



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/40584/2013

THE IMMIGRATION ACTS

Heard at Field House

On 4 July 2014

Determination

Promulgated

On 08 August 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SUKHVINDER SINGH SIDHU

Respondent

Representation:

For the Appellant: Mr T Wilding

For the Respondent: Mr A Pipe

DETERMINATION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge Trevaskis promulgated on 10 April 2014 in which he allowed the appeal of Mr Sidhu under the Immigration Rules and also under Article 8. For the purposes of continuity I shall refer to Mr Sidhu as the appellant as he was in the Tribunal below.

2. It is unimportant to deal with the facts of this case in any great detail. Suffice it to say that the findings of fact that are to be found in paragraphs 29 to 31 of the determination are not challenged in the grounds of appeal settled by the Secretary of State. The nub and difficulty in the appeal is found in paragraph 32 of the determination.
3. The background to this case is that there had been previous grants of discretionary leave provided to the appellant as a result of a relationship that he had. The marriage, however, broke down and the husband and wife separated. The decree absolute was granted on 4 September 2012. However, the appellant formed a new relationship and it is that new relationship which is the subject of the application made by the appellant that he should be entitled to remain in the United Kingdom. He has been living in the United Kingdom since 1995.
4. In paragraph 32 the judge said:

“The appellant was granted discretionary leave in 2012; according to the IDI transitional arrangements (page 25B appellant’s supplemental bundle) his case will normally continue to be dealt with under the ‘old’ policy, leading to settlement. I find that there is no reason why this appellant’s case should be dealt with in any other way.”
5. Pausing there, there are grave difficulties in the judge’s approach. We do not know what specific arrangements he was referring to save by reference to page 25B in the appellant’s supplemental bundle but it does appear that the document to which he was referring was one which was either not current or did not accurately set out what those transitional arrangements were.
6. Secondly, whilst the judge referred to such case normally being dealt with under the old policy it is quite apparent that an issue as to whether something is normally dealt with under a policy would indicate that there should be defined in the policy exceptional cases which may fall outside it. In this case we simply do not know what the judge had in mind when he said that he sees no reasons why it should not be dealt with in the way cases normally are.
7. It seems to me that the most significant error in this part of the determination is that he must have treated the transition arrangements as providing the appellant with a positive right and that was a positive right that should result in his being granted leave to remain and the parties are agreed that there is no positive right as a result of these transition arrangements. They do not provide rights but they provide the process by which remedies or by which periods of leave should be provided to an individual.
8. As a result of that the judge went on to find that the application had to be considered according to Article 8 outside the Immigration Rules. That thereafter led to the Immigration Judge going on what has been described

as a free-ranging Article 8 application without any reference to applicable Rules or the applicable datum level which is provided by the reference in the current Rules to the public interest. Although there is a reference to Section 276ADE in paragraph 4 of the determination the judge shies away from dealing with it by reference to Appendix FM or paragraph 276ADE because of his thinking. It is accepted that that was wrong.

9. The judge goes on to say that the respondent's decision was not in accordance with the law but does not therefore remake the decision under the Rules as he should do if there had been an obligation under the Rules as he had apparently found that there was.
10. Consequently there are a series of errors in the determination which entirely deprived the appellant of the correct approach to which he was entitled. It is true that his appeal was allowed under Article 8 but only in circumstances that were not permissible under the present regime. His application for leave to remain postdated the introduction of changes into the Immigration Rules and those therefore applied in his case and there will then have to be an examination of his rights under the Immigration Rules as they now stand in relation to Article 8. Thereafter there will then inevitably follow a consideration of whether in the circumstances of the appellant's case there should be a departure from the Immigration Rules by reason of the circumstances that he is able to put forward in his case.
11. Where there has been such a substantial departure from the correct approach to be adopted in this case it is my firm view that both the appellant and the respondent have been deprived of what they each are entitled to receive from the Tribunal, and it is in those circumstances that the decision that I make is not only that there has been an error of law but that the error of law can only be remedied by the case being heard once again by the First-tier Tribunal and suitably guided as to what the course of action should be. The judge who hears the case afresh will be able to approach the case in the correct way.
12. When I say that the case should be heard afresh, as I have already indicated, that does not mean that there should be further findings of fact necessary because those have been adequately made by the judge in paragraphs 29 to 31.

Signed

Date

Upper Tribunal Judge Jordan