



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13067/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30 September 2014

Determination Promulgated
On 3 October 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR KEVIN OKEKE
(No Anonymity Direction Made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Emezio a solicitor from Dylan Conrad Kreolle

For the Respondent: Mr S Walker a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 2 September 1964. He has been given permission to appeal the determination of First-Tier Tribunal Judge Hawden-Beale ("the FTTJ") who dismissed his appeal against the respondent's decision of 19 February 2014 to refuse to grant him indefinite leave to remain in the UK outside the Immigration Rules on human rights grounds under paragraphs 276ADE, 322(1) and Appendix FM of HC 395 and under Article 8 outside the Rules.

2. The respondent was not satisfied that the appellant was seeking leave for a purpose not covered by the Immigration Rules, he did not meet the requirements of paragraph 276ADE Appendix FM in relation to his family or private life and the decision did not breach his rights under Article 8.
3. On 29 June 2004 the appellant arrived in the UK with entry clearance as a student and was granted leave to enter on that basis until 31 October 2007. On 10 October 2007 he submitted an application for further leave to remain as a student which was granted until 31 October 2009. On 30 October 2009 he submitted an application for further leave to remain as a Tier 1 Post Study Worker which was granted until 17 March 2012. On 16 March 2012 he submitted an in time application for further leave to remain as a Tier 4 (General) Student.
4. On 27 March 2012 the respondent wrote to invite the appellant to arrange an appointment to collect his biometric details. On 5 April 2012 the appellant attended an appointment at a Post Office in Golders Green having paid the fee of £19.20. Although the biometric information was successfully collected, there was a technical problem with that data being transferred to the respondent's case working system, the transfer failed and the application was rejected as invalid on 16 June 2012. As a result the appellant had to issue an application for judicial review which was conceded by the respondent leading to a consent order on 19 November 2012.
5. The rejection of his application by the respondent caused difficulties for the appellant who was not able to start the course which he had planned to attend. Furthermore, he could not apply for a course starting in September 2013 because under the Rules he could not make a Tier 4 application more than three months before the start of the course. In the circumstances on 30 March 2013 the appellant applied to vary his application for Tier 4 limited leave as a student to an application for indefinite leave to remain outside the Immigration Rules. He said that in 2014 he would qualify for indefinite leave to remain on the basis of 10 years long residence and that discretion should be exercised in his favour. He asked the respondent to take into account the administrative errors which had caused difficulties not of his making. This was followed by the respondent's decision of 19 February 2014 against which the appellant appealed.
6. The FTTJ heard the appeal on 12 June 2014. Both parties were represented, the appellant by Mr Emezie who appeared before me. The appellant gave oral evidence. The FTTJ concluded that there were not arguably good reasons for granting leave to remain outside the Immigration Rules. The appellant's wife and their two children, all of whom were German citizens, had been living in Germany but had joined the appellant in the UK. The family could go and live in Germany or Nigeria. The appellant could not bring himself within the Article 8 provisions of the Immigration Rules and, applying Gulshan principles (Gulshan v SSHD [2013] UKUT 640 IAC), he had not established that there were compelling circumstances not sufficiently recognised under

those Rules which merited a grant of leave under Article 8. The FTTJ dismissed the appeal both under the Immigration Rules and on human rights grounds. She did not make an anonymity order.

7. The appellant applied for and was granted permission to appeal. The grounds of appeal are lengthy but in essence argue that the FTTJ erred in law in three ways. Firstly, in the light of the respondent's policy guidance she should have concluded that the appellant had completed 10 years continuous lawful residence in the UK whilst awaiting a decision on his application for further leave to remain. Secondly, notwithstanding the evidence before her and her findings in the light of this evidence, she failed to allow the appeal on the basis that the appellant had established that he was a member of the family of an EEA national exercising treaty rights in the UK and that he was entitled to reside here under the provisions of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Thirdly, the finding that the family could continue to live in the UK exercising Treaty rights whilst the appellant was removed to Nigeria was irrational and not open to the FTTJ.
8. Permission was granted on the primary basis that it was arguable that the FTTJ erred in not adequately considering any rights the appellant might have as the family member of an EEA national, although all the grounds could be argued.
9. Since the hearing before the FTTJ the parties had not submitted any further evidence. I have the appellant's bundle which was before the FTTJ.
10. In response to my question, Mr Emezie said that he did argue that the appellant was entitled to succeed under the 2006 Regulations in his submissions to the FTTJ. Whilst he accepted that such submissions were not recorded in the determination he directed my attention to what the judge said in paragraphs 11, 15 and 18 of the determination. He submitted that these provided a clear indication that grounds under the 2006 Regulations were argued and that the FTTJ considered them and made relevant findings. At the hearing the appellant had produced the original German passports issued to his wife and children, her original payslips for employment in this country and other relevant documents copies of which were contained in the appellant's bundle. He submitted that the FTTJ erred in law by failing to reach a final conclusion as to whether the appeal should be allowed or dismissed under the 2006 Regulations.
11. As to the appellant's claim to have achieved 10 years lawful residence in the UK, Mr Emezie submitted that, whilst that period might not have been achieved by the time of the hearing before the FTTJ, it had now been completed. This had happened before the appellant's appeal rights were exhausted.
12. Mr Emezie submitted that the FTTJ made a serious error of law in her conclusion that the appellant could go to Germany with his family or go to

Nigeria with or without them. There were compelling circumstances under Gulshan principles which included his position under the 2006 Regulations. Mr Emezie asked me to find that the FTTJ had erred in law and to set aside the decision. If I was able to allow the appeal on the evidence before me he asked me to remake the decision. If not it would need to go back for rehearing in the First-Tier Tribunal.

13. Mr Walker accepted that in the light of what was said in paragraph 11 the FTTJ did see the appellant's wife's payslips. In reply to my question as to whether what the FTTJ said in paragraph 15 amounted to an acceptance that the appellant was entitled to succeed under the 2006 Regulations, Mr Walker submitted that there was no clear conclusion although he accepted that the finding appeared to lean towards an acceptance of the position put forward by the appellant. He also accepted that these findings should have led to a clear conclusion as to whether the appeal was allowed or dismissed under the 2006 Regulations. Had the FTTJ allowed the appeal under the 2006 Regulations it would probably not have been challenged by the respondent. The findings in relation to the 2006 Regulations should have led to consideration of the appeal both under those Regulations and as to whether the position impacted on the compelling circumstances test in Gulshan.
14. Mr Walker accepted that if I found there were errors of law I could remake the decision without further evidence. Whilst he said that he was not able to formally concede the appeal he accepted that it might well be allowed on the facts found by the FTTJ. He did not wish to make any further submissions as to how the appeal should be determined if I set aside the decision of the FTTJ.
15. In reply to my question and after taking instructions Mr Emezie said that the appellant wish to pursue all his grounds of appeal. I reserved my determination.
16. The respondent did not consider the appellant's application under the 2006 Regulations because at the time of the application and on the information provided by the appellant there was no reason for her to do so. At that stage the appellant had said and the respondent understood the position to be that the appellant's wife and children were living in Germany and he visited them there. I can find no indication that the respondent became aware that the position had changed at any time before the issue of the refusal letter dated 19 February 2014. However, in his grounds of appeal to the First-Tier Tribunal dated 16 April 2014, the appellant stated in paragraph 29 that his wife and children had been living with him in the UK since August 2013 and that this was now their permanent residence. There was no specific reference to grounds of appeal under the 2006 Regulations.
17. Whilst the determination does not record that Mr Emezie argued grounds of appeal under the 2006 Regulations I find that the determination contains sufficient indications that he did so and that these grounds and the evidence

relating to them were considered by the FTTJ. The relevant passages are those in paragraphs 11, 15 and 18 which states;

“11. I heard oral evidence from the appellant who stated that he was aware of the factual background set out in the grounds of appeal and relied upon them. He said that his wife and family had moved to the UK in August 2013 because after his first application had been rejected as invalid and whilst the matter was going through the courts, he could not go to Germany to see them and so his wife decided to move here with the children. She is now a care worker in London and is employed by Professional Recruitment Ltd (payslips for January - April 2014 were seen), the children are now in school in London and they all lived together with the appellant.”

“15... His family are also present here under the 2006 EEA regulations...”

“18... Nor is there any reason why an application for a residence card as the spouse of the German national exercising treaty rights here in the UK could not be made.”

18. The FTTJ correctly stated that she needed to consider the position at the date of the hearing. The appellant’s application was for leave to remain outside the Immigration Rules. Leave under the 2006 Regulations would be leave outside the Immigration Rules. In circumstances where, following the refusal, the appellant found it either difficult or impossible to visit his wife and children in Germany it was not unreasonable for the family to make the decision that she and the children should move here and that they should live together. There was no reason why his wife and children, as German citizens, should not come and live in this country. It was open to the appellant to argue an additional ground of appeal that he was entitled to leave as the spouse of an EEA national exercising Treaty rights under the 2006 Regulations. There is no indication that the Presenting Officer at the hearing before the FTTJ argued otherwise, nor did Mr Walker at the hearing before me.
19. I find that the FTTJ erred in law by failing to reach a conclusion as to whether the appeal should succeed under the 2006 Regulations particularly in the light of her conclusion in paragraph 15 that “his family are also present here under the 2006 EEA regulations”. It was not sufficient to say, in paragraph 18, “nor is there any reason why an application for a residence card as the spouse of a German national exercising treaty rights here in the UK could not be made”.
20. I find that the FTTJ erred in law in reaching the conclusion that there were not arguably good reasons for granting leave to remain outside the Rules. The finding that the appellant and his family were present here under the 2006 Regulations was an important factor which should have been considered in relation to this question and the question of whether there were compelling circumstances not sufficiently recognised under the Rules which merited the grants of leave to remain under Article 8. It was not correct to state, in paragraph 17, that the appellant’s reasonable expectations on the conclusion of his studies were limited to going to live with his wife and children in

Germany or returning to Nigeria. Because they are German citizens another reasonable and permissible option would be for them to exercise Treaty rights and come and live with him here, which is what has happened. I am not persuaded by the FTTJ's argument in paragraph 17 in relation to the best interests of the children which appears to be that if their lives have been disturbed once by uprooting them and moving them from Germany to England there is no reason why it should have not happen again by moving them to Nigeria.

21. I find that the FTTJ did not err in law in her conclusion that the appellant had not achieved 10 years continuous lawful residence in the UK. I cannot fault the reasoning set out in paragraph 14 which led to the conclusion that the appellant failed because he was still short of the 10 year period at the date of the hearing. I can only consider the submission that 10 years has been achieved by the date of the hearing before if I set aside and remake the decision. Otherwise I must consider the position as it was at the date of the hearing before the FTTJ.
22. Having found that the FTTJ erred in law I set aside the decision which I conclude can be remade without hearing further evidence. The findings of fact made by the FTTJ are preserved. Mr Emezie made his submissions in relation to both the questions of errors of law and remaking the decision. Mr Walker indicated that he did not wish to make any submissions in relation to remaking the decision.
23. I find that the FTTJ's conclusion that "his family are also present here under the 2006 EEA regulations" when read with the evidence leading up to this set out in paragraph 11 is a sufficiently clear finding that the appellant has established that he is married to and living with an EU citizen who is present in this country and exercising Treaty rights as a worker so that he is entitled to a residence permit under the 2006 Regulations. The appeal is allowed on this basis.
24. I find that the appellant has established that he has achieved 10 years lawful residence in the UK by the date of the hearing before me on 30 September 2014. The period commenced on 29 June 2004. The reasons for refusal letter dated 19 February 2014 does not indicate that there are any contra indications under paragraph 276B of the Immigration Rules apart from the period which had not been achieved by the date of that letter. The respondent's public's policy "Guidance - Long residence and private life - Version 11.0" valid from 11 November 2013 indicates that the periods which the appellant has spent awaiting a decision on his application and on his appeal count as lawful residence. It was not possible for the appellant to submit a further application whilst the decision on his application or the appeal against the refusal were pending. I allow the appellant's appeal on the basis of long residence under paragraph 276B of the Immigration Rules.

25. As the appellant's appeal has been allowed both on the basis of the 2006 Regulations and 10 years lawful residence it is not necessary for me to reach a fully reasoned conclusion as to whether it would succeed on Article 8 human rights grounds. However, had it been necessary for me to do so I would have concluded that this is a case where Gulshan principles apply. In relation to the first test there are arguably good grounds for granting leave to remain outside the Rules largely but not wholly as a result of my conclusions in relation to long residence and the 2006 Regulations. In relation to the second test I would have found that there were compelling circumstances not sufficiently recognised under the Rules.
26. The FTTJ did not make an anonymity direction and I have not been asked to do so. I can see no good reason for such a direction.
27. Having found that the FTTJ erred in law and set aside her decision I remake the decision by allowing the appellant's appeal on the basis of long residence under paragraph 276B of the Immigration Rules and under the 2006 Regulations.

.....
Signed
Upper Tribunal Judge Moulden

Date 1 October 2014