IN THE UPPER TRIBUNAL

R (on the application of Mehmood Ahmed Raja) v Secretary of State for the Home Department IJR [2015] UKUT 00058 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Field House

Heard: 9 January 2015

Before

UPPER TRIBUNAL JUDGE GILL

Between

THE QUEEN (ON THE APPLICATION OF Mehmood Ahmed Raja) Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Applicant: Mr. M. Karnik, of Counsel, instructed by Ahmad & Williams Solicitors.
For the Respondent: Mr. Z. Malik, of Counsel, instructed by the Treasury Solicitor.

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JUDGMENT
Delivered on 28 January 2015

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Upper Tribunal Judge Gill:

Introduction and background facts:

1. The applicant is a national of Pakistan, born on 21 March 1968. By a decision served on 23 July 2014, Upper Tribunal Judge Freeman granted permission to apply for judicial review of a decision of the respondent of 17 May 2013 (hereafter referred to as the "second decision", for reasons which will become clear) to refuse the applicant's application of 22 August 2011 for leave on the basis of his residence in the United Kingdom since the date of his arrival (said to be 14 January 1997) and Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

2. The Article 8 claim was based on the applicant's relationship with a Ms A, who arrived in the United Kingdom as a Pakistani national in 2003 with her son, S, then aged 9 years. She had claimed asylum on the ground that she was at risk of persecution at the hands of her then husband. She was granted refugee status and is now a British citizen. The applicant and Ms A went through an Islamic marriage on 14 August 2006 and live together with S, now aged 20 years.

3. The issues that arise are whether the respondent has unlawfully considered the applicant's application of 22 August 2011 for leave on the basis of long residence and on the basis of Article 8.

4. The applicant's application of 22 August 2011 was first decided by the respondent in a decision of 17 November 2011 (the "first decision"). The first decision was the subject of a previous claim for judicial review, under ref: CO/2843/2012 (the "previous judicial review claim"). The first decision did not mention the applicant's application on the basis of long residence under the then para 276 of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs"). However, it dealt with the Article 8 claim.

5. Permission was granted in the previous judicial review claim by Mr. John Howell QC, sitting as Deputy High Court Judge, on 17 July 2012. He extended time and said that it was at least arguable that the application for leave on the basis of long residence had not been addressed in the decision letter. In addition, he said that it was at least arguable that the decision maker had failed to address the nature of the Article 8 claim being made because it appeared that he had approached the claim as if it was based on a relationship with an adult child and his surviving parent or other siblings and that this claim should fail because no evidence of special elements of dependency had been provided, whereas the Article 8 claim was based on the applicant's relationship with Ms. A, said to have subsisted since 2006, and evidence had apparently been provided to show that they had lived at the same address since 2008/2009.

6. The parties settled the previous judicial review claim in a consent order signed by the parties on 23 November 2012 and sealed by the Administrative Court on 28 December 2012. This consent order is important because an important ground in the applicant's challenge in the instant claim is that the respondent's agreement in the consent order to reconsider her decision included not only the application for leave on the basis of continuous long residence under para 276 of the IRs and the application for leave as an unmarried partner under para 295D of the IRs but also the Article 8 claim. Further, it is contended that the agreement to consider the applications on the basis of the IRs in force as at 22 August 2011 was not limited to the applications under the IRs but extended to the Article 8 claim. Insofar as relevant, the consent order reads:

> "WE, the solicitors for the Claimant and the solicitors for the Defendant in this matter, agree an Order in the following terms:-
>
> **Upon the Defendant** agreeing to reconsider the Claimant's application for leave to remain dated 22 August 2011, as set out on form FLR(O) on the assumption that the Claimant has applied for leave to remain on the following bases: (i) as the unmarried partner of a person settled in the UK; or (ii) as the unmarried partner of a person who has been granted refugee status in the UK; or (iii) on the basis of continuous

long residence in the UK after allegedly entering the UK on 14 January 1997; and

Upon the Defendant confirming that she will apply the Immigration Rules in force on 22 August 2011

BY CONSENT IT IS ORDERED THAT:

1. This application for judicial review be withdrawn; and
2. There be no order as to costs."

7. Following the consent order, the respondent wrote to the applicant's solicitors a letter dated 9 January 2013 requesting further evidence (A28-30) to which the applicant's solicitors responded by letter dated 5 February 2013 with a list of documents (A25-27).

8. The respondent then made her second decision (mentioned above). This has been supplemented by a decision dated 17 December 2014 (the "third decision") (B47-51) that was made after the applicant submitted further documents which were included in a bundle (bundle B) submitted for the hearing of his renewed application for permission before Judge Freeman.

9. At the hearing on 9 January 2014, I granted the applicant permission to enlarge the grounds of challenge so as to include a challenge to the third decision. Mr. Malik confirmed that there was no prejudice to the respondent in my doing so and that the respondent's detailed grounds of defence had dealt with the applicant's grounds in relation to the third decision.

10. Accordingly, this judicial review claim concerns the second and third decisions.

11. The first four paragraphs of the third decision are important, because the applicant contends that their terms obliged the respondent to consider the further evidence of residence contained in Bundle A in relation to the decision on the application for leave on the basis of long residence, evidence which the applicant contends the respondent had failed to consider.

12. The first four paragraphs of the third decision read:

"On 22 August 2011, Jeya & Co submitted an application on your behalf, for leave to remain in the UK under Article 8 of the European Convention on Human Rights. This application was refused without a right of appeal on 17 November 2011 and after a reconsideration on 07 May 2013 the decision was maintained. You have now requested a Judicial Review of this decision. This letter is supplemental, and should be read in conjunction with the reconsideration of 07 May 2013.

The Secretary of State has concluded in the decision of 07 May 2013 that you do not qualify for leave to remain under the Immigration Rules as in force on 22 August 2011. **The Secretary of State maintains that decision.** For the reasons already given, the Secretary of State is not satisfied that you meet the requirements in paragraphs 295D and 276B of the Immigration Rules as they stood at the time of your application.

Prior to 09 July 2012, any application submitted to the Home Office for leave to remain in the UK on the basis of a claim under Article 8 of the European Convention on Human Rights was considered outside of the Immigration Rules. Your application has moreover been considered independently under Article 8.

> As a result of the changes to the Immigration Rules which came into effect on 09 July 2012, the Secretary of State will consider any Article 8 elements of an applicant's claim to remain in the UK in line with the provisions of Appendix FM (family life) and Rule 276ADE (private life) of the Immigration Rules."
>
> (my emphasis)

The grounds

13. The grounds may be summarised as follows:

14. Ground 1 is that the respondent's consideration of the application on the basis of long residence under para 276 of the Immigration Rules as it existed as at 22 August 2011 was unlawful because she had failed to take into account the evidence of residence in bundle A.

15. Ground 2 is that the respondent's approach in considering the applicant's Article 8 was unlawful, in that, she followed the approach applied in assessing Article 8 claims following the amendments to the IRs effective from 9 July 2012 by HC194. It is contended that this was contrary to her undertaking in the consent order to consider the Article 8 claim "*by applying the IRs in force as at 22 August 2011*". In the alternative, it is contended that the respondent was obliged to follow the approach applied in assessing Article 8 claims prior to 9 July 2012, pursuant to the judgment in Edgehill v Secretary of State for the Home Department [2014] EWCA Civ 402.

16. Ground 3 is that she failed to consider relevant evidence in her assessment of the Article 8 claim and made other errors in her consideration of exceptionality outside the IRs, including the fact that she used the wrong starting point by beginning her assessment of the Article 8 claim with Appendix FM and para 276ADE. In this respect, Mr. Karnik relied upon R (Khairdin) v Secretary of State for the Home Department (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) and R (Adiya) v Secretary of State for the Home Department [2014] EWHC 3919 (Admin).

17. Ground 4 is that she failed to give reasons why she had not exercised her discretion in the applicant's favour to confer a right of appeal against her decision to refuse his application of 22 August 2011.

Assessment

Ground 1

18. The first question is whether the respondent was obliged in the third decision to have taken into account the further evidence of residence that was submitted in bundle A in the period between the second and third decisions. The further evidence relied upon in this respect comprises of the documents in bundle A at pages A64, A65, A67, 72, A72A, 73 and 74 as well as the witness statements, each dated 4 July 2014, from the applicant, Ms. A and her son, at A1-10.

19. Mr Karnik submitted that the obligation arose from the fact that the respondent had stated in her third decision that she "maintained" the second decision on the long residence application.

20. In my judgement, if it was clear from the third decision that the respondent had re-opened the assessment made in her second decision of the long residence application, then the next question for me would have been whether the submission of evidence in bundle A, a bundle served in the judicial review proceedings, fixes the respondent with notice of such evidence. However, this question is irrelevant for reasons I will now explain.

21. It is plain that the respondent did not (in her third decision) re-open the decision on the long residence application. I agree with Mr Malik that, in stating that she was maintaining her decision on the long residence application, she was merely confirming that she was not writing about the decision taken in the second decision on the long residence application. The next sentence, which is underlined in the text quoted at [12], likewise confirmed that she was not writing about the decision that was taken in the second decision on the application for leave as an unmarried partner. The next paragraph of the third decision (the third paragraph quoted above), makes it clear that the purpose of the letter was to inform the applicant that his Article 8 claim had been reconsidered. Read as a whole, it is plain that the second and third paragraphs of the third decision merely informed the applicant that the respondent was only writing to him about his Article 8 claim.

22. Accordingly, the respondent did not overlook relevant evidence when she made her decision on 7 May 2013 on the applicant's long residence application. The further evidence mentioned at [18] above was not before her then.

23. The next argument was that, even if the relevant decision in relation to the long residence application was the second decision, the respondent had overlooked relevant evidence. In this respect, Mr Karnik relied upon the documents in bundle A at A162-166 and the witness statements at A1-10.

24. However, as I have said, the witness statements were submitted after the second decision. As for the documents at A162-A166, it is not clear that these documents were before the respondent when she made her second decision. This is because the cover letter dated 5 February 2013 from the applicant's representatives at A25-27 which accompanied the evidence submitted in response to the respondent's request for further evidence of 9 January 2013, did not mention any document relevant to an assessment of residence that pre-dated 2010. In any event, the earliest document at A162-166 was a P60 for the tax year to 5 April 2007. At most, this only related to residence from April 2006, whereas it was necessary for the applicant to show continuous residence for 14 years prior to his application of 22 August 2011, which means he had to show continuous residence from 21 August 1997. There was no evidence before the respondent when she made her second decision to show that the applicant had entered the United Kingdom on 14 January 1997 as claimed in his application for leave on the basis of long residence.

25. Accordingly, I reject ground 1. As at the date of the decision on the applicant's long residence application (the date of the second decision), the respondent did not overlook any relevant evidence.

Ground 2

26. Ground 2 is that the respondent unlawfully considered the applicant's Article 8 claim following the approach to Article 8 claims since the IRs were amended effective from 9 July 2012 by HC194.

27. I reject the first argument, that the respondent had in the consent order undertaken to reconsider the applicant's Article 8 claim "under the [IRs]". In the first place, the consent order made no mention of Article 8 at all. If the parties had agreed that the Article 8 claim was included within the ambit of the respondent's undertaking, one would expect that Article 8 would have been specifically mentioned in the consent order, especially given that the applicant was represented by solicitors at the time and that he had been granted permission in the previous judicial review claim in terms which included his challenge to the lawfulness of the decision made on his Article 8 claim in the first decision. There is no specific mention of Article 8.

28. Furthermore, prior to 9 July 2012, Article 8 claims were not considered *under the IRs*. Accordingly, if the consent order was intended to include the Article 8 claim, it makes no sense for the consent order to refer only to reconsideration taking place by reference to the IRs.

29. Importantly, it is wholly illogical and irrational to construe the words "*she will apply the [IRs] in force on 22 August 2011*" in the consent order as meaning "*she will apply the jurisprudence for Article 8 claims in force on 22 August 2011*", as this would have meant that she was agreeing to reconsider the Article 8 claim by taking into account all further evidence submitted prior to the date of her reconsideration but applying the jurisprudence as at 22 August 2011.

30. The reality is that, although the applicant was granted permission in the previous judicial review claim which permitted him to challenge the lawfulness of the decision that had been made in the first decision on his Article 8 claim, he entered into a consent order in terms which did not include the Article 8 claim. In other words, he compromised the claim he had against the first decision in relation to Article 8. The consent order therefore brought his Article 8 challenge to an end. The fact that the consent order provides that there be no order for costs further suggests that there had been some compromise on the applicant's part, in agreeing to the consent order.

31. I also reject the second argument, that the respondent was obliged to reconsider the Article 8 claim following the approach prior to 9 July 2012. If the respondent had agreed to reconsider the Article 8 claim in accordance with the approach as at 8 July 2012, one would have expected to see that date in the consent order. It is not mentioned.

32. Edgehill has no application. This is because the applicant made an application for leave on the basis of Article 8 on 22 August 2011. A decision was made on his Article 8 claim in the first decision. Whatever the flaws in that decision, the applicant settled his judicial review challenge to the first decision insofar as the first decision concerned his Article 8 claim in terms which did not include an undertaking to reconsider his Article 8 claim. Accordingly, there was no extant application for leave on the basis of Article 8 as at 8 July 2012. Accordingly, the transitional provisions did not apply.

33. Accordingly, I do not need to resolve inconsistencies said to exist between Edgehill and Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558.

Ground 3

34. Ground 3 concerns the respondent's consideration of Article 8 in the second and third decisions. The third decision provides more detailed reasons than the second decision, although the third decision is stated to be supplementary to the second decision. The second decision did not consider whether there were exceptional circumstances outside the IRs. This was considered in the third decision.

35. For the reasons I have given in relation to ground 2, I reject the argument that the respondent erred in her consideration of the Article 8 claim, in that, she used the wrong starting point by beginning her assessment of the Article 8 claim with Appendix FM and para 276ADE. Accordingly, Khairdin and Adiya are not relevant.

36. The remainder of ground 3 is that the respondent failed to consider relevant evidence in her assessment of the Article 8 claim and made other errors in her consideration of exceptionality outside the IRs.

37. In the third decision, the respondent considered the applicant's private life claim under para 276ADE and his Article 8 claim based in his relationship with Ms. A under Appendix FM. She then considered his Article 8 claim based on his medical condition and his relationship with S outside the IRs, applying her guidance for considering Article 8 claims outside the IRs, which at the relevant date provided, inter alia, that "*exceptional*" means "*circumstances in which the refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the appellant would not be proportionate*".

38. It is contended that the respondent failed to consider relevant evidence as to the following:

    i. Whether Ms A can re-establish herself safely in Pakistan, it being contended that the fact that she visited Pakistan three times does not of itself mean that she will be able to re-establish herself safely in Pakistan, and whether it would be reasonable for her to enjoy family life with the applicant in Pakistan.

    ii. Whether family life is being enjoyed between the applicant and S (who was 20 years old at the date of the third decision), it being contended that the mere fact that he is now an adult does not mean that he no longer enjoys family life with his mother and the applicant. This is because he has always lived with Ms A, he has not established an independent life and he is still dependent on the applicant and Ms A.

    iii. If family life was being enjoyed between the applicant and S, whether it would be reasonable to expect S to return to Pakistan in order to enjoy family life with the applicant.

    iv. Whether the respondent considered the applicant's Article 8 claim based on his medical condition. It is said that the applicant had a liver transplant on 12 January 2013 as a result of Hepatitis B and C and that he needs further and ongoing treatment.

v. In assessing the private life claim under para 276ADE, whether the respondent overlooked the further evidence of residence that had been submitted.

vi. In considering the case outside the IRs, whether the respondent likewise overlooked the additional evidence of residence.

vii. Whether the respondent considered on a cumulative basis all of the relevant circumstances in deciding that there were no "exceptional circumstances" under the terms of her guidance

39. As to v., even if the bundle submitted in these judicial review proceedings fixes the respondent with notice of the documents contained within it, the further evidence of residence still did not enable the applicant to show that he had been in continuous residence for at least 20 years as at the date of the third decision. Thus, any error in overlooking the additional evidence of residence is not material to the decision under paragraph 276ADE.

40. However, as to i., it is plain that the decision maker failed to consider the witness statement of Ms A, where she explained why it would be unsafe for her to return to Pakistan notwithstanding that she visited Pakistan three times. She also explained why it would be unreasonable to expect her to return to Pakistan.

41. As to ii., the witness statements of the applicant, Ms A and her son explained the relationship between the applicant and S and the three of them as a unit. The decision maker appears to have taken the age of 18 years as a bright line beyond which family life is not enjoyed, which is plainly incorrect. There was either a failure to consider the witness statements in assessing whether family life was being enjoyed with S or a failure to explain why the evidence did not show that such family life was being enjoyed.

42. If family life with S was being enjoyed, then it would have been necessary for the decision maker to consider whether it would be reasonable for S to live in Pakistan.

43. Accordingly, I am satisfied that i.-iii. are established. I cannot say that, if the decision maker had not made these errors, the applicant's claim under Appendix FM and under the guidance outside the IRs would necessarily fail, although at the same time, I cannot say that his claim will inevitably succeed.

44. I do not need to decide iv., vi. and vii, given that the relationship with S falls to be considered outside the IRs and that any assessment of whether there are "exceptional circumstances" under the guidance must be made on a cumulative basis, which will include taking into account the period of residence established and any up-to-date evidence of the applicant's medical condition submitted to the respondent, as at date of the decision to be taken.

45. For the above reasons, the third decision is unlawful insofar as it concerns the assessment of the applicant's case under Appendix FM and under the guidance outside the IRs.

Ground 4

46. I reject ground 4, which is that the respondent failed to give reasons why she had not exercised her discretion in the applicant's favour to confer a right of appeal against her decision to refuse his application of 22 August 2011.

47. The respondent is not obliged to make a removal decision of her own volition: Daley Murdock v. SSHD [2011] EWCA Civ 161. She has a Removal Decisions Policy (most recently dated 20 October 2014) which she applies. The applicant has not requested the respondent to make a removal decision under the Removal Decisions Policy.

48. In these circumstances, the respondent had no obligation to make a removal decision or say why she was not making one.

Decision

The third decision is quashed insofar as it concerns the assessment of the applicant's case under Appendix FM and under the guidance outside the IRs.

Signed Date: 28 January 2015
Upper Tribunal Judge Gill