Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32157/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 June 2017	**On 21st June 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHELDON DALE DUNKLEY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr S Cantor, Counsel, instructed by Farani-Javid-Taylor Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (appellant) against the decision of Judge of the First-tier Tribunal Abrese (FtJ), promulgated on 17 November 2016, allowing the respondent's appeal against the appellant's refusal, dated 16 September 2015, of his human rights claim made on 22 January 2015.

Background

2. It is pertinent to note at the outset that the FtJ made a number of unchallenged findings in regard to the respondent's immigration history. The respondent is a national of Jamaica, date of birth 2 February 1979. He entered the UK on 26 June 1998 and was granted further leave to remain valid until 30 September 1999 as a student. The respondent maintains, and the FtJ found as a fact, that he submitted an application for further leave to remain order to continue his studies. He did not hear from the appellant and became concerned as his passport was retained by the appellant and the respondent needed it to attend a trip to Barcelona as part of his course. When he finally managed to speak to somebody at the Home Office in 2000 the respondent was informed that he was now an overstayer and that his file had been closed since September 1999. The respondent sent in a letter of complaint and, whilst waiting for a response, enrolled at another college. Despite writing to the appellant on numerous occasions, confirmed by reference to the correspondence covering the period 1998 to 2008 contained in his bundle before the First-tier Tribunal and identified by the FtJ at [29] to [33] of his decision, there appears to have been no adequate response by the appellant.

3. Eventually in September 2007 the respondent applied for the issuance of a residence card confirming his right to reside in the UK as a family member of an EEA national. There was a delay in considering this application. The residence card, which was eventually granted on 18 November 2009, was valid until 18 November 2014. The respondent's relationship with his EEA national partner broke down in 2011.

4. On 22 January 2015 the respondent applied for indefinite leave to remain on the basis of his long residence. The appellant approached this application on the basis that it was a human rights claim. The appellant was not satisfied that the respondent had accrued at least 10 years continuous lawful residence. The appellant noted that there was no evidence that the respondent was in a subsisting relationship with his former EEA national partner. The appellant noted the respondent's claim to now have a British citizen partner ([MW]) but there was said to be no evidence of a subsisting relationship. There were said to be no insurmountable obstacles to family life continuing outside the UK in any event. The respondent did not meet the requirements for leave to remain under paragraph 276 ADE of the immigration rules, and there were no exceptional circumstances sufficient to warrant a grant of leave to remain outside the immigration rules in accordance with article 8.

The First-tier Tribunal decision

5. The FtJ heard from both the respondent and [MW], his partner. The FtJ found, and this has not been challenged, that the respondent and [MW] were credible witnesses, that they were in a genuine and subsisting relationship, that this relationship had endured since 2014 (although they met each other in 2011), that the respondent earned £37,500 per annum and that [MW] earned in excess of

£18,600, that the respondent was Christian and his partner was Muslim, and that this was likely to cause tension with [MW]'s family. During the submissions the Presenting Officer at the First-tier Tribunal hearing accepted that there had been a delay caused by the Secretary of State, but that the respondent would have been aware since 2011 that he had no right to remain in this country.

6. The FtJ found that the respondent did not meet the requirements of paragraph 276ADE. Although he resided in the UK for a considerable period of time the respondent maintained links with his family in Jamaica, he had insight into Jamaican culture and society and could look for employment with the skills and experience gained in this country. There were no very significant obstacles to his integration in Jamaica. Although it would be difficult for the respondent's partner to move to Jamaica she was willing to do so if this was the only option available to her. Although the FtJ found that there may be obstacles to her relocation, these would not be significant and could be overcome.

7. The FtJ then considered whether there were factors outside of the immigration rules, consistent with article 8, rendering the refusal of the human rights claim disproportionate. The FtJ adopted the approach in *Razgar* [2004] UKHL 27. The FtJ took into account the factors identified in section 117B of the Nationality, Immigration and Asylum Act 2002 (although the judge referred to section 117B of the Immigration Act 2014, nothing turns on this mistake). The FtJ found that the respondent had contributed through his employment by paying taxes and had not been a burden on public funds, that he had integrated into British society and had made a positive contribution to British society. None of these factual findings have been challenged. The FtJ found that the respondent failed to inform the appellant that his relationship with his ex-EEA national partner broke down 2011, and that he admitted this. The FtJ accepted that the respondent had formed strong relationships with friends and members of his family in the UK.

8. At [57] and then from [60] to [63] the FtJ considered the very significant delay by the appellant in considering the respondent's further application for leave and in responding to his numerous letters. The FtJ identified the delay as being "extreme" noting that the appellant failed to carry out the appropriate steps or to formulate a proper response. The FtJ found that this had an impact on the respondent in that he continued to reside in this country and to develop and enhance his relationships with his partners and other family members. The judge considered the principles relating to delay established in *EB (Kosovo)* [2008] UKHL 41 and whether such a delay would have an impact on the public interest factors supporting the respondent's removal. The FtJ concluded that the respondent had been "prejudiced" by the delay in relation to his immigration status and that the appellant's inactivity during the period of her delay had an impact on the respondent's private life in the UK. The FtJ then quoted from *EB (Kosovo)* in respect of the ways in which a delay may be relevant. Purporting to apply the principles established in *EB (Kosovo)* the FtJ found that the delay strengthened the private life relationships established by the respondent in the UK. Having considered all the evidence in the round, including the respondent's

residence in excess of 17 years, and the fact that he had adjusted and acclimatized himself to the customs and norms in the UK, and concluded that it would not be proportionate to remove the respondent. The appeal was allowed under article 8 grounds.

The grounds of appeal and the grant of permission

9. The grounds contend that the FtJ failed to follow the principles established in *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387 in that he did not identify compelling reasons for looking at the case outside the immigration rules. The FtJ failed to explain how the respondent's status was prejudiced by the appellant's delay given that he was issued with an EEA residence card in 2009 and had no right to reside in the UK following the breakdown of his relationship in 2011. It was submitted that the FtJ misapplied *EB (Kosovo)* as the fact that the respondent had longer to establish a private life as a result of the delay did not mean that his application should succeed, particularly in light of the findings that there were no significant obstacles to the respondent's return to Jamaica. Permission was granted on the basis that it was arguable that the FtJ failed to give adequate reasons for finding the existence of compelling circumstances and that he misapplied *EB (Kosovo)*.

10. At the hearing Mr Avery adopted and expanded upon the grounds. It was submitted that the FtJ did not immediately identify what it was that caused him to look at the appeal outside of the immigration rules. The FtJ failed to take into account the three-year period between 2011 and 2014 when the respondent was aware that he had no basis to remain and failed to take any steps to leave. It was submitted that the delay in the circumstances was not compelling and that it was difficult to see what prejudice had been suffered by the respondent as a result of the delay.

11. Mr Cantor submitted that the delay was properly regarded by the FtJ as a compelling circumstance. There had been no challenge by the appellant to the findings of significant delay. The proportionality assessment was ultimately a matter for the FtJ to decide and he was entitled to attach significant weight to the delay.

Discussion

12. The grounds did not challenge the FtJ's factual findings in respect to the nature and extent of the appellant's delay in dealing with the respondent's application and correspondence between 1999 and 2007. By all accounts this delay was considerable. No explanation was offered by the appellant for the delay. Following *EB (Kosovo)* a significant delay by the appellant in determining an application may, as well as, enabling a person to develop closer personal and social ties and establish deeper roots in the community than he otherwise have done, and therefore strengthening his article 8 private life, reduce the weight that would otherwise attach to the public interest factors underpinning the removal of a person who does not meet the formal requirements of the immigration rules.

13. It is satisfactorily clear that these were the principles that the FtJ had in mind when stating, at [60], that the respondent was "prejudiced" in relation to his immigration status by the significant delay. Although the FtJ's reasoning could have been expressed in clearer terms, a full and proper consideration of his decision, especially at [57] and [61] to [63], discloses the significance that he attached to the extent of the delay and the consequences wrought by the delay on the relevant public interest factors. In these circumstances it cannot be said that the FtJ has misunderstood or miss-applied the principles established in *EB (Kosovo)*.

14. Despite not making any explicit reference to the term "compelling circumstances" or the authority of *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387 it is readily apparent from the judgement, when holistically considered, that the FtJ regarded the delay of many years as constituting a "compelling circumstance". This was a conclusion that the FtJ was rationally entitled to reach. In looking beyond the immigration rules the FtJ has taken account of all relevant considerations, including those identified in section 117B. The FtJ was aware that the respondent had no right to remain in the UK from 2011 [63] but was nevertheless entitled to conclude that he had established a significant private life with his friends, family, through his employment and his relationship with his British citizen partner (who earned in excess of £18,600), and that the significant delay was sufficient to render the decision to remove disproportionate. Whilst this may be a generous conclusion it is not one that was reached by an unlawful route, by misdirection of law, or by failure to consider relevant factors. Nor was it a decision that was perverse.

15. In the circumstances I am satisfied that the FtJ did not make a material error in law.

Notice of Decision

The First-tier Tribunal did not make a material error. The Secretary of State's appeal is dismissed.

20 June 2017

Signed Date

Upper Tribunal Judge Blum