



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02634/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 24 September 2014

Determination promulgated
on 25 September 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WEN PING CHEN

Respondent

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr D Stevenson, of McGill & Co, Solicitors

No anonymity order requested or made

DETERMINATION AND REASONS

1. Parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.
2. The appellant applied on 6 July 2012 for indefinite leave to remain, based on his residence in the UK since 3 July 1997. The SSHD refused that application by letter dated 11 December 2013 under the Immigration Rules as amended on 9 July 2012 (the "new Rules"), in particular Appendix FM and paragraph 276ADE.
3. The appellant appealed to the First-tier Tribunal. In his determination promulgated on 6 May 2014, Judge Farrelly held that the appellant's case based on paragraph 276ADE(vi) was misconceived. He then referred to the case law on the criteria for considering Article 8 ECHR outwith the new Rules, and went on to allow the appeal under Article 8.

4. The SSHD appeals to the Upper Tribunal on the grounds that although the judge cited the relevant cases, including *Gulshan* [2013] UKUT 640, he failed to identify arguably good grounds for going outside the Rules, or any compelling circumstances not sufficiently recognised under the Rules. Mrs O'Brien submitted that the case disclosed no significant barriers to the appellant's return, and that his simple presence here for a lengthy period falling short of what the Rules required could not be a reason for going beyond the Rules.
5. Mr Stevenson referred to *Edghill* [2014] EWCA Civ 402. He said that in view of the date of the application leading to these proceedings, the new Rules did not apply. The point had not been taken previously, but, once noticed, the case had to be approached on the correct basis. The judge had therefore been right, even if for the wrong reasons, to look at Article 8 beyond the requirements of the new Rules. The outcome reached on proportionality in that light was open to the judge and showed no legal error.
6. Mr Stevenson was aware of the contrary case of *Haleemudeen* [2014] EWCA Civ 558, but he said that the Court there went wrong at paragraph 25 by thinking that the material date was the date of decision, as in *Odelola* [2009] UKHL 25. That was so in *Odelola*, but not in a case such as this, because there are transitional provisions to the effect that applications made before 9 July 2012 are to be decided in accordance with the Rules in force on 8 July 2012.
7. I do not think that the judge gave any good reason to look outside the new Rules, but that was not the proper question. I found Mr Stevenson's submissions persuasive. The judge was misled by both sides into thinking that the new Rules and the jurisprudence on going beyond them were relevant. Although for the wrong reasons, the judge was right in thinking that a proportionality exercise arose. He was obviously aware of the general public interest in upholding the Rules unless significant factors were to be found on the other side. He did not leave any relevant considerations out of account, nor take into account any irrelevant considerations. It might well be said that the facts show nothing more than might ordinarily be expected in a long residence case falling short of the number of years required, and that the outcome is unusually generous; but the respondent did not argue that the outcome, if a proportionality exercise was properly arrived at, is one which no reasonable judge might have reached.
8. The determination of the First-tier Tribunal shall stand.



24 September 2014
Judge of the Upper Tribunal