



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

Appeal Number: IA/22236/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court
On 7th October 2014
Prepared 8th October 2014

Determination Promulgated
On 11th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

GURMAIL SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Jaffar (Solicitor, Mayfair Solicitors)
For the Respondent: Mr N Smart (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant entered the UK in 2002. In 2005 he made an application to remain on the basis of marriage, that application was dealt with in 2009 when he was granted Discretionary leave until June 2012. In May 2012 he applied for an extension which was refused in June 2012. The Appellant's appeal was heard by First-Tier Tribunal Judge Ferguson on the 11th of October 2013 and allowed to the extent that he found that there was no lawful decision and remitted the case to the Secretary of state to make a decision. This is considered further below.
2. The Secretary of State challenged that decision in the Upper Tribunal. That application was considered by Deputy Upper Tribunal Judge Robertson on the 28th of January 2014. In a

determination of the 12th of February she found that Judge Ferguson had erred and that the case was to be remitted to the First-tier tribunal for a decision on the Appellant's article 8 claim.

3. The case then came before First-Tier Tribunal Judge Pirotta at Birmingham on 29th of April 2014. In a determination promulgated on the 16th of May 2014 she dismissed the appeal finding that the Appellant had not shown that he benefited from a Home Office policy and that his removal was proportionate under article 8.
4. The Appellant sought permission to appeal to the Upper Tribunal in grounds of the 25th of May 2014. The grounds refer to paragraph 134 of the Statement of Changes in HC194 and to paragraph 134 in particular. The argument being that the Appellant having applied before the 9th of July 2012 he was entitled to have his circumstances considered under the Discretionary Leave Policy that applied on the 8th of July 2014. It was also argued that the Judge erred in appearing to apply the new Immigration Rules to the Appellant's article 8 claim, considered irrelevant matters and erred in the approach to article 8.
5. Permission was granted by Judge Kamara on the 6th of June 2014. In doing so the Judge suggested that Judge Pirotta had arguably erred in failing to apply and consider the case of EB Kosovo [2008] UKHL 41.
6. At the hearing Mr Smart on behalf of the Home office provided a copy of the Immigration Directorate Instructions for Family Members under Appendix FM of the Immigration Rules Chapter 8 Transitional Provisions dated April 2013. The relevant part of this document is part 2.3 starting on page 5. The submissions of the representatives are set out in the Record of Proceedings and referred to where relevant below.
7. When the Appellant first applied for leave to remain on the basis of his marriage in 2005 there was a delay in the consideration of his application by the Secretary of State and in 2009 he was granted Discretionary Leave until 2012, this was on the basis that at the time he was married. His application for an extension pre-dated the significant rule changes introduced from the 9th of July 2012 and so was potentially subject to transitional provisions. Being an application for Discretionary Leave it was an application outside the rules and subject to any policies issued by the Secretary of State.
8. Under Odelola [2008] EWCA Civ 308 the general rule is that applications are to be dealt with under the rules that are in force at the date a decision is made. In relation to applications under the Immigration Rules made before the 9th of July 2012 transitional provisions apply. These are that such applications are to be considered under the rules that applied on the 8th of July 2012.
9. However no such transitional provisions apply to article 8 which is covered by paragraph 400 of the Immigration Rules. This rule allows the Secretary of State to require a separate private or family life application to be made and requires consideration of a claim that removal would be in breach of an applicant's article 8 rights that claim to be assessed against the provisions of Appendix FM and paragraph 276ADE. Paragraph 400 came into force on the 9th of July 2012 and is *not* subject to transitional provisions; it applies to all cases where article 8 is considered outside the rules after that date.
10. The above approach is confirmed by the Court of Appeal cases of Edgehill [2014] EWCA Civ 402 and Haleemudeen [2014] EWCA Civ 558. Edgehill confirms that the transitional provisions mean that applications made before the 9th of July 2012 are to be considered under the Immigration Rules that were in force on the 8th of July 2012. Haleemudeen confirms that

article 8 considerations are to be assessed against the provisions of paragraph 276ADE and Appendix FM although there is no reference to paragraph 400 of the Immigration Rules.

11. It is trite law that article 8 is not a stand alone right or a by pass to the Immigration Rules and the fact that a person cannot meet the provisions of the Immigration Rules does not improve or enhance an article 8 claim. It is only if the rules are not a complete code and there are compelling circumstances justifying consideration outside the rules that article 8 arises. If article 8 does arise outside the rules it is only if the result is unjustifiably harsh that an individual can succeed.
12. In neither the determination of Judge Ferguson nor that of Judge Pirotta are the provisions of the policy that applied to Discretionary Leave applications set out; it appears that neither Judge was provided with a copy of the underlying policy. Judge Pirotta noted at paragraphs 25 to 29 that the Appellant had not provided a copy of the policy despite directions being made that he should and the time that had been available.
13. In the grounds of application for permission to appeal to the Upper Tribunal the Appellant's Representative quoted from paragraph 134 of HC194. However those transitional provisions have been superseded by the terms of the 2.3 in the April 2013 IDIs. The significant difference between the 2 versions is that the April 2013 version provides that the old Discretionary Leave policy will apply "provided they continue to qualify for leave *and* [my emphasis] their circumstances have not changed ...".
14. In Judge Ferguson's determination at paragraph 18 he referred to paragraph 134 of HC 194 but not to the applicable IDIs. At 19 he referred to the Refusal letter and the reason given that the Appellant's marriage was no longer subsisting. For reasons that were not his fault Judge Ferguson erred as he had not had his attention drawn to the correct transitional provisions and as the Appellant's circumstances had changed with the breakdown of his marriage the underlying policy relating to Discretionary Leave did not apply to his circumstances. Accordingly Judge Robertson was right to find that Judge Ferguson ought to have considered the Appellant's circumstances under article 8.
15. So far as Judge Pirotta was concerned she did not err in her approach to the policies involved. She had not been provided with a copy of the underlying policy and was entitled to find that the Appellant had not discharged the burden of proof that required him to prove that which he asserted. In any event reference to the correct transitional provisions shows that the policy did not apply.
16. So far as an assessment under article 8 was concerned, following Haleemuden and paragraph 400 of the Immigration Rules, that had to be undertaken with reference to any relevant parts of Appendix FM and paragraph 276ADE. The Appellant's circumstances were analysed fully by Judge Pirotta who considered the length of time he had spent in the UK and the life that he had established here against his history in India and the connections he had there.
17. The point raised about EB (Kosovo) is misconceived. Delay by the Secretary of State in making a decision does not give rise to any rights as such, delay gives an applicant more time in which to establish themselves in the UK and it is those connections that have to be assessed in an article 8 evaluation. So far as private life is concerned the ambit of article 8 has been limited by the decision in Patel [2013] UKSC 72 from which it is to be seen as limited to cases involving the physical and moral integrity of the individual.

18. Applying the relevant principles Judge Pirotta was right to dismiss the Appellant's appeal under article 8. The determination is properly reasoned and contains no error of law in relating to either the Appellant's failure to demonstrate that he was entitled to benefit under a policy outside the Immigration Rules or under article 8.
19. In summary the Appellant was not entitled to benefit from the Discretionary Leave policy as his circumstances had changed by the time the decision was made and the IDIs that applied then disapplied the underlying policy. Judge Ferguson was wrong to consider that the policy applied. In any event the burden was on the Appellant to show that he benefited from the policy and had failed to provide relevant evidence to Judge Pirotta was entitled to find that he had not discharged the burden of proof. The Appellant's claim under article 8 was properly considered and dismissed applying the relevant Immigration Rules and case law.

CONCLUSIONS

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

I do not set aside the decision.

Anonymity

The First-Tier Tribunal made/did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing the appeal I make no fee award.

Signed

Deputy Judge of the Upper Tribunal (IAC)

Dated 9th October 2014