IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43079/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30th October 2014	**On 12th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

ZVIAD SHESHABERIDZE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Harris of Counsel instructed by Farani.Javid. Taylor Solicitors
For the Respondent: Mr S Kandola, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission a decision of the First-tier Tribunal, Judge Britton, promulgated on 3rd June 2014, in which the Tribunal dismissed the Appellant's appeal brought against a refusal of an application for further leave to remain outside the Immigration Rules. The judge took into account that the application was Georgian national who had entered the UK on 22nd September 2003 on a student visa which was extended until 7th October. His application for further leave to remain outside of the Rules was made on 5th October 2012, i.e. in time, and it was

made on the basis of his relationships with his partner, a Russian national whose visa had expired in 2008, and their Russian citizen child David born in the United Kingdom on 25th February 2005, and also a Russian national. However the Respondent refused the application reasoning that the Appellant did not meet any of the requirements of the Immigration Rules and that the decision was proportionate taking into account the family circumstances including the best interests of the child, David.

2. The Appellant appealed on the basis that the Respondent's decision of 26th September 2013 was contrary to the Immigration Rules and law, failing to take into account that the Appellant had completed ten years' continuous lawful residence in the United Kingdom (paragraph 2 refers). In the context of human rights the Appellant's son was 8 years old so that the decision was contrary to the family's Article 8 rights and argued that discretion under the Immigration Rules should have been exercised differently.

3. Permission was granted on renewal by Upper Tribunal Judge Pitt who found merit in the proposition made in the grounds that as at the date of decision the Appellant had been in the United Kingdom lawfully as a student for over ten years. Further that the assumptions made by the First-tier Tribunal judge concerning the child's ability to adapt to living in Russia or Georgia and inclusion at paragraph 21 of the assessment of the child's best interests comments on the parents' failure to prepare him for return to those countries, were arguably in error. The grant of permission pointed out that the challenge to the judge's failure to pay regard to the case of Zoumbas [2013] UKSC 74 is misconceived as the judge referred to it in turn at [24].

4. In a Rule 24 response the Respondent pointed out that no application had been made in respect of paragraph 276B and that there had been no reliance on the same in the Grounds of Appeal or before the judge.

5. At the hearing before me the matter proceeded on the basis of submissions. Mr Harris pursued the Appellant's challenge on two grounds:

   (a) Firstly although the Appellant had not made an application under 276B, it being apparent that he did not have ten years' residence as at the date of application in October 2012, he had raised the issue in the Grounds of Appeal. The ground had merit and required determination. In the event that the issue could not succeed under the Immigration Rules it was a matter which should have been weighed positively for the Appellant in the Article 8 balancing exercise. In that regard it was pertinent that the judge, although having identified correctly the date of the Appellant's entry as 22nd September 2003, then mistakenly went on at [25] to state that he had taken into consideration that the Appellant "had not been in this country for ten years". In this context there being no requirement to have obtained the requisite period of ten years' lawful residence as at the date of application laid out in the Rule, and the relevant date for

the assessment of the satisfaction of the Rule in an in-country appeal was the date of hearing. Further in the context of the calculation of the period of lawful residence the matter was not adversely impacted by the earlier expiry of leave, section 3C leave under the 1971 Immigration Act is lawful leave, and counts towards the ten year period. Had the judge recognised that the ten year marker had been reached it may have occurred to him to consider whether or not, as at the date of hearing the Appellant met the requirements of the long residence Immigration Rules, in the context of further leave to remain under 276A, if not indefinite leave under 276B. A failure to recognise an entitlement to remain vitiated the Article 8 consideration.

(b) The judge's assessment of the best interests of the Appellant's child affected by the immigration decision was flawed. The matter was set out at paragraphs [20] to [21]. The judge accepted that the Appellant's son David had been in the United Kingdom for over seven years, the child was 9 as at the date of hearing in May 2014 and had been born here in 2005. The judge correctly states that his starting point is that it is in the best interests of children to be with their parents. However the judge does not specifically consider the issue of where he should be with his parents. That requires an assessment of the child's own private life and ties to the United Kingdom in the context of the length of residence. The relevant case of Azimi-Moayed & Others (decisions affecting children: onward appeals) [2013] UKUT 197 (IAC) states in its head note at (ii) and (iii) matters the judge should take into account to the point that the child's position can be such that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary, the social cultural and educational ties developed over the period of time in the United Kingdom. Whilst the judge was entitled to look at the questions of adaptability on return to Georgia or Russia the issue is not necessarily determinative when taking into account the ties developed in the United Kingdom. The judge does not appear to have reached a conclusion as to the best interests of the child in the context of his own cultural identity or ties here with reference to the issue as to whether he should remain in the United Kingdom or relocate. At paragraph 21 there is also a criticism of the parents. One has to ask why it is there. It must be relevant because it is included and the judge appears to hold it against the child. The case of Zoumbas, which the judge sets out over the page in his determination points out that it is an error of approach to blame a child for matters for which he is not responsible such as the conduct of the parent.

6. Mr Kandola for the Respondent relied on the Rule 24 response to the point that the Appellant had not made an application for long residence either prior to the decision nor in a Section 120 notice following. Sop that the issue was simply not before the judge. The only application in respect of long residence is that for indefinite leave to remain, i.e. 276B, and it is conceded that the Appellant could not in any event meet those requirements because he did not have the English language competency.

The suggestion that he could nonetheless be granted leave in line with 276A(2) referred to an entirely different provision and was a gloss on the case made for the first time in the oral submissions before me.

7. Turning to the issue of Article 8 the judge had correctly self-directed referring to EA (Article 8 – best interests of child (Nigeria)) [2011] UKUT 00315 (IAC).

8. The judge had had regard to the length of residence and the evidence of the appeal and he was not required to do anymore. He invited me to find that there was no error of law and dismissed the appeal.

My Consideration

9. In terms of the long residence aspect of the appeal I find that there is merit in the grounds as identified in the grant of permission. The issue was live before the First-tier Tribunal Judge as a result of the reference to it in the Grounds of Appeal. The grounds asserted that the Appellant had gained ten years' lawful residence as a student; the chronology reveals that although that was not the case at application it was the position by the date of decision. The judge's assessment of the length of residence is problematic for the reasons set out in Mr Harris' submission. It is not clear what the judge meant when he said that he took account of the fact that the Appellant did not have 10 years residence. It may be a reference to the date of application. It may be that it was a mistake about the calculation of time to the date of decision and hearing or an error as to the import of the latter position.

10. The Appellant arrived on 22nd September 2003 with leave and he then embarked on a period of "lawful residence" in the context of Immigration Rules, HC 395, as amended at paragraph 276A(b) which states that to count as lawful residence for the purposes of 276B it must -

> "(b) 'lawful residence' means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain, or
>
> (ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or
>
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

11. The Appellant's leave expired on 7th October 2012. Before that date he made an application for leave pursuant to Article 8 ECHR. At the time of his application he did not have 10 years continuous lawful residence to found an application under Rule 276. However once his in time application was made his existing leave continued as the result of Section 3C statutory leave, pursuant to the Immigration Act 1971. Section 3C leave is

lawful. The Respondent's Long residence and private Life guidance reminds her officers that section 3C leave is lawful and that it is to be counted in a length of residence calculation.

12. The date of the Respondent's decision is 26 September 2013 i.e. a few days after the Appellant had been here for 10 years. Although the Respondent did not have a rules based application in front of her because the Appellant had not applied to vary his application before her decision, and the grounds of appeal did not raise a rules based challenge, the question of what the Appellant's position is under the rules remained pertinent to the judge's Article 8 consideration because, in terms of the public interest, if an Appellant has a basis to remain under the rules, what is the public interest in removal?

13. It is a Robinson obvious point because it is a point that materially affects a Treaty obligation of the UK and it is a point, once made, with obvious merit. That it was not raised before the First-tier judge in terms may explain why he did not take it into account, but is not sufficient, as submitted by Mr. Kandola, to save the decision. Nor does the fact that the Rules at 276A sets out a basis for granting limited leave on the satisfaction of a lesser basis than that set out for the application made because the only application available is for the larger grant of indefinite leave, deprive the point of merit.

14. I find that the rest of Mr Harris's submissions add nothing to the point above because they do not establish any separate error of law. If the parents had no rules based entitlement to be here then the judge's best interests consideration and overall conclusions are in accordance with the recent jurisprudence set out at EV (Philippines) & Others v SSHD [2014] EWCA Civ 874.

15. It follows that for the reasons above I find that the First-tier tribunal decision is vitiated by a material error of law and I set it aside. I find that on the evidence as it was before the First –tier, taking account of the length of lawful residence of the first Appellant, the best interests of the child, the strength and character of family and private life here, and the limited public interest in removing someone with an entitlement to be here under the Immigration rules in the event of having made a rules based application, I remake the decision, and allow the Appellants' appeals on Article 8 grounds.

Decision

16. The decision of the First-tier Tribunal is set aside and I remake the decision allowing the Appellants' appeals on Article 8 grounds.

Signed Date **11th December 2014**

Deputy Upper Tribunal Judge Davidge