



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10649/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12th April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR KOFI ASAMOAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Malik, Counsel, instructed by Danbar Solicitors

For the Respondent: Mrs H Abosie, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mr Kofi Asamoah against a decision of Judge Jessica Pacey to dismiss his appeal against refusal of his application for leave to remain on grounds of long residence in the United Kingdom. The application had been made under paragraph 276B of the Immigration Rules, that is to say, on the basis that he had resided in the United Kingdom lawfully for a continuous period of ten years. The appeal, however, was restricted under Part 5 of the Nationality, Immigration and Asylum Act 2002 (as amended) to the ground that the decision of the Respondent was

unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with his rights under Article 8 of the European Convention of Human Rights and Fundamental Freedoms.

2. The Appellant had originally entered the United Kingdom on 2nd April 2005 as a working holidaymaker with leave to remain until 8th February 2007. It was his case that shortly before that period of leave had expired he had applied for further leave to remain. It was ultimately accepted by the Secretary of State that his application had been confused with that another person sharing the same name, and this may have accounted for the fact that he had not received Notice of Refusal of that application.
3. The significance of this insofar as his application under paragraph 276B was concerned was that the Appellant believed, rightly or wrongly, that his leave to remain had been extended pending the outcome of his application by operation of Section 3C of the Immigration Act 1971. It is not entirely clear to me, and I am not sure if it was clear to the judge who decided this appeal, at what time precisely the Appellant became aware that the application he had made in 2007 had in fact been refused. At all events, he made a further application for leave to remain in 2011.
4. So it was that there was apparently a gap in the Appellant's lawful residence of up to four years between 2007 and 2011. I say that it was up to four years because it is unclear when precisely the application he claims to have made in 2007 was refused and when, therefore, his leave to remain under Section 3C ended.
5. In reaching her decision, Judge Pacey noted at paragraph 14 that the Presenting Officer had argued that the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules. The Appellant himself was unrepresented at the hearing in the First-tier Tribunal, and he cannot therefore be criticised for failing to address the judge in relation to those requirements for leave to remain. This is a matter to which it will be necessary for me to return.
6. Judge Pacey did not specifically consider whether the appellant met any of the alternative requirements for leave to remain under paragraph 276ADE, but instead proceeded straight to her consideration of the appeal under Article 8, outside the Immigration Rules. She noted in doing so (at paragraph 21) that there was very little evidence before her of any private life that the Appellant may have developed in the United Kingdom and that he had not called any witnesses to give oral testimony in that regard. She also added, and I shall return to this because it was strictly speaking inaccurate, that neither had anybody written letters of support.
7. The judge further noted, and this has not been challenged, that the appellant no longer had any family life in the United Kingdom, given that his relationship with an EEA national spouse had ended. She therefore concluded that in all the circumstances Article 8 was not engaged. She nevertheless considered, in the alternative, the possibility that it was engaged and thereafter conducted an analysis as to whether the Appellant's removal was proportionate in pursuit of the legitimate aim of maintaining

the economic wellbeing of the country through the consistent application of immigration controls.

8. The judge said that she bore in mind the regrettable confusion by the Home Office (see above) but she also reminded herself that the burden of proving the primary facts lay with the Appellant and proceeded to make a number of observations concerning the Appellant's failure to prove, in her mind, that he had ever made an application in 2007 for further leave to remain, and/or that he 'chased' the Home Office for a decision.
9. The judge attached significant weight to a reply the Appellant had made during the course of his evidence, which was to the effect that it had never been his intention to return to Ghana. She noted (at paragraph 28) a discrepancy between his evidence at the hearing - that he had not worked whilst in the United Kingdom - and HMRC documents showing that he had paid income tax in the United Kingdom.
10. The judge concluded as follows:
 29. In the balancing exercise, then, factors in favour of the public interest outweigh those in the Appellant's favour.
 30. In considering the public interest when dealing with proportionality I have had regard to Section 117 of the 2002 Act and have taken full account of the Secretary of State's view of the state's obligations under Article 8 of the European Convention set out in the Immigration Rules.
 31. In particular, I take account of Section 117B(4) since I do not accept that the Appellant made an in time application in 2007 I do not accept that he had any leave, even Section 3C leave between early 8th February 2007 and 10th May 2011 when he made an application under the Immigration (EEA) Regulations.
 32. On the balance of probabilities the Appellant has not discharged the burden of proof."

She then went on to give notice of her decision to dismiss the appeal on human rights grounds.

11. Permission to appeal has been granted to argue all the grounds, which, it has to be said, are lengthy. I shall therefore attempt very much to summarise them.
12. Firstly, it is said that the judge made a substantial error of fact amounting to an error of law in noting in her introductory paragraphs that the Appellant had come to the United Kingdom in 1995 when in fact he did not come until 2005. However, it is accepted by Mr Malik, who represented the Appellant before me, that that was not in any sense material to the outcome of the decision. Indeed, had she been right to say that the Appellant had come to the United Kingdom in 1995, then he would likely have succeeded under a different paragraph of the Immigration Rules. As it is, the error is wholly immaterial.
13. Secondly, in finding that his claim not to have worked in the United Kingdom was inconsistent with his records with HMRC, it is said that the judge failed to identify the

documents which revealed that inconsistency and, further, that she had not given the Appellant an opportunity to provide an explanation. I reject that ground because (a) the judge did not need to identify the page number of the document in the Appellant's bundle given that Mr Malik accepts that it shows that the Appellant had paid Income Tax in the UK, and (b) according to the notes taken by the Presenting Officer, the assertion that he had never worked whilst in the United Kingdom was one made by the Appellant in the course of cross-examination. Where a person spontaneously makes a factual assertion whilst giving his oral testimony, he cannot afterwards be heard to complain that he did not have the opportunity to explain why that assertion was inconsistent with other evidence upon which he relies. The position would of course have been different had he made an inconsistent statement in a written statement that was made in advance of the hearing. In any event, it is difficult to see what this particular finding had to do with the issue that the judge had to decide concerning the Appellant's private life. It seems to me to have been otiose.

14. Thirdly, there is a general assertion in the grounds (followed by citation of a considerable amount of case law) that the judge erred in failing to make clear credibility findings. Mr Malik was however unable to point me to any particular part of the decision where there was any supposed lack of clarity in the judge's findings. I therefore reject this ground.
15. Fourthly, criticism is made (again, in considerable detail) of the judge's finding that there had been a gap in the lawful residence of the Appellant to which I referred during my introductory remarks. However, it seems to me that although the gap may not have been as great as the judge assumed, it was accepted by the Appellant that there had been such a gap. What the Appellant sought to do, both in written representations to the Secretary of State and indeed to the judge at the hearing of his appeal, was to explain what he believed to be the mitigating circumstances for how that gap arose. However, that could not alter the fact that he could not meet the requirements for continuous lawful residence under 276B, regardless of whether or not the judge accepted his explanation for his inability to do so. Any error the judge may have made in that regard does not therefore seem to have been material to the outcome of the appeal.
16. I shall return to consider the fifth ground later given that this appears to me to be the strongest.
17. The sixth ground is that the judge failed to attach weight to the delay in the Respondent processing the application the Appellant claims to have made in 2007. The difficulty with this argument is that the judge was not satisfied on a balance of probabilities that he had ever made such an application. That was a primary finding of fact which she was entitled to make and, absent a finding that he had made such an application, she could not conceivably attach weight to the Respondent's alleged delay in processing it. Moreover, even if he had made such an application, the judge found that the Appellant had contributed to the delay in failing to make early enquires as to its progress and/or outcome.

18. I therefore return to the fifth ground. This undoubtedly has merit. I mentioned at the outset that the only Ground of Appeal available to the Appellant was that the decision was incompatible with the Appellant's right to private life under Article 8 of the Human Rights Convention and thus unlawful under Section 6 of the Human Rights Act 1998.
19. The Secretary of State's view of the operation of Article 8 in private life cases is embodied in paragraph 276ADE. The Secretary of State views this as a complete code for dealing with private life cases, although it is of course open to a Court or Tribunal to consider matters outside its scope where there are unusual and compelling circumstances that do not fall within its contemplation. Nevertheless, the first port of call in a private life case is always paragraph 276ADE. As it is sometimes put, a private life claim under Article 8 should be viewed through the lens of that paragraph.
20. As I mentioned earlier, the judge was specifically reminded of the need to look at paragraph 276ADE by the Presenting Officer. What the judge did, however, was merely to make a passing reference to it by saying that she had, "taken full account of the SSHD's view of the state's obligations under Article 8 of the European Convention [as] set out in the Immigration Rules". The mere assertion that she had taken account of the Secretary of State's views as "set out in the Immigration Rules" was inadequate. What the judge was required but failed to do was to apply the specific provisions of paragraph 276ADE(vi) to the facts of the Appellant's case as she found them. The judge does not make reference, for examples, to whether the Appellant would face "very significant obstacles to his integration in the proposed country of return". That was an error of law. It is thus necessary to look into this appeal in a little more detail in order to see whether it is appropriate to set aside Judge Pacey's decision and remake it.
21. At paragraph 13 of her decision, the judge noted that the Appellant had told her that he, "had family in Ghana, with whom he was in contact". On the face of it, that might suggest that there would be little standing in the way of the Appellant's integration upon return.
22. However, Mr Malik drew my attention to two supporting letters contained within the Appellant's bundle of documents. The judge was thus wrong to suggest that there were no such letters. At page 26 of the Appellant's bundle is a letter from Mr Daniel Adu-Bediako. It is dated 16th May 2017 and is addressed "to whom it may concern". In summary it says as follows. Its author has known Mr Kofi for over ten years. Mr Kofi is a responsible individual who always takes pride in helping friends and family and he has been an active member of the community and church member of the local church in High Wycombe. He is a law-abiding citizen who does not involve himself in criminal activities. He is hardworking and, in the view of Mr Adu-Bediako, the Appellant is an outstanding person. The letter is thus primarily a character reference. However, contrary to the finding of Judge Pacey, it does establish that the Appellant has ties to the United Kingdom.

23. Of more significance to the enquiry that the judge was required to undertake was a letter, dated the 15th April 2017, from one 'John Obeng' (page 28 of the Appellant's bundle of documents). It begins by referring to a telephone conversation that he had had with the Appellant during the previous weekend in which the Appellant apparently indicated that he was at that time intending to return to Ghana.
24. Mr Obeng says he would be pleased to see the Appellant again after such a long time but cautions against his return for two reasons. Firstly, the family home where he used to live has been burnt to the ground as the result of an electrical fault and most of his family have therefore relocated to different towns. Mr Obeng accordingly suggest that the Appellant might find it difficult to get shelter unless he has money to rent a place which, he adds, could be very expensive.
25. Secondly, Mr Obeng says that the economic situation in Ghana is very bad at the moment. On the telephone, the Appellant had apparently told him that he had no savings and so Mr Obeng suggests that life would be difficult for him if he were to return to Ghana and that the economic pressures could affect his mental wellbeing. Mr Obeng stresses that he was not trying to dissuade the Appellant from returning to Ghana, but says that he has seen other people who have returned from Europe without proper planning, and some of them end up on the streets suffering from a mental health breakdown.
26. Does the above evidence demonstrate that the Appellant would face "very significant obstacles" to his integration on return to Ghana? I conclude that it does not. Mr Obeng's primary concern was that the Appellant; would find difficulty in returning to Ghana if he did not make adequate preparation given that the family home, which he had left to come to the United Kingdom, would no longer be available to him. He does not, however, suggest that his family members, who apparently continue to reside in Ghana and with whom the Appellant apparently maintains contact, would be unable or unwilling to assist in his resettlement.
27. Thus, with proper planning and by giving advance notice to his friends and relatives in Ghana of his proposed return, any obstacles to his integration on return could be overcome.
28. I therefore conclude that had the judge considered the matter, she would have been bound to conclude that the Appellant did not meet the requirements of paragraph 276ADE(vi). Moreover, it was not suggested that the length of his residence (lawful or unlawful) was such as to qualify him for leave to remain under any of the other subparagraphs of 276ADE.
29. I therefore conclude that despite the judge's error of law in failing first to consider the appeal under paragraph 276ADE of the Immigration Rules before moving on to consider it under Article 8, it would be inappropriate for me to exercise discretion by setting aside her decision. I therefore dismiss the appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed

Date: 9th May 2018

Deputy Upper Tribunal Judge Kelly