



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00570/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 March and 14 June 2018

Decision & Reasons Promulgated
On 25 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRISTOPHER AGUSTUS MILLS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer (15 March 2018).
Mr D Clarke, Home Office Presenting Officer (14 June 2018).
For the Respondent: Mr M Adophy of Rana & Co, solicitors.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing an appeal by the applicant against the decision of 23 December 2015 refusing him further leave to remain in the UK on the basis of his private and family life. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. In brief outline the background to this appeal is as follows. The appellant is a citizen of Jamaica born on 18 July 1967. He first came to the UK on 10 January 1998 with entry clearance valid until July 1998. His leave was subsequently extended until 30 September 1999. On 1 October 2009 he applied for indefinite leave to remain. This was refused on 26 March 2010 with no right of appeal. On 26 October 2010 he applied for that decision to be reconsidered. The respondent did not make a decision on that application until 23 December 2015 when it was refused for the reasons set out in Annex A of the decision letter.
3. His application was considered under the provisions of appendix FM and para 276ADE (1) of the Rules as at the date of decision. The respondent was not satisfied that the appellant had a partner in the UK. He did have three children in the UK, the two older children were now adults and the youngest child was under 18 but he was not able to show that he met the requirements of the Rules for leave to remain as the parent of that child. The respondent went on to consider whether there were any particular circumstances which would amount to exceptional circumstances to justify a grant of leave under article 8 but she was not satisfied that that was the case. Accordingly, the application was refused.

The Hearing before the First-Tier Tribunal

4. At the hearing before the First-tier Tribunal it was argued that as the application was made in October 2010 and was seeking the reconsideration of an application made in 2009, it should not have been dealt with under the Rules which came into force in July 2012 but under the Rules as they were on the date of application. The judge accepted this submission and found that the respondent had wrongly applied appendix FM and para 276ADE (1) in deciding the application [10]. It was conceded that the appellant could not meet the requirements of the post-2012 Rules for the reasons given in the respondent's decision.
5. The judge considered the position under the pre-2012 Rules. He accepted that the appellant had been resident in the UK for over 14 years by January 2012 but the provisions then in force excluded any period of time after service of notice of liability to removal. The appellant had received such notice in March 2010, by which time he had only been in the UK for 12 years.
6. The judge went on to consider the position under article 8. He said that, given that the appellant had been in the UK for 19 years at the date of hearing and would have completed 20 years within six months of the hearing date, there were circumstances which warranted consideration on the basis of private life and that as the application was prior to 2012, there was no need for the appellant to demonstrate exceptional circumstances outside the Rules. He placed considerable weight on the period of time the appellant had been in the UK, just short of 20 years, which under the current Rules

would be accepted as sufficient to establish private life even with no leave. He then added that he did not need to take a strict view of the appellant not being in the UK for the full 20 years and he considered that 19 years 6 months was sufficient to engage article 8 under private life. He commented that the appellant had demonstrated that he had been working in the UK for at least eight years, having submitted tax returns since 2009 as well as bank statements showing his income and accounts. There were current domestic difficulties, but the appellant had family in the UK which added to the weight of his private life. The reference to domestic difficulties refers to the fact that the appellant, although married, had not had any contact with his wife and younger child since May 2017 when she moved and left no forwarding address.

7. The judge said that applying the test as set out in Razgar [2004] UKHL 27, he found that the appellant had established private life in the UK engaging article 8 and that his removal would be a material interference. The respondent had failed to explain why it had taken over five years to make a decision on the reconsideration. The delay had given a further opportunity for the appellant to strengthen his private life and demonstrated that there was no public interest imperative to his removal. He considered that the appellant's removal would not be proportionate to the need for proper immigration control and he allowed the appeal.

The Grounds and Submissions

8. In the respondent's grounds it is argued that the application should have been considered under the post-2012 provisions of the Rules. The request for reconsideration was a fresh application and the respondent had not erred by considering appendix FM and para 276ADE(1) but the judge had by failing to consider the transitional provisions in para A277 and A277C. Secondly, when assessing the appeal under article 8 outside the Rules, the date of the original application was irrelevant and article 8 should have been applied on the basis of the position as at the date of decision. Thirdly, the judge had had no regard to the public interest considerations or to the fact that the appellant had been working illegally and had spent the majority of his time in the UK without leave. Fourthly, the judge had failed to take into account his own findings that the appellant was unable to meet the requirements of the current Rules and the fact that at [12] he had found that there would be no basis for concluding that there would be any significant obstacles to the appellant's reintegration to Jamaica on return.
9. In the appellant's rule 24 response it is argued in substance that the judge properly considered article 8 outside the Rules, this being a stand-alone provision which did not depend on exceptionality to be engaged. The Rules were not a complete code as indicated by the Supreme Court in Hesham Ali [2016] UKSC 60 and an inability to satisfy the Rules, whilst significant, would not be determinative of a human rights claim. Taking into account the length of delay in making the decision, the judge had been entitled to find that there was now no public interest imperative in favour of the appellant's removal.

10. In her submissions Ms Everett conceded that the transitional provisions were in fact irrelevant. The judge had found that the appellant could not meet the provisions of either the pre-2012 or post-2012 Rules. The position was therefore that the appeal had to be determined on the basis of article 8 outside the Rules and this had to be assessed as at the date of hearing. However, the judge had failed to make that assessment in the light of the fact that the appellant could not meet the Rules, to identify any particularly exceptional or compelling circumstances to justify a grant leave under article 8 or to take account of the fact that the appellant had been living unlawfully in the UK for long periods and working without permission.
11. Mr Adophy submitted that the judge had clearly been aware of the provisions of the Rules and was fully entitled to find that private life was engaged. There was no particular threshold which had to be met. The judge had considered article 8 and proportionality. He had been entitled to attach great weight to the considerable delay by the respondent in reaching a decision and had put the facts into their proper context not least as the appellant had now been living in the UK for over 20 years.

The Error of Law

12. It is common ground that the appellant could not meet the requirements of either the pre-2012 Rules or the post-2012 Rules set out in appendix FM and para 276ADE(1). In these circumstances the issue is whether the judge erred in law in his approach to article 8. I am satisfied that he did. At [14] he said that as the application was prior to 2012, there was no need for the appellant to demonstrate exceptional circumstances outside the Rules. However, this does not accurately reflect the judgment of the Supreme Court in Hesham Ali where the Court, whilst accepting that a failure to meet the requirements of the Rules did not exclude the possibility of succeeding under article 8, held that the policies adopted by the Secretary of State and given effect in the Rules were a relevant and important consideration when determining appeals on Convention grounds because they reflected the general public interest made by the responsible minister and endorsed by Parliament (see [53] of the judgment of Lord Wilson).
13. The judge therefore failed to approach article 8 taking proper account of the provisions of the current Rules. The judge's assessment of article 8 was in substance treated as free standing question outside the context of the statutory scheme (see the Senior President at [62] of Secretary of State v SC (Jamaica) [2017] EWCA Civ 2112). By way of example, at [14] the judge said that as para 276ADE(1) did not apply, he need not take a strict view on the appellant being in the UK for the full 20 years and he considered that 19 years 6 months was sufficient to engage article 8. Whilst such a long period of residence may arguably engage article 8, the judge failed to take into account when assessing proportionality, the private life provisions of the Rules, particularly in the light of his finding at [12] that there was no basis to conclude that there would be very significant obstacles to the appellant's reintegration on return to Jamaica.

14. The judge also failed to consider the provisions of s117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) and in particular the requirement that little weight should be given to private life established when a person is in the UK unlawfully or his immigration status is precarious (s.117B(4)-(5)). Further, the judge gave weight to the fact that the appellant had been working but failed to take into account that he had not been entitled to work. He was entitled to take into account the delay in reaching the decision but failed to consider all the issues arising from delay identified by the House of Lords in EB Kosovo v Secretary of State [2008] UKHL 41. Therefore, I am satisfied that the judge he left relevant matters out of account when assessing whether article 8 was engaged and whether removal would be proportionate, failing to make that assessment in the context of the public interest set out in the Rules and in s.117B of the 2002 Act. The decision is set aside.
15. The hearing was adjourned to enable the parties and, in particular, the appellant to have the opportunity of filing further evidence. In the event, no further evidence has been filed by either party and no application has been made to call further oral evidence. The re-making of the decision, therefore, proceeded by way of submissions only.

Further Submissions.

16. Mr Clarke accepted that the appellant’s circumstances were such that they warranted further consideration outside the Rules. However, he submitted that this was not a case where the appellant was able to establish family life within article 8(1). He had two adult children in the UK but there was no evidence of family life with them. He had a minor child born on 30 September 2003 but there had been no change from the position set out in his witness statement of 4 July 2017 that, about two months previously, he found that his daughter and her mother had moved away and he did not know where to. He had not received any phone call from his daughter since that date. He had spoken to his son who told him that his mother had specifically told him not to give her address to him. There was no evidence that contact was likely to take place in the near future and it followed that there was no evidence of family life of any substance.
17. It followed, so Mr Clarke submitted, that the appellant relied on his private life. The First-tier Tribunal had found that he could not meet the requirements of the Rules. Although he had now completed 20 years residence, he could still not comply with the Rules as para 276ADE(1) provided that time should be calculated from the date of application. In so far as the appellant sought to rely on the delay in reaching the decision under appeal, he submitted that he could not bring himself within any of the three grounds which might make delay relevant as set out in EB Kosovo. It could not be said that the appellant had developed closer personal social ties or established deeper roots save that he had lived here five years longer while waiting for the decision. His immigration status remained precarious and his claim based on long residence was covered by para 276ADE(1).

18. Further, it could not be said that the delay was the result of a dysfunctional system yielding unpredictable, inconsistent and unfair outcomes. In summary, it was Mr Clarke's submission that there were no exceptional or compelling circumstances which would justify the grant of leave under article 8 and, in any event, the public interest considerations in s.117B of the 2002 Act also weighed against the appellant as it required that little weight to be given to private life established when leave was unlawful or precarious.
19. Mr Adophy submitted that the relevant date for the assessment of article 8 was the date of hearing. The Supreme Court had confirmed in Hesham Ali that an appeal could succeed under article 8 even if the Rules could not be met. The assessment had to take place in the context of the Rules but the position now was that the appellant had been resident in the UK for 20 years and an application under para 276ADE(1) was likely to succeed. Further, there had been undue delay in deciding this appeal from 2010 to 2015 when the likelihood was that the appellant would have been granted leave to remain had the application been decided more speedily. This was a case, so Mr Adophy argued, where the appellant could properly be regarded as having had a legitimate expectation of a positive decision but had been deprived of that by the delay. He submitted that when the facts were looked at as a whole, it would now be disproportionate for the appellant not to be granted leave to remain on the basis of his private life.

Assessment of the issues

20. The judge found that the appellant could not meet the requirements of either the pre-2012 or the post-2012 Rules. At the date of the hearing before the First-tier Tribunal, he had been living in the UK for over 19 years but the judge was not satisfied that there was any basis on which he could conclude that there would be very significant obstacles to his reintegration into Jamaica on return. Mr Adophy makes the point that the appellant has now completed 20 years continuous residence in the UK but, nonetheless, he cannot bring himself within the provisions of para 276ADE(1) because time must be assessed as at the date of application. However, it is not in dispute that the appellant has private life within article 8(1) arising from his long residence in the UK.
21. The appellant has three children in the UK, two adult children but there is no evidence of dependency to show that there is family life within article 8(1). His third child is a minor child and for this reason there continues to be family life between her and the appellant. However, at present, there is little substance to that family life as the appellant has not been in contact with her since about May 2017 (two months prior to his statement in July 2017). Although in his witness statement the appellant refers to being advised to seek a contact order, there is no evidence that he has followed this course nor is there any further evidence of any prospects of contact with his daughter. However, when taken with his private life I am satisfied that the decision does amount to an interference with his private and family life.

22. In order to succeed in a claim under article 8 outside the Rules, the appellant must show that there are exceptional or compelling circumstances making removal incompatible with article 8. In R (Agyarko) v Secretary of State [2017] UKSC 11, the Supreme Court adopted the approach set out by the European Court in Jeunesse v The Netherlands (app no 12738/10) ECtHR Grand Chamber, 3 October 2014 that in cases concerned with precarious family life, it was only likely to be in exceptional circumstances that the removal of the non-national family member would constitute a violation of article 8. The same approach must necessarily apply in cases of private life.
23. There is no dispute that the respondent's decision is in accordance with the law and is for a legitimate purpose, the maintenance of immigration control to protect the economic well-being of the country and for the prevention of disorder and crime. The core issue is whether the decision is proportionate to that legitimate aim.
24. I must take into account the provisions of s.117B of the 2002 Act. The appellant can speak English and is able to work, although he does have permission to do so. However, s.117B(4) and (5) provide that little weight should be given to a private life established by a person in the UK unlawfully or when his immigration status is precarious. The appellant has not had to leave to remain in the UK since 30 September 1999 and since then his leave has been both precarious and unlawful. He is not subject to deportation and by s.117(6) the public interest does not require his removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. But in the light of the appellant's present circumstances he does not have such a relationship with his daughter.
25. It is clear from the evidence before the First-tier Tribunal that the appellant has worked in the UK and has been able to support himself, but he has not been entitled to work and has been doing so unlawfully. His private life depends primarily on the length of his residence but he is unable to meet the residence requirements of para 276ADE(1) and I cannot assume that an application made now will necessarily succeed. The appellant not only has to meet the residence requirements but also the suitability requirements in para 276ADE(1)(i).
26. I take into account the fact that there has been a substantial delay in making a decision on the appellant's application to have the previous refusal reconsidered. He made that application on 26 October 2010 and did not receive a decision until 23 December 2015. In EB Kosovo, the House of Lords identified three circumstances in which delay may impact on the assessment of proportionality: the development of closer personal and social ties and establishing deeper roots in the community that he could have shown previously, a relationship may become more permanent and an expectation may grow that if the authorities intended to remove him they would have taken steps to do so and, finally, delay when it is a result of a dysfunctional system yielding unpredictable, inconsistent and unfair outcomes which may affect the public interest in maintaining immigration control.

27. This judgment, however, must be read in the context of the subsequent legislation requiring that little weight should be given to private life established when a person's status is unlawful or precarious and the changes in the Rules setting out the respondent's policy when assessing claims under article 8. The delay in decision-making has led to the appellant being in the UK for a further five years together with the period during which his appeal is taking place but otherwise the factors identified in EB Kosovo have little impact in this appeal on the assessment of proportionality. There is no substance in the argument that the appellant had any legitimate expectation of a positive decision if there had been no such delay. His entitlement is to a decision made in accordance with the Rules and policies in force at the date of decision.
28. Looking at the evidence as a whole, I am not satisfied that it discloses any exceptional or compelling circumstances which would make the appellant's removal disproportionate. Although he has a family in the UK, he has little contact with them and he has remained in the UK without leave since 30 September 1999. I am not satisfied that there is any basis in the evidence on which a finding could properly be made that the respondent's decision is disproportionate. On the contrary, I find that the respondent's decision is proportionate to a legitimate aim.

Decision

29. The First-tier Tribunal erred in law and the decision has been set aside. I re-make the decision by dismissing the appeal human rights grounds.

Signed H J E Latter

Date: 21 June 2018

Deputy Upper Tribunal Judge Latter