IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08780/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR PHILIP BOAMAH FORDWDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss N Nnamani (Counsel)
For the Respondent: Miss A Everett (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Dean promulgated on 2nd March 2015, following a hearing at Taylor House on 20th February 2015. In the determination, the judge dismissed the appeal of Philip Boamah Fordwdo. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Ghana, who was born on 16th February 1964. He appealed against the decision of the Respondent Secretary of State dated 29th January 2014 refusing him further leave to remain in the UK as a Tier 5 Temporary Worker (Religious Worker) Migrant.

3. The Respondent rejected the claim for two reasons. First, that the Appellant did not meet the requirements of paragraph 245ZX(B)(C) in that the Appellant did not claim any points for a certificate of Sponsorship and he did not possess a certificate of Sponsorship from a recognised Sponsor. Second, as far as paragraph 276ADE of Appendix FM was concerned, he had a wife and child living in Ghana and could not qualify in terms of Article 8 rights in this country.

The Appellant's Claim

4. The Appellant's claim is that he has been in the UK for ten years having arrived on 3rd November 2004, so that by 5th November 2014, he had already completed ten years in the UK. He had been granted leave to remain as a work permit holder until 10th June 2009 when he first arrived on 3rd November 2004. Thereafter, there was considerable delay in this various applications being properly considered by the Respondent Secretary of State.

The Judge's Findings

5. The judge had an application before him to vary Grounds of Appeal to include the ten year rule, but refused to do so, holding that, although the Appellant had entered the UK in 2004, in order to make a successful application he would need to demonstrate to the required standard that he had at least ten years' continuous lawful residence in the UK. The present forum was not one where such an application could be properly be determined. Second, the Respondent had not made a decision on the basis of the ten year rule and therefore no decision under the ten year rule existed against which he could appeal.

6. The judge went on to consider that the Appellant was 51 years old, came to the UK in 2004, but did not meet the requirements of paragraph 276ADE(iii) to (vi).

7. The judge went on to consider Article 8 and referred to the decision in **Razgar [2004] UKHL 27**. He went on to state that the Appellant did have an established private life in the UK, but that private life was established in the knowledge that he had only a temporary basis of stay in this country. The passage of more time does not create a legitimate expectation that further leave would be granted, the judge held (see paragraph 22). In addition, the Appellant's private life amounted to nothing more than ordinary day-to-day life, friendships, and employment (paragraph 24).

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the Appellant should have been granted leave to amend his grounds of appeal to enable him to rely on the ten years' lawful residence rule, so that he could meet paragraph 276B of HC 395. The Grounds of Appeal did not assert that the Appellant met the requirements of paragraph 245ZQ(B)(C).

10. On 7th July 2015, permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge did not, in reaching his decision on proportionality of removal, consider the lawfulness or otherwise of the Appellant's stay in the UK.

11. On 14th August 2015, a Rule 24 response was entered on the basis that the Respondent did not oppose the Appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider the proportionality of removal, the lawfulness or otherwise of the Appellant's stay in the UK, to be assessed as well.

Submissions

12. At the hearing before me on 27th November 2015, Miss Nnamani, appearing as Counsel on behalf of the Appellant, submitted that the Rule 24 response by the Respondent Secretary of State did not oppose the application for permission to appeal, which was now conceded, and so the only issue for this Tribunal was that of proportionality. However, she also submitted that it was important for the other grounds to be argued as well, as her application by fax of 24th November 2014, sought out to emphasise once again. This is because this case had a long history and there had been considerable delay, and the Appellant had satisfied the ten year rule, so that Article 8 considerations should not be excluded from the final decision.

13. Miss Everett, appearing on behalf of the Respondent submitted that the Upper Tribunal in granting permission had expressly excluded the consideration of other grounds. Furthermore, the First-tier Tribunal Judge did have the same application to consider at paragraph 9 of the determination, and decided (at paragraph 10) that he would not be granting permission to amend the grounds so as to include the other matters. That determination by the judge at the First-tier Tribunal level had been upheld by UTJ Coker in the Upper Tribunal, so that it was affirmed that no other grounds were to be considered now except the ten year rule.

14. I ruled that permission to include the other grounds would not be granted as no convincing case had been made out in circumstances where UTJ Coker had already determined that permission was granted solely on the

basis of considering the proportionality of removal. Furthermore, as UTJ Coker made clear, Judge Dean had refused permission to amend the Grounds of Appeal on the basis expressly that the decision subject of appeal before him was an appeal against a decision to refuse him a Tier 5 visa. There had been no application for leave to remain on the basis of ten years' lawful residence. There was accordingly no decision with respect to that matter by the Respondent Home Office that could properly be appealed. In any event, at the date of the decision, which was the subject of the appeal, the Appellant had not accrued ten years' lawful residence. The date of the decision was 29th January 2014. The Appellant only accrued ten years' residence on 5th November 2014.

Remaking the Decision

15. The sole issue before this Tribunal, with an error of law finding already having been made by UTJ Coker on 7th July 2015, is the asserted failure of the First-tier Tribunal Judge to factor into his assessment the claimed lawfulness of the Appellant's residence at the date of the hearing. I find that the judge did not, in reaching his decision on the proportionality of removal, consider the lawfulness or otherwise of the Appellant's stay in the UK. The grant of permission goes on to say (see paragraph 2) that, "the parties are reminded that if the decision is set aside it is likely that this appeal will be re-determined on the basis of submissions only".

16. I heard little by way of submissions from Miss Nnamani about the lawfulness of the Appellant's residence at the date of the hearing. Instead, the submissions were largely confined to attempting to reopen the consideration of the ten year lawful residence point, with respect to which no application had been made before the Respondent Secretary of State, and no decision from that authority.

17. What appears clear, however, is that the Appellant entered the UK lawfully on 3rd November 2004 as a work permit holder, and was granted various extensions of leave to remain, right the way through until 10th June 2009. His final application on 25th August 2009 was then refused, when he applied to remain as a Tier 5 Religious Migrant. Despite that refusal in 2009, however, the Appellant had remained lawfully in the UK pending the outcome of his appeal, by virtue of Section 3C of the Immigration Act 1971, because leave was granted pending the outcome of his appeal. The Appellant, accordingly, had ten years of lawful residence in this country. An application for ten years' lawful residence, however, has not, as has repeatedly been stated, been made.

18. Instead, what is in issue here is whether the Appellant met paragraph 276B of the Immigration Rules, because this was the application that the Respondent Secretary of State had been considering all along. The Appellant's original Grounds of Appeal before the First-tier Tribunal, prepared by Samuel Louis Solicitors has very little to say about the Appellant's Article 8 rights in the UK. The refusal letter of 29th January 2014, had already emphasised that the Appellant's wife and child were in

Ghana and that the Appellant's representative's correspondence "does not elaborate on the family relationship;" and that, "although your sister-in-law writes of regular contact with you, there is no information about your brother or any extended family life". The judge had clearly found that the Appellant had "established a private life during his time in this country and that his proposed removal will interfere with that private life" (see paragraph 21).

19. Given that the judge had referred to a consideration of the "**Razgar** principles" (see paragraph 19), it is clear that the first and second steps of Lord Bingham's tabulation in **Razgar** (see paragraph 17) had been found in favour of the Appellant. The remaining questions were in relation to the issues of legitimacy, necessity, and fairness or proportionality or reasonableness. These remaining issues were encapsulated by the remaining three steps in Lord Bingham's tabulation. If the first and second step was resolved in favour of the Appellant, the third step was whether the interference was in accordance with the law. There is here no burden on the Appellant or on the Secretary of State. The determination of this question is a simple factual question. The interference was plainly in accordance with the law.

20. However, in relation to the fourth and fifth steps, which dealt with the issue of necessity, and the issue of fairness/proportionality/reasonableness, which was the last step, the judge's failure to consider the impact of the ten years' lawful residence in this country, in relation to the proportionality of removal, is such that the decision must be set aside.

21. In considering whether steps four and five of the **Razgar** tabulation fall to be determined in favour of the Appellant, I conclude that the decision was neither necessary in a democratic society in the interests of the economic wellbeing of the country or for the protection of the rights and freedoms of others, nor was it proportionate. This is because the Appellant had lived lawfully for ten years in the UK. It is true that the Appellant does not refer, in terms of his private life rights in the UK, to more than ordinary day-to-day friendships, and employment. However, the First-tier Tribunal Judge had made a clear finding of facts (at paragraph 21) that the Appellant's removal would interfere with the established private life that he did have in this country.

22. It is incorrect to say that that private life can simply be swept aside because it has "been established in the knowledge that he has been here on a temporary basis throughout his time in this country" (see paragraph 21). If that were to be the case, no Article 8 application would ever succeed. Article 8 applications arise with most force when the Immigration Rules cannot be complied with. Accordingly, the interference here is not proportionate to the legitimate public end that is sought to be achieved because the Appellant has been in the UK lawfully, has been in lawful employment, and does have friends, as has been accepted. His

wife and child may be in Ghana, but his claim is in relation to his "private life" and not in relation to his "family life".

23. The only issue that can militate against his claim in these circumstances is the public interest considerations under Section 117B, but his residence in this country has not been "precarious" because he has been here with lawful permission and has accumulated a specific number of years in this country, which had a formal application been made to the Respondent Secretary of State on that basis, would have entitled him to a consideration of leave to remain in this country on the basis of the so-called "ten year rule".

24. The fact that this is so, cannot be an irrelevant consideration as far as the Article 8 evaluative exercise is concerned. Accordingly, I find that the balance of considerations fall to be determined in favour of the Appellant and this appeal is allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law so that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th December 2015