning to Jamaica, with a view to applying for entry clearance.

4. The appeal therefore comes before the Upper Tribunal in order to determine whether there was a material error of law in the decision of the First-tier Tribunal such that it must be set aside.

The Grounds

5. The Secretary of State argues that it is clear from the findings of the First-tier Tribunal that the Claimant could return to Jamaica with his wife without encountering any significant obstacles. It is submitted that the First-tier Tribunal used Article 8 as a general dispensing power. It is further argued that the Judge failed to identify what about this particular case was so exceptional on the facts to even warrant consideration outside the rules. It is submitted that the Secretary of State had not remained inactive in relation to his attempts to remove the Claimant and issued removal notices to him on a number of occasions which resulted in him making further applications which then caused a barrier to removal. Furthermore, it is asserted that he remained under the radar for a period of six years following the expiration of his student leave until he met the sponsor. Consequently, it is asserted that the First-tier Tribunal Judge misdirected herself in placing the burden at the feet of the Secretary of State for not enforcing return. When balanced against

the Claimant's disregard for the Immigration Rules and the fact that both he and his wife were aware at all times that his status was precarious and he illegally accessed the NHS, it is asserted that insufficient weight had been given to the public interest in removal. Further, it is submitted that the First-tier Tribunal gave no consideration to the Claimant returning to Jamaica on a temporary basis to put his immigration matters in order and no evidence had been put before the Tribunal that would indicate that this was an unreasonable measure in the circumstances of the case.

The Rule 24 Response

6. It is submitted on behalf of the Claimant that the First-tier tribunal was entitled on the evidence before it to allow the appeal under Article 8. It is further submitted that the Judge did not err in her approach to the application of Article 8 and the relevant public interest considerations under sections 117 A to D of the NIA 2002. It is asserted that the Judge set out her reasons clearly as to why less weight was to be attached to the public interest against removal and the approach was justified and supported by established case law including **EB (Kosovo) v SSHD [2008] UKHL 41**. It was made clear that delay on the Secretary of State's part was relevant to the development of close personal ties and that the tentative quality of a relationship could be diminished as time elapsed and enforcement did not take place. It is submitted that the Judge was entitled to weigh the Secretary of State's delay in the proportionality exercise before allowing the appeal. It is further submitted that the Secretary of State has provided no explanation for the inordinate and lengthy delay in this case. It is further submitted that the Secretary of State had failed to provide evidence of anything effective being done to enforce removal. It is submitted that the viability of the Claimant returning to Jamaica was not envisaged by section 117B of the NIA 2002.

The hearing

7. I heard submissions from both representatives which I summarise here. Mr Mills submitted that the Secretary of State did not know what delay the Judge was referring to. The Claimant overstayed a student visa and did not make himself known to the Secretary of State until July 2009, which application was refused in 2011 and thereafter he was served papers telling him he should leave the United Kingdom. He put in further representations and May 2011 and thereafter there were further applications and decisions. The decision giving rise to the right of appeal in this case was made in 2016 and it was hard to see where there was a protracted delay. This was not a case where the Secretary of State had waited years and years. A Judge would be entitled to place some weight on delay but it was neither a weighty nor determinative factor. Further, the Judge was required to give little weight to the Claimant's family life under section 117 B (4) of the NIA 2002 but this was not mentioned. The

Claimant's relationship was established in 2009 and he had no leave since 2003. The test to be applied was therefore that in **R (on the application of Agyarko)** and the Judge did not apply that test.

8. Mr Ali submitted that the Judge set out the immigration history of the Claimant as included in the reasons for refusal letter but the Claimant's full immigration history was not set out by the Secretary of State anywhere. He was reporting since 2009 and there was no evidence of an attempt to forcibly remove him. He did make applications and was still reporting on a monthly basis. The Judge took into account relevant evidence and also had regard to the public interest. She went through all of the relevant factors and consider them in turn and while she did not mention section 117B (4) it was clear she had in mind. Delay was a very relevant factor and did not have to be of a certain type. The grounds were mere disagreement with the decision and with the weight attached to the delay.

9. Mr Mills replied that it was absolutely apparent that the Judge had not applied the right test. The Judge had to demonstrate what the compelling circumstances were because nothing less than that would do. That test had not been applied at all or set out and the Judge had entered into a free-wheeling proportionality assessment. For delay to be determinative it needed to be egregious and it was not in this case.

Discussion

10. The First-tier Tribunal Judge found that the Claimant did not satisfy the requirements of the Immigration Rules either with regard to family or private life. She found at [26] that the evidence did not suggest that there were insurmountable obstacles to the Claimant and his wife continuing family life outside the UK. She found that there would not be serious hardship which could not be overcome. She also found that there would be no very significant obstacles to his integration into Jamaica [27 to 29]. She directed herself at [31] that little weight should be placed upon the Claimant's private life as his status was and had always been precarious. She then considered whether the decision to remove was proportionate having regard to **EB (Kosovo) UKHL 41**. The reasons for allowing the appeal on the basis that the Secretary of State's decision was not proportionate are at [32-33]:

> "33. The respondent has been aware of the appellant from at least 2009 when he made his first application and she has certainly been aware of him since 2011 when he was served with form IS 151A, notice of liability to removal. Yet she has done nothing about removing him even though this is the second application he has made subsequent to that notice being served upon him. She cannot say that the appellant has not been visible because he has been reporting regularly since 2009.
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> 34. Having regard to **Jeunesse** and the fact that the respondent has not really concerned herself with the appellant's removal

> despite serving that notice in 2011, I have to question whether there is really a public interest in removing the appellant and I am not satisfied that it is given the fact, as in **Jeunesse,** the respondent has tolerated his presence in the UK for several years. In the circumstances, I am satisfied that the evidence before me does outweigh the public interest considerations which justify maintaining the decision, given the above I am satisfied that the decision to refuse leave to remain is not proportionate and the appeal should be allowed because the decision is unlawful under section 6 of the 1998 Human Rights Act."

11. The First-tier Tribunal Judge was required to take the factors in section 117 B of the 2002 Act into consideration. She did not direct herself in relation to s117 B (4) that little weight should be given to the Claimant's relationship with his wife because it was a relationship formed with a qualifying partner that was established at a time when he was in the United Kingdom unlawfully. He had been in the UK unlawfully since 2003 and his relationship was established in 2009 and hence the little weight provisions applied.

12. In **Agyarko** [2017] UKSC 10 Lord Reed held at [54-57] that:

> *Exceptional circumstances*
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> 54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is "likely" only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that "a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there" (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances" (*Jeunesse*, para 114).
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> 55. That statement reflects the strength of the claim which will normally be required, if the contracting state's interest in immigration control is to be outweighed. In the *Jeunesse* case, for example, the Dutch authorities' tolerance of the applicant's unlawful presence in that country for a very prolonged period, during which she developed strong family and social ties there, led the court to conclude that the circumstances were exceptional and that a fair balance had not been struck (paras 121-122). As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state (para 121)."

13. Whilst it is clear therefore that delay is capable of being an exceptional factor, the delay relied on by the Judge in finding that the public interest in removal was outweighed dated from 2009. I have set out his immigration history above. His application in 2009 was determined in 2011 and he was served with a notice informing him of liability to removal. He then made a further application in 2012 which was determined in 2013. He then made a further application in 2016 which is the subject of this appeal. Between 2009 and 2016 therefore he made three applications all of which were determined in between a 3 month and two year period. In the circumstances this is not a case where the delay in either decision-making or removal could be reasonably characterised as the tolerance of his unlawful presence for a very prolonged period.

14. In the circumstances, the Judge, having found that the Claimant failed to satisfy the Immigration Rules failed to accord sufficient weight to the public interest in the removal of the Claimant, placing undue weight on delay as an exceptional factor and failing to address the precariousness of the Claimant's status when his family life was established.

15. In the light of the fact finding required in accordance with part 7.2 of the Practice Statement and with the agreement of the parties I remit this matter for a de novo hearing before a Judge other than Judge Hawden-Beal.

Notice of Decision

There is a material error of law in the decision of the First-tier Tribunal and I set it aside.

I remit the appeal for a de novo hearing.

No anonymity direction is made.

Signed Date 31 October 2018

Deputy Upper Tribunal Judge L J Murray