Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04162/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11th June 2019	**On 17th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR YESHPAUL DINESH RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss N. Wilkins (Counsel)
For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Cruthers, promulgated on 25th February 2019, following a hearing at Manchester on 31st October 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon 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 Guyana, and was born on 27th December 1988. He appealed against the decision of the Respondent dated 23rd January 2018, refusing him leave to remain in the UK on the basis of his Article 8 rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that he arrived in the UK on 6th December 2004, as a 14 year old, with his parents and younger sister, [RR]. His older sister, [R], had already been in the UK since 2002 and now has indefinite leave to remain. His mother, on the other hand, still has an outstanding human rights claim, in an appeal that is pending before the Tribunal on 26th July 2019. His younger sister, [RR], however, has now been granted leave to remain on the basis of Article 8. The Appellant claims that since he arrived in the UK as a child, and has been here for almost half his life, he has a strong claim to remain in this country, together with his other family members, on the basis of Article 8.

The Judge's Findings

4. The judge held that the Appellant could not succeed. This is because paragraph 276ADE(1) would be of no assistance to him. He had not spent seven years of his life as a child under 18 years in this country. He had not spent at least half his life continuously, between the ages of 18 and 25 in this country. Most importantly, he had not been in this country for twenty years. Against that background, the Appellant had known, since the time that he became appeal rights exhausted in 2006, that he had no right to remain in this country, and ought to have left (see paragraph 69). He did not do so. Instead, he went on to develop further private life rights, getting an education, making friends, and integrating into British society, but in circumstances where the public interests still remain in his removal, because of the importance attached to immigration control. Significantly, the Appellant was not able to point to there being very significant obstacles to his relocation to Guyana. The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the judge erred in law in failing to have regard to the fact that the Appellant had actually entered the UK in 2004 when he was a child of only 14 or 15 years, and under the control of his parents, and that it was after that year that he spent half his life in the UK, and all his adult life in this country. The failure of the judge to factor this particular history into the proportionality assessment amounted to an error of law. Second, the judge did not treat the element of display on the part of the Secretary of State in removing the Appellant, during which time the Appellant developed further Article 8 rights, to be a factor that went in his favour. Instead, the judge took the view that very often people in the situation prolonged their stay in this country by making appeals before the Authorities. Finally, it was said that the Secretary of State had engaged in inconsistent decision making, which the judge failed to properly factor into his decision making, because

the Appellant's older sister and aunt and uncle had been granted leave to remain in this country under the legacy system.

6. On 10th May 2019 a Rule 24 response was entered by the Secretary of State to the effect that the Appellant's sister in the UK was granted indefinite leave, but she had arrived in 2002, which was two years before the Appellant was granted ILR, and she was only granted permission to stay on the basis of the legacy system, and this was exceptionally outside the Rules. The Appellant had lived in the UK for over fourteen years, arriving as a child of approximately 15, and the judge had made sustainable findings that the Appellant had only resided with precarious immigration status throughout that period of time. He had made good use of his presence in this country and this was something that he could draw upon after return to Guyana. There was nothing here that suggested that the public interest in removal should not take precedence.

Submissions

7. At the hearing before me on 11th June 2019, Miss Wilkins, appearing on behalf of the Appellant emphasised the fact that there was case law to the effect that if a person entered as a child, then this was something that had to be considered in terms of the evaluation of the length of stay in this country, and the judge had failed to do so. Second, it was simply not the case that the Appellant had himself engaged in delay, over a six year period, when the Appellant was reporting to the Authorities, and he was not being removed. What that meant, she submitted, was that the House of Lords decision in **EB (Kosovo) [2008] UKHL 41** would come into effect.

8. In that case, Lord Bingham had stated that a delay is not necessarily irrelevant to the decision because

> "The applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay, the likelier this is to be true. To the extent that it is true, the Appellant's claim under Article 8 will necessarily be strengthened" (see paragraph 14).

9. Lord Bingham had also gone on to say that if a person is not removed then he "may well be imbued with a sense of impermanence" (paragraph 15). Lord Bingham had also stated that delay would be relevant also "in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes" (paragraph 16).

10. For his part, Mr Bates submitted that there was actually no error of law in the determination at all and that this amounted simply to a disagreement with the judge's decision. He drew the Tribunal's attention to the decision in **SH (Iran) [2014] EWCA Civ 1469**, where the Court of Appeal had explained how different results may be reached in different decisions with respect to different individuals even if

they belong to the same family. The relatives who had been granted leave to remain had succeeded on the basis of the legacy system.

11. The Court of Appeal explained that

> "There is no separate legacy 'policy'. There is no basis for relying on delay as, in itself, a ground for obtaining leave to remain. There is in the ordinary case no relevant legitimate expectation, other than that the case will be considered on applicable law and policy at the time the decision is made" (paragraph 65).

12. Mr Bates submitted that this was indeed the case here. The Appellant had no legitimate expectation, just because his relatives had been granted leave to remain, that he would also be granted leave at any earlier point in time. His only legitimate expectation was to having the applicable law and policy at the time applied to him. Second, insofar as the Appellant's entry into this country as a child was concerned, the judge was not oblivious to this. He had indeed taken into account the fact that the Appellant had come at the age of around 15 but he had not been able to succeed under the Immigration Rules, and he could not succeed under freestanding Article 8 jurisprudence either because,

> "There were no very significant obstacles to the Appellant returning, and any private life that he had built up in this country 'has been precarious' such that 'the Appellant should not have harboured any legitimate expectation that he would be allowed to remain in the UK indefinitely'" (paragraphs 77).

Error of Law

13. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

14. First, there is the question of the Appellant having arrived as a boy of little more than 14 years, with his parents. As such, there is established case law to the effect that it is important to take account of this as a key fact, namely, that the Appellant arrived as a minor, when he had no choice about where he travelled or lived, even if his arrival in this country was "precarious" in the circumstances. It was in these circumstances that he developed a special quality to the private life that he later had, culminating in the final years of his schooling. It is important, therefore, to distinguish the child from the adult in the case of a foreign national arriving independently of his parents. This particular quality to a child is recognised in European jurisprudence in the case of **Maslov v. Austria [2009] INLR**. It has also been recognised domestically by the UK Supreme Court in the case of (**Hesham Ali [2016] UKSC 60**), where the Supreme Court (at paragraph 26) affirmed this as a matter of relevance in the decision making process.

15. Second, there was the question of delay. The judge was faced with reliance upon the House of Lords decision in **EB (Kosovo) [2008] UKHL 41**, but concluded that "I do not give a great deal of weight to those delays". The reference to the "delays" was a reference to the fact that the Appellant had become appeal rights exhausted in 2006,

but continued to remain in this country. What was overlooked by the judge was the fact that the Appellant was reporting to the Authorities on a regular basis and crucially not engaging in any further attempts to prolong his stay in this country. To that extent, the judge was wrong to have stated that,

> "It is obvious that delays by the Respondent generally arise in part because non-British nationals do not accept judicial and Home Office decisions but instead remain in the UK and swamp the Respondent's officers with further (unfounded) leave to remain applications" (paragraph 69).

16. There was, of course, in this case no evidence at all that the Home Office was being swamped with further unfounded applications for leave to remain by this Appellant. Had this observation not been made, it would have most likely have led the judge to take a different view of the Article 8 rights that the Appellant subsequently developed.

17. The judge goes on to consider these (at paragraph 74) when he observes that,

> "I would agree that the Appellant seems to have 'made the most of what [he] found in the UK. [He has] studied hard, made friends and [considers that he has] integrated to British society' (paragraph 20 of his first statement). But all that is nowhere near a sufficient basis to establish a disproportionate breach of Article 8 here, (even taken cumulatively with the other points in the Appellant's favour). Apart from anything else, countless foreign students make the most of opportunities in the UK every year" (see paragraph 74).

18. Instead, because the judge misconstrued the situation (at paragraph 69) in observing that "it is obvious that delays by the Respondent genuinely arise in part because non-British nationals do not accept judicial and Home Office decisions", when that was not the case, the correct approach to a delay occasioned by the Secretary of State in not removing a person, which in this case amounted to a significant period of six years, was not adopted by the judge, because during those years, the Appellant

> "... was in his formative years, and developed Article 8 rights, which he otherwise would not have done, and it is this particular aspect that would have imbued him "with a sense of impermanence", leaving aside any question of whether he had a legitimate expectation to do so in the first place."

19. The plain fact here is that the Appellant did not have any outstanding applications for the period of approximately six years from 2008 to 2014. In 2006, when he became appeal rights exhausted, he was a minor of 17 years of age. He was not in a position to take the decision to leave this country. He could not be criticised for remaining here. It was for the Secretary of State to remove him. Yet he did not do so. He failed then to comply with the terms of a consent order that was made on 10th July 2015 to reconsider the Appellant's case. This delayed matters for a further two years, during which time again, the Appellant developed further Article 8 rights. The plain fact here is that the delay to the most part is attributable to the inaction of the Respondent.

Remaking the Decision

20. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. Both Mr Bates and Miss Wilkins agreed at the end of the hearing that there would not be any oral evidence were I to make a finding of an error of law, and it was a matter of record that since the appeal before the judge below, the Appellant's younger sister, [RR], had now also been granted leave to remain on the basis of Article 8. The Appellant's mother, had an outstanding appeal before the Tribunal on 26th July 2019. These were matters of record, and this aside, the evidence remained as it was before the judge below. This being so, I have remade the decision in the circumstances as they stand before me.

21. I am allowing this appeal for the reasons that I have set out above. Had the judge approached the matter from the perspective of the Appellant having entered the UK as a minor, during which time the special quality to the private life that he developed, especially in the final years of his schooling, was distinct to what would have been the case had he entered as an adult, and bearing in mind that when the Appellant became appeal rights exhausted in 2006, he had no further applications to make which unnecessarily prolonged his stay in this country, it is plain that the time that the Appellant has remained in this country after 2006 is entirely to be put at the Secretary of State's door.

22. Indeed, a consent order of 10th July 2015 to reconsider the Appellant's case was not followed through for another two years, adding yet more time to the Appellant's stay in this country. This being the case, the conclusion by the judge below that, "but all that is nowhere near a sufficient basis to establish a disproportionate breach of Article 8 here (even taken cumulatively with the other points in the Appellant's favour)", cannot stand, and I conclude that taken cumulatively, what one has is indeed a sufficient basis to establish a disproportionate breach of the Appellant's Article 8 rights, who has now been in the UK for all of his adult life, and for half the period of his life as such, having entered as a child of no more than 14.

23. The Appellant has no family left in Guyana. His grandparents have passed away. He has not lived in Guyana since he was 15 years of age. He has never worked there. Both of these facts mean that he will find it very difficult to find housing and employment in order to meet his essential living needs. He has very limited private life in Guyana. Against the background of these findings, I conclude that there would be "very significant obstacles" to his being able to integrate into life in Guyana (see **Kamara [2016] EWCA Civ 813**, where it was explained that the concept of "'integration' is one which 'is a broad one' because it is not confined to the mere ability to find a job or sustain life while living in the other country".

24. Instead, the term "integration" is one which

> "Calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in

that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there" (paragraph 14).

25. I am not satisfied that this would indeed be the Appellant's happy circumstance if he was to be returned to Guyana. This appeal is allowed for the reasons I have given above.

Decision

26. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision. I allow this appeal.

27. No anonymity direction is made.

28. This appeal is allowed.

Signed Dated

Deputy Upper Tribunal Judge Juss 12th July 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Dated

Deputy Upper Tribunal Judge Juss 12th July 2019