



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/22434/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

UPPER JUDGE GLEESON

Between

RAM TOSHA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Zakir Hussain, Counsel instructed by Duncan Lewis Solicitors
(Southall)
For the Respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The applicant, an Indian citizen, appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him leave to remain in the United Kingdom.
2. The appellant arrived in the United Kingdom on 16 April 2000 having travelled from Zimbabwe. He claimed asylum on arrival and was granted temporary admission. His

asylum claim failed on 1 August 2000. He did not appeal the asylum decision but has remained (and worked) unlawfully in the United Kingdom for just over 18 years now.

Background

3. After the failure of the asylum claim in 2000, the appellant did not embark for India. He absconded, failing to report as directed, and working without permission.
4. On 26 September 2006, the appellant was encountered by police and Immigration Officers in Southall, and was identified as a former asylum applicant who appeared on the Secretary of State's records as an absconder with no legal basis to remain in the United Kingdom.
5. On 8 November 2006, the appellant submitted an application for indefinite leave to remain outside the Immigration Rules on the basis of family and private life. The application was initially rejected and resubmitted on 5 December 2006. The initial application was submitted by a firm called Heer Malik both as to the ineffective application and the one which resulted in the Secretary of State's decision. No decision was made on that application until 9 September 2016.
6. During the delay of 10 years by the respondent, the applicant instructed a number of firms of solicitors and made some rather intermittent attempts to find out what the respondent's decision was on his application.
7. Duncan Lewis, who now represent the appellant, were unable to provide a full account of the efforts made by the appellant to pursue his application, which are presumably in the records of the appellant's former firms of solicitors.
8. On 9 September 2016, the respondent refused the appellant's December 2006 application for leave to remain, with an in-country right of appeal, which he exercised. That is the decision which was challenged before First-tier Judge Cohen in February 2018.

First-tier Tribunal decision

9. The First-tier Judge had before her no evidence about the appellant's efforts to pursue this application, save his oral evidence that he had pursued the application with the Home Office 'from time to time'.
10. The First-tier Judge found as a fact that the appellant came to the United Kingdom for economic purposes and did little to chase the Home Office during the ten-year delay. That conclusion is supported by the information in the Secretary of State's records disclosed by Mr Tufan at the Upper Tribunal hearing (see below).
11. The First-tier Tribunal decision continues
"The appellant claims to have provided documents required by the Home Office with previous representatives but has produced no evidence to substantiate that claim which I disbelieve. He did not have an outstanding asylum claim and would

not be able to take advantage of the Legacy Scheme. The majority of his family members remain in India and the appellant is in contact with them. I have addressed the appellant's work activities above and rely on those conclusions. The appellant may equally attend Temple and undertake voluntary activities on return to India. I find that the appellant may use his work experience and experience of living in the United Kingdom in order to assist him in finding suitable employment upon return to India. Furthermore the appellant's sister and brother-in-law have supported his family financially in India and I find that they may equally support the appellant upon return."

That is the extent of the analysis within the determination of Article 8 ECHR outside the Rules.

Permission to appeal

12. The challenge to the First-tier Judge's decision is made on four grounds. The appellant contends that:
 - (1) He was entitled to the benefit of the Immigration Rules as they were before 9 July 2012, by reason of the date when the application was made;
 - (2) It was not open to the First-tier Judge to find as a fact that the appellant made very little effort to chase the Home Office for a decision during the 10-year delay;
 - (3) Having regard to the lengthy delay, and the private life which had arisen during the almost 18 years which the appellant spent in the United Kingdom, the appellant continues to assert that his removal would be disproportionate and therefore unlawful; and
 - (4) The Judge erred in law in failing to consider with Article 8 ECHR within the Rules before moving on to consideration of whether there were any exceptional circumstances for which leave to remain should be given on Article 8 grounds outside the Rules.
13. First-tier Judge Foudy granted permission, principally on the basis of ground (1) above, but all grounds may be argued.

Rule 24 Reply

14. The respondent in his Rule 24 Reply relied on *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74, which held that the *Edgehill* exception applied only to decisions made in a two-month window which ended on 9 September 2012. The respondent therefore contends that he was entitled to apply the Rules as they stood at 9 September 2016, when the contested refusal decision was made.
15. That is the basis on which this appeal came before the Upper Tribunal.

Secretary of State GCID chronology

16. The appellant is unable to say how often he contacted the respondent to seek to progress his application during the 10-year delay between December 2006 and

September 2016. Mr Hussain for the appellant accepts that the appellant did not produce at the First-tier Tribunal hearing any of the solicitors' correspondence from his former solicitors to support his evidence that he did so 'from time to time'. Mr Hussain raised no objection on the appellant's behalf when Mr Tufan offered to clarify what happened, by reference to notes on the respondent's GCID database, which he had available on his laptop at the hearing.

17. The following details emerged from the GCID records:
- (a) Between 2006 and November 2008, nothing seems to have happened.
 - (b) On 6 November 2008, the Secretary of State's records show that there was a complaint of delay to which he responded.
 - (c) On 9 June 2009, the appellant's then solicitors made a request for an update. It is not clear whether a response was provided.
 - (d) On 15 March 2012, 6 years after the original application, London Immigration Solicitors notified the respondent that they were now acting.
 - (e) On 8 March 2016, almost 10 years after the application was made, London Immigration Solicitors asked the respondent if the applicant had a right to work in the United Kingdom.
 - (f) On 8 August 2016, the respondent wrote to London Immigration Solicitors apologising for the long delay in dealing with the application, answering a number of other queries, but not directly answering the question as to whether the applicant was entitled to work.

Discussion

18. I deal first with the *Edgehill/Singh* point. The appellant contends that he was entitled to the benefit of the Immigration Rules as they were before 9 July 2012, by reason of the date when the application was made.
19. That argument was comprehensively rejected by Lord Justice Underhill (with whom Lady Justice Arden and Lord Justice Lewison agreed) at [56] in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 which held that:

"56. The foregoing analysis has regrettably been somewhat dense, but I can summarise my conclusion, and the reasons for it, as follows:

(1) When HC 194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in *Edgehill*, "the implementation provision" set out at para. 7 above displaces the usual *Odelola* principle.

(2) But that position was altered by HC 565 - specifically by the introduction of the new paragraph A277C - with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE-276DH in deciding

private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in *Edgehill* only obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012.

(3) Neither of the decisions with which we are concerned in this case fell within that window. Accordingly the Secretary of State was entitled to apply the new Rules in reaching those decisions.”

The decision in this appeal was not a decision made between 9 July and 6 September 2012, and therefore is not within the *Edgehill* exception, for the reasons set out in subparagraph 56(2) above.

20. For the appellant, Mr Hussain accepted that the present decision, made in 2016, is a non-*Edgehill* decision and thus that the Secretary of State was entitled to make the decision under the Rules as they were in 2016.
21. The second ground requires the Upper Tribunal to reopen a finding of fact, in this case the First-tier Judge’s finding that the appellant made very little effort during the 10-year delay to find out what had happened to his application.
22. The Upper Tribunal may reopen a finding of fact only where it is sufficiently perverse or unreasonable as to amount to an error of law. The circumstances in which a Tribunal may do so were set out in 2005, in the judgment of Lord Justice Brooke (with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed) in *R (Iran) & Ors v Secretary of State for the Home Department [2005]* EWCA Civ 982 (27 July 2005) at [90]. The Upper Tribunal must be satisfied that the finding of fact is perverse, *Wednesbury* unreasonable, not supported by the evidence, incomprehensible or a decision which no reasonable judge could have reached.
23. The only evidence the First-tier Judge had before her was the appellant’s oral evidence that he recalled chasing the decision from time to time; the GCID records bear out his recollection but were not available to the Judge. The Judge had not been greatly impressed by the appellant as a witness, and the finding that he had not made much effort to pursue his application was unarguably open to her on the evidence before her. The appellant’s account is supported by the Secretary of State’s records read to me at the hearing this morning. The appellant has not demonstrated any error of fact in this finding, still less one which meets the high *R (Iran)* error of law threshold.
24. The proportionality challenge is based on the appellant’s private life, accrued while in the United Kingdom unlawfully for the past almost 18 years. Section 117B(4) of Part VA of the Nationality, Immigration and Asylum Act 2002 (as amended) directs judges when dealing with private life which has accrued while a person is in the United Kingdom unlawfully to give little weight to such private life and that is exactly what the judge did.
25. Finally, Mr Hussain asserts that the judge did not take the two stage approach which *Singh* and *EB Kosovo* require and he relies in particular on paragraph 60 of *Singh* in this respect which states that now that Article 8 is brought within the Rules, the correct

approach is to deal first with Article 8 within the Rules and then move on to see whether Article 8 outwith the Rules avails an appellant.

26. The First-tier Judge did exactly that: at [20]-[22] in her decision she considered Article 8 within the Rules, then at [23]-[26] she considered Article 8 outside the Rules, with reference to the judgment of the Court of Appeal in *Agyarko & Ors, R (on the application of) v The Secretary of State for the Home Department* [2015] EWCA Civ 440 (06 May 2015), concluding that no insurmountable obstacles had been shown.
27. At paragraph 27 the judge considered with the public interest in maintaining immigration control. There is no express reference to section 117B, but the Judge clearly had that provision in mind. She concluded that there was a public interest in removing this appellant, who failed to comply with the Rules, worked without permission, and remained unlawfully in the United Kingdom for 18 years.
28. Nothing in the grounds of appeal amounts to a material error of law by the First-tier Tribunal and I dismiss the appeal.

DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand

Signed: *Judith A J C Gleeson*
Upper Judge Gleeson

Date: 15 August 2018