



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23862/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6 September 2018

Decision & Reasons Promulgated
On 27 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

OSMAN KARGBO
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert, instructed by Lighthouse Solicitors
For the Respondent: Ms L Kenny, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the Secretary of State's refusal to grant him further discretionary leave and/or leave to remain on Article 8 grounds within or outwith the Immigration Rules, following a period of discretionary leave of 30 months granted in January 2014, so before the introduction of Part VA into the Nationality, Immigration and Asylum Act 2002 (as amended). The appellant is a citizen of Sierra Leone.
2. The appellant entered the United Kingdom, according to his account, at some time in 2002 and made an asylum claim on 25 August 2002, which was refused on 19 October 2002. He then did not embark or seek to regulate his position for over 7 years, remaining unlawfully in the United Kingdom.

3. On 11 December 2009, the appellant's then representatives made further submissions, which were refused with no right of appeal on 7 January 2011. It is not suggested that the respondent's refusal decision was challenged.
4. The appellant made further submissions again on 8 March 2011, which were refused with no right of appeal on 27 November 2012. By that time, he had been in the United Kingdom without leave for over 10 years.
5. On 20 December 2013, for reasons which are unexplained, the respondent granted the appellant discretionary leave under paragraph 353B of the Rules, until 19 June 2016. It is the respondent's case that the discretionary leave granted in January 2014 was granted in error. No copy of the reasons underlying the discretionary leave, if any were given, is before me or was before the First-tier Tribunal.
6. On 18 May 2016, before the existing discretionary leave expired, the appellant applied on human rights grounds for leave to remain on form FLR(O), seeking an extension of the 30 months' leave previously granted. On 27 September 2016, the respondent refused that application, stating that Sierra Leone is a safe country listed in section 94(4) of the 2002 Act.
7. The respondent concluded that the appellant could not meet the private life requirements of the Rules, and refused the application under paragraph 276CE with reference to paragraph 276ADE(1)(iii), (iv), (v) and (vi) of the Immigration Rules HC 395 (as amended). The respondent found that the appellant, who was over 18, had not shown that there would be very significant obstacles to his reintegration in Sierra Leone and refused to grant any further leave on private life grounds. She also considered whether the application raised any exceptional circumstances under Article 8 ECHR outside the Rules, but considered that there were none and that the appellant should not have had any legitimate expectation of remaining indefinitely in the United Kingdom.
8. The appellant has had no leave since 19 June 2016, but has remained in the United Kingdom without leave for over 2 years since his discretionary leave expired.

First-tier Tribunal decision

9. The appellant had an in-country right of appeal, which he exercised. The respondent was not represented before the First-tier Tribunal. The appeal had previously been adjourned from a date when the cousin attended. On the date of the relisted hearing, the cousin did not attend; the appeal proceeded on the evidence of the appellant alone. There was no application for an adjournment.
10. The First-tier Judge considered the appellant's case under paragraph 276ADE and found that he could not meet the requirements of the Rules.
11. She then considered Article 8 outside the Immigration Rules, accepting that the appellant had shown some evidence of a private life in the United Kingdom set out in letters from his cousin and friends. At [25] of the First-tier Tribunal's decision the judge found that the relationship between the appellant and his cousin in the United

Kingdom was such that there was family life between the two of them. At [29] she went on to determine whether the rights of the appellant outweighed the public interest:

“29. I have to determine whether the rights of the appellant outweigh the public interest. The appellant is now aged 43 years of age and there are no issues surrounding his health. Although he states that he was depressed and had a high temperature when he got the decision, there is no medical evidence that takes the matter further. He is single and has no relationships or children in the United Kingdom. His cousin is his only relative, but they are both adults now. He relies upon her for accommodation and financial assistance because of his immigration status. I find that he can keep in contact by phone, Skype and visits.”

12. There is in the bundle a statement from a person who describes herself as the appellant’s fiancée but apparently, they had already split up in 2015 about three years before the hearing, and were now just friends.
13. The Judge considered section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and found that little weight could be given to the appellant’s private life developed in the United Kingdom, which had all been unlawful, except the 30 months of his discretionary leave, which was precarious. The Judge balanced the rights of the appellant and the public interest and dismissed the appeal.
14. The appellant appealed to the Upper Tribunal.

Grounds of appeal

15. The grounds of appeal identify three errors of law. Firstly, the failure to identify the basis of the previous grant of leave to remain. Secondly, the failure to give adequate weight to evidence of private life ties and thirdly, the failure to correctly assess the proportionality of removal.

Grant of permission

16. Permission was granted by First-tier Judge PJM Hollingworth because:

“...It is arguable that in the light of the factors identified in the permission application, that the proportionality exercise has been affected. It is arguable in the circumstances that a fuller analysis was required in the light of the evidence of the witnesses whose statements appeared in the appellant’s bundle, as referred to in the permission application and in the light of the absence of the closest family member, who had been present at the previous hearing but was not available at the date of hearing before the Judge.”

Rule 24 Reply

17. There was no Rule 24 Reply on behalf of the respondent. That is the basis on which this appeal came before the Upper Tribunal.

Documents before the Upper Tribunal

18. I have seen a copy of the respondent's policy on discretionary leave, in particular at sub-paragraphs 3.4, 3.7, 5 and 7.1 thereof. The governing paragraph dealing with exceptional circumstances is paragraph 3.4:

"3.4 Exceptional circumstances

This applies to asylum and non-asylum cases. A grant of [discretionary leave] may be appropriate following consideration under paragraph 353B of the Immigration Rules. This applies in cases where there are outstanding further submissions to be considered, but also where there are no outstanding further submissions, appeal rights are exhausted and the case is subject to a review at the removals stage. This may include those who have spent a significant period of time in the UK *for reasons beyond their control* after having claimed asylum, though such individuals are expected to provide evidence as to why they cannot leave voluntarily. ..."

[Emphasis added]

19. I have seen a copy of the December 2013 letter confirming the grant of discretionary leave. That letter records only the decision: it states that there was a further letter giving reasons, but the reasons letter is not before me or the First-tier Tribunal. I therefore do not know why discretionary leave was granted, and Ms Kenny has not been able to assist the Tribunal on this point.
20. In his September 2016 refusal letter, the respondent asserts that discretionary leave was granted in December 2013 under paragraph 353B of the Immigration Rules, but no further reasoning is given. The respondent argues now that the grant of discretionary leave did not create any legitimate expectation that the appellant would be allowed to remain indefinitely in the United Kingdom.

Discussion

21. The appellant argues that the Judge's reasoning is materially flawed by her failure to understand correctly the basis on which discretionary leave was granted and the fact that the hearing was adjourned to the detriment of the appellant to a date on which his witnesses were not available. The grounds assert that the First-tier Tribunal erred in not identifying paragraph 353B of the Rules as the source of the discretionary leave grant. It is right that the judgment does not mention paragraph 353B, but this takes matters no further because the question is whether discretionary leave should be renewed, not why it was previously granted.
22. The second question raised in the grounds of appeal relates to the weight given to evidence of private life ties: in applying Section 117B(4) and (5), the First-tier Judge did not err in giving little weight to the appellant's private life ties. The Act requires him to give the private life developed in the United Kingdom 'little weight'.
23. The third question relates to the proportionality of removal. The criticism is that the judge did not set out the full *Razgar* step-by-step approach. The appellant has not explained what in his evidence ought to have led to a different outcome under Article 8 ECHR outside the Rules. In order to succeed under Article 8 outside the Rules now

it is necessary to show exceptional and/or compelling circumstances for which leave to remain ought to be granted.

24. This appellant was legally advised throughout by a series of solicitors' firms. The present firm, Lighthouse Solicitors, were not his representatives at the First-tier Tribunal hearing. There is no suggestion that those who then represented the appellant made any adjournment request to enable the cousin to attend, nor is there any indication what the cousin might have said (given that family life between them as adults was accepted by the Judge), which might have materially affected the outcome of the appeal.
25. The appellant could not reasonably have considered that, when granted a short period of discretionary leave after a long period of overstay, he had a legitimate expectation that further discretionary leave, or some other kind of leave, would be granted. The assessment of whether discretionary leave should be granted falls to be assessed on the date on which the decision is made and not on the basis of the Rules as they previously stood. There is no reasoning in the discretionary leave letter which is produced and the accompanying correspondence referred to in the grant is not before me or the First-tier Tribunal.
26. It may be that in January 2014 before the introduction of the amendment to the 2002 Act, including Section 117B, greater weight was given to the private life which the appellant had accumulated during the 10 years when he had been in the United Kingdom unlawfully or as an asylum claimant. We simply do not know.
27. For all of the above reasons, and on the limited evidence before her, it was unarguably open to the First-tier Judge to make the decision she did. There is no material error of law in her decision and I uphold the decision of the First-tier Tribunal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The decision of the First-tier Tribunal stands.

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

Date: 25 September 2018