



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02185/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 22 December 2017**

**Decision & Reasons
Promulgated
On 3 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**ARJAN TOCILLA
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms P Duffy (Senior Home Office Presenting Officer)
For the Respondent: Mr J Collins (counsel instructed by Nova Legal Services)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of Arjan Tocilla, a citizen of Kosovo born 4 April 1983, against the Home Office refusal of his human rights

claim, which took the form of an application for indefinite leave to remain on the basis of having achieved ten years' lawful residence in the United Kingdom. Its refusal was treated as the refusal of a human rights claim.

2. The Respondent entered the United Kingdom on 5 October 2009 and claimed asylum. That application was refused, though he was granted discretionary leave to remain on 13 February 2001 until 4 February 2001, doubtless, given its duration, to allow him to reach the age of 18. According to the history given by the Secretary of State, he then lodged an "out of time" application for further leave to remain on 6 September 2004 and this was withdrawn on 3 August 2012. Nevertheless on 8 May 2014 a decision was taken to grant him discretionary leave to remain, until 7 November 2016. On 21 July 2015 he made an application for indefinite leave to remain on the basis of his claim to have achieved a decade long lawful residence.
3. The case for the Respondent was that, contrary to the immigration history summarised above, he had in fact made an application for an extension of his original discretionary leave shortly prior to 4 February 2001: he had instructed his representative to do so, and was confident that they had done so. All his actions thereafter were predicated on the basis that such an application had been made (as he put it, "My Solicitors have constantly chased for a decision on this application and enquired about the progress ... but the Home Office would tell them my application is still under consideration". He denied making any further application in September 2004, although his representatives had chased the progress of his case at that time; and nor had he ever withdrawn any application.
4. The case is accordingly somewhat unusual, in that there is no documentary evidence to support any of the three critical events variously alleged by the parties: not of the 2001 extension application the Respondent claims to have made, nor of a subsequent application that the Home Office asserts it received and nor of any withdrawal of such an application.
5. Faced with this conflict of assertion, the First-tier Tribunal surveyed the material which was available to it, directing itself that it was to determine the issue on balance of probabilities. As it saw things, the Respondent had provided a "formidable bundle of documentary evidence" consistent with the thesis he advanced. There were in total ten strands of evidence indicating that such an application had been made, including a letter from the Respondent's original lawyers stating that such an application was under way in 1999, various letters seeking information as to the progress of this application, and a letter from the Home Office in January 2007 which acknowledged the previous making of a prior application for leave. On 1 April 2009 the Secretary of State wrote granting him the right to work and stating that that dispensation would continue during the ongoing consideration of his asylum related representations.

6. The Tribunal decided that absent any documentary evidence or other material from the Home Office to confirm the existence of another application made in 2004, there was no other application that could have founded the various suggestions from all sides that an application had indeed consistently been under way, other than that which the Respondent had credibly asserted his representatives had originally made in 2001. He had therefore been lawfully present in the United Kingdom for a short period with discretionary leave to remain, and then for a very long period with section 3C leave, before receiving a further grant of discretionary leave. Accordingly he had passed the milestone of ten years' lawful residence some time ago. Accordingly the appeal was allowed.
7. The Secretary of State appealed on the basis that there was no explanation by the First-tier Tribunal as to why a copy of the application was not presented to it. Other histories could be posited for the chain of events in question: the Respondent's solicitors might have failed to lodge the application they implied to him they had made, due to negligence or other reasons. The First-tier Tribunal was wrong to place reliance on the absence of evidence put forward by the Secretary of State as to the existence and withdrawal of the 2004 application: any such application, having been made late, would not have attracted the protection of section 3C of the Immigration Act 1971 in any event.
8. Permission to appeal was granted on the basis that there might be an inconsistency between the Respondent's evidence that he had made an in-time application through his legal representatives, and a later legal representative's letter stating that the Respondent had informed them of having made such an application.
9. Before me Mr Duffy candidly admitted that the Home Office grounds of appeal amounted to a challenge to the rationality of the reasoning below, and he could not add to the points made on paper. He acknowledged that the only evidence of the application asserted by the Secretary of State to have been made in 2004, and later withdrawn, was via the Home Office's electronic case record system: there was no copy of the supposedly underlying paperwork. Mr Collins responded that the Home Office's administrative systems had been the subject of well-known criticism over this period and it would be unsurprising if they had misunderstood the true position and misattributed actions to the Respondent based on inadequate casework.

Findings and reasons

10. Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17 stated:

"14. Rationality is a familiar concept in public law..... Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts

or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

11. There is no absolute requirement for corroboration of oral evidence in immigration appeals. I do not consider that the First-tier Tribunal erred in law in coming to the conclusion that it did. It weighed up a number of sources of evidence that were before it, noted that neither side was able to provide the ideal form of corroborative evidence, and concluded that on balance of probabilities it was more likely than not that the Respondent was correct in his ongoing belief that an extension application had been made. Given he had clearly instructed his representatives to make such an application, that they stated some time earlier that they had the matter in hand, and that the Home Office at one point acknowledged there having been an outstanding application before them, that conclusion is wholly unexceptional. I do not consider that the Home Office grounds of appeal show any lack of logical connection between the evidence and the reasoning underlying the decision.
12. The comment of the First-tier Tribunal granting permission to appeal, when it alighted upon a possible discrepancy in the evidence, in truth seems to identify no such thing; there is nothing inconsistent between one representative accepting that their client advisor made a particular application when informed to such effect by their client, and in the client themselves stating that they believed an application had truly been made: any difference is down to the perception of the observer.
13. The Secretary of State's other ground of appeal falls away once the first ground is rejected. It is obviously true that an application made late in 2004 would not have attracted section 3C leave. It is equally a true that timely application made in 2001 would have done, and until determined, such leave would have continued.
14. The Secretary of State did not challenge the ultimate disposition of the appeal once ten years of long residence were established. Of course, the only available ground of appeal was based on the Human Rights Convention. The First-tier Tribunal's allowing of the appeal effectively acknowledges that, absent any reason of character or conduct to contraindicate the grant of leave to remain, the provisions of the Immigration Rules acknowledging the ten year route to settlement were met here. As those Rules demonstrate the government's formulation of one set of circumstances in which leave should be granted, it would be odd to come to any other conclusion other than that a failure to grant

such leave is disproportionate to the strong private life that the Respondent has clearly established during his lengthy period of lawful residence in this country from his late teenage years onwards.

15. Accordingly the Home Office appeal is dismissed.

Decision:

The appeal is dismissed.

Signed:

Date: 22 December 2017

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends to the left and then curves back towards the right.

Deputy Upper Tribunal Judge Symes