Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26198/2013

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport
On: 15 July 2014

Determination Promulgated
On: 15 September 2014

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RICARDO O'NEIL BROWN
(anonymity direction not made)

Respondent

Representation

For the Appellant: Ms S Lee, Salam & Co, Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. This is the continuation of an appeal by the Secretary of State against the determination of First-tier Tribunal Judge S A Rowlands in which he allowed the appeal of the Claimant, a citizen of Jamaica, against the Secretary of State's decision to refuse to issue a derivative Residence

Card as confirmation of the Claimant's right to reside in the United Kingdom. Following a hearing on 8 April 2015 we allowed the Secretary of State's appeal to the extent that we set aside the decision of the First-tier Tribunal to be remade by the Upper Tribunal. We now proceed to remake that decision and in doing so will refer to the parties as they appeared before the First-tier Tribunal.

Background

2. The Appellant applied on 18 January 2012 for a derivative Residence Card as confirmation of a right to reside in the United Kingdom. His application was based upon his relationship with his two children who are both British citizens born in the United Kingdom on 24 August 2006 and 31 December 2010. The application was refused by reference to regulations 15A (4A) and 15A (7) of the Immigration (EEA) Regulations 2006 (as amended) on 6 June 2013 because the Appellant, living as a family with his wife and children, could not be described as their primary carer. Although in refusing the decision the Respondent did not make removal directions the Respondent stated in the refusal notice "you should now make arrangements to leave (the country). If you fail to make a voluntary departure a separate decision may be made … to enforce your removal from the United Kingdom".

3. The Appellant exercised his right of appeal to the First-tier Tribunal and in doing so did not challenge the decision made under the EEA regulations but asserted that the decision was in breach of his protected rights under Article 8 ECHR due to his private life established in the United Kingdom since his arrival here in 1999 and his family life with his wife and two children.

4. The First-tier Tribunal allowed his appeal but in doing so made errors of law identified in our decision following the hearing on 8 April 2015. In making that decision we concluded that it was clear given what was known about the Appellant's circumstances and in view of the stated requirement to leave the country Article 8 was engaged (see JM v SSHD [2006] EWCA Civ 1402; [2007] Imm AR 293).

5. In those circumstances and with the appeal to the First-tier Tribunal being confined to Article 8 ECHR it is on that basis that the Upper Tribunal now considers this appeal. In doing so the Appellant's status under the terms of the Immigration Rules is relevant in that the Appellant gave evidence to the First-tier Tribunal, accepted by the First-tier Tribunal Judge, that his status had always been lawful.

The hearing

6. At the hearing before us the Appellant was represented by the Ms Lee who submitted a written skeleton argument, a copy of the Court of Appeal decision in Edgehill v SSHD [2014] EWCA Civ 402, a copy of the Life in the UK test passed by the Appellant on 1 August 2011 together with the bundle that was before the First-tier Tribunal. Mr Richards represented the Secretary of State and submitted a copy of the Court of Appeal decision in Haleemudeen v SSHD [2014] EWCA Civ 558.

7. In opening submissions Mr Richards, referring to the assertion in the skeleton argument that the Appellant met the requirements of paragraph 276B(i)(b) of the Immigration Rules, said that no application had been made under the rules. At the time of the application and indeed the decision the Appellant did not meet the requirements of paragraph 276B(i)(b). Further when the decision was made the 14 year continuous residence rule was no longer in existence. Mr Richards referred to Haleemudeen as authority for the argument that it was the rules of the date of the decision that applied and in any event the 14 year accrual was not reached until after the appeal process had started

8. So far as the factual basis of the appeal is concerned Mr Richards said that he was happy that the evidence shows that the Appellant is in a genuine and subsisting marriage and jointly cares for his two young children.

9. For the Appellant Ms Lee submitted that the assertion in her skeleton argument was justified because the application was submitted prior to the change in the Immigration Rules at a time when paragraph 276B(i)(b) was still in force. She accepted that it was not until after the Respondent's decision and at a time when paragraph 276B(i)(b) was no longer in force that the Appellant would have met it requirements but argued that nevertheless the Appellant should be able to benefit from its provisions.

Oral evidence.

10. The Appellant gave oral evidence and adopted his written witness statement. He accepted that he had misunderstood his situation and that the assertion in paragraph 2 and that his status in the UK had never been illegal was incorrect. Nevertheless he said that he had always understood his situation to be legal because he still had an outstanding application and appeal. He accepted that he had no valid leave to remain since 2006 and added that he had always made applications thereafter to remain. He understood now that he had not had legal status since 2006.

The Appellant confirmed that he is still married and has been married nearly 10 years. He said that he has no immediate family in Jamaica.

11. Cross-examined by Mr Richards the Appellant said that his wife was aware of his pending appeal when they were married in 2004 and they had not discussed what would happen if that appeal was unsuccessful. He said they always believed that something would be sorted out, this was never discussed but they had faith.

12. The Appellant said that he works as a barber. His wife has just finished a teaching course. Asked if there was any reason why he and his wife could not go to work in Jamaica the Appellant said that he had never checked. He came to the United Kingdom straight from school in 1999.

13. Answering further questions from Ms Lee the Appellant said that his children were aged seven and three. They both attend Upper Horfield Community School and Nursery in Bristol and are doing well. He referred to a letter from the school. He drops them to school and picks them up and supports them in their school activities.

14. The Appellant said that he wanted to stay in United Kingdom because the system here is the best for the children, his elder child enjoys school and the younger enjoys nursery. The children are in close contact with other family members in United Kingdom. They have cousins living locally who they see weekly. All of them go to the same church except the Appellant's mother and sister. His elder child performs in church every few months. The Appellant is a key-holder of the Church and also an usher. He is involved in a leadership role organising follow-up ministries, gospel concerts and managing the Church football team. He and the family are settled and established in Bristol and their lives would be impacted substantially if they all had to go to live in Jamaica. There is a lack of security in Jamaica with a lot of crime and violence. They are safe here.

15. The Appellant said that he works six days a week as a barber earning £270 to £300 per week on a self-employed basis. His gross income shown by his tax return is in the region of £12,000 per annum. He does not claim any benefits. Where necessary he is supported by the Church and his family. His wife has just finished her studies and has had a job as an examination invigilator. She is looking for a permanent teaching job. His wife obtained a degree in engineering and was employed in that area afterwards but stopped working when their daughter was born.

16. The Appellant said that only speaks English. He used to speak Jamaican Creole. He has no health problems. His wife receives child tax credit and

child benefit. The property they live in is rented and they pay £94 per week. It has two bedrooms.

17. Elsie Brown, the Appellant's wife, gave evidence and answering questions from Ms Lee adopted her written statement. She said that she has completed her teacher training course and hopefully has a job as a maths teacher in the City of Bristol College starting in September. Until now she has been doing temporary and agency work. She confirmed that she will be teaching maths at GCSE and A-level. The witness confirmed that she had an engineering degree and had been made redundant from her previous employment.

18. Cross-examined by Mr Richards the witness agreed that when she married the Appellant in 2004 she was aware of his status. She went ahead with the marriage because she loved him. If he was sent back to Jamaica she would not go with him but would stay here with the children. They did not have any children in 2004. She has never been to Jamaica.

Submissions

19. On behalf of the Respondent Mr Richards relied on his earlier submissions. Paragraph 276B(i)(b) does not apply, the new rules apply. The Respondent does not intend to split the family. The key question taking into account paragraph Ex.1 of Appendix FM of the Immigration Rules now in force is whether it is reasonable to expect the elder child to relocate to Jamaica. Mr Richards said that in the circumstances it was reasonable. The Appellant is Jamaican. He has lived here for the last eight years but has no claim to remain. There are no insurmountable obstacles to the family living together in Jamaica. Mr Richards said that having heard the evidence he is satisfied that the Appellant is a truthful witness who has been doing his best to assist the court he is happy for him to be accepted as a witness to the truth. However there are no compelling reasons why his case should be considered outside the rules. Even taking into account the best interests of the children it is clear that if the family all go to Jamaica they will remain a family unit. If the matter is considered outside the Immigration Rules then the wider interests of society need to be considered against the rights of the individuals.

20. For the Appellant Mr Lee relied on her skeleton argument and her earlier submissions. If the appeal is not considered under the old Immigration Rules it can only be considered under Article 8. In this respect it is not reasonable to expect the Appellant's eldest child to leave the United Kingdom. She was born and is established in the United Kingdom and all of her family and social ties are here. We were referred to the evidence in the Appellant's bundle and in particular the evidence from

the school. Equally it is not reasonable to expect the Appellant's wife and younger child to leave the United Kingdom. They are British citizens who have never been to Jamaica. There is no suggestion that the Appellant is or will become a burden on public funds.

Decision

21. There are three core issues for us to consider. The first is whether the application should be considered under the long residence rule applicable at the time the application was made. The second is whether the Appellant's situation should be considered outside the terms of the EEA regulations and the Immigration Rules. The third, dependent on an affirmative answer to the second question, is whether the Respondent's decision is in breach the Appellant's rights protected by Article 8 of the Human Rights Convention.

22. So far as the first issue is concerned this appeal relates to an application made for a derivative residence card as confirmation of a right to reside in the United Kingdom. It was never an application for leave to remain; it was an application that could only have succeeded if the Appellant already had the right to reside under the EEA regulations. The application was unsuccessful and the Appellant now recognises that he did not have the right to reside. To suggest that an application which was never one for leave to remain under the Immigration Rules should nevertheless be considered on appeal in such a manner and further that the appeal should be allowed on the basis that the Appellant, at the date of the appeal hearing but not the date of the application or even the Respondent's decision, met a requirement of the rules as they existed at the date of the application but not at the date of the decision or the appeal hearing cannot have any merit. This is not to say that the length of the Appellant's residence should not be factored into the proportionality balance if the Appellant's appeal falls to be considered under Article 8 ECHR but it cannot be factored into the balance that the Appellant would have met the long residence requirements of the rules because he did not and could not.

23. Turning to the question of whether the Appellant's situation should be considered outside the terms of the EEA regulations and Immigration Rules the first point to emphasise is that in our error of law decision we did not find that the First-tier Tribunal erred in law by considering Article 8 of the Human Rights Convention. To the contrary we found that it was clear that Article 8 was engaged (paragraph 8). The grounds of appeal to the First-tier Tribunal include Article 8 grounds and this is a ground of appeal provided for by Schedule 1 to the EEA regulation and

section 84(c) of the 2002 Act. The grounds of appeal to the Upper Tribunal suggested only that the judge was wrong to consider Article 8 because no removal directions had been made. The grounds do not suggest, as Mr Richards put forward in submissions, that there are no compelling reasons why the current situation should not be considered outside the terms of the immigration rules.

24. This is an Appellant whose private life in the United Kingdom commenced 15 years ago when he arrived in the United Kingdom as a student and who lives with his wife and family in the United Kingdom enjoying a family life that has been established since before his marriage some 10 years ago. The family enjoy a private life that has been established over an equally long period and which includes close connections with the local community in Bristol and two children attending local school and nursery who have never known life in another country. All the family speak English, the Appellant is self-sufficient and the Appellant's British Citizen wife is about to embark on a new career where the likely remuneration will ensure that the family remain self-sufficient. Mr Richards was at pains to accept the credibility of the Appellant and his wife. It is important in this regard to note that the Appellant, although he now accepts that he was wrong to do so, has believed his presence in the United Kingdom to be lawful throughout his time here.

25. If compelling reasons were needed to consider the situation of the Appellant outside the terms of the EEA regulations and the immigration rules then we are satisfied that such reasons exist. In Nagre (paragraph 30) Sales J states

> " after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it clear that the consideration under the rules has fully addressed any family life or private life issues arising under Article 8 it would be sufficient to simply to say that"

and in paragraph 34

> "in cases where consideration of the new rules does not fully dispose of a claim based on Article 8, the Secretary of State will be obliged to consider granting leave outside the rules".

26. In our judgement it is abundantly clear that Article 8, as pleaded in the grounds of appeal to the First-tier Tribunal, must be considered. In the first place, and for the reasons that we have given, there are compelling reasons to do so but in the second place and in any event the regulations under which the decision to refuse was made do not fully address the family and private life issues arising.

27. In considering Article 8 we are assisted by Mr Richards' acceptance of the Appellant's credibility and in any event make our own positive decision in this respect. We have no doubt that the Appellant has lived in the United Kingdom since the age of 17, that he has believed his status to be lawful throughout, that he has never had recourse to public funds or otherwise been a burden on the state, that he has enjoyed a family life with his wife since sometime in 2001, that they have been married since December 2004 and that they have two children now aged seven (almost 8) and three. Following the Razgar principles we are satisfied that Article 8 is engaged in respect of both private and family life. Because, despite his erroneous belief, the Appellant does not have leave to remain in the United Kingdom and has not held such leave since 2006 we are satisfied that the Respondent's decision is lawful and in pursuance of the legitimate aim of immigration control. So we move on to proportionality.

28. On the positive side of the proportionality balance this is a long established, subsisting and secure the family unit in which the three of the four members are British citizens and where it would, in our judgement, be wholly unreasonable to expect them to re-establish family life in Jamaica, a country where the three British citizens have never been. The maintenance of effective immigration control is of course in the public interest and in considering the public interest question we have had particular regard to the provisions of section 117A, 117B and 117D Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. We are bound to do so because although this appeal was heard just prior to the commencement of section 117 we are considering and making our decision after commencement and in any event the public interest must be a continuum. Section 117 states:

> 117A Application of this Part
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
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> 117B Article 8: public interest considerations applicable in all cases
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part
(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a)is a British citizen, or
(b)who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii)is a persistent offender.
(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),has not been convicted of an offence.
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

> (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
> (5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.

29. In this consideration we note that the Appellant speaks English and is financially independent. At the time the Appellant commenced his private life in this country and when he and his wife formed their relationship and married he had leave to remain in the United Kingdom. In our judgement the Appellant's immigration status was not precarious when he established his private life between 1999 and 2006 and whereas it may have become precarious thereafter this was not appreciated by the Appellant.

30. In weighing the positive against the negative in the proportionality balance we have had particular regard to the public interest as required by statute. In our judgement the balance falls overwhelmingly in the Appellant's favour. The positive aspects as detailed above are clear both in relation to family and private life. The statutory public interest factors are in the specific circumstances of this Appellant matters that weigh in the Appellant's favour. The Appellant's status in the United Kingdom by virtue of his failure to meet the requirements of the Immigration Rules or the EEA regulations is the only matter that we can identify that could conceivably be seen as a negative in the proportionality balance and this almost wholly ameliorated by our finding that, whatever the reality, the Appellant always believed his status to be lawful.

31. The Appellant has a genuine and subsisting relationship with both of his children. Both are British citizens and therefore "qualifying" children within the terms of section 117D above. The Appellant has a genuine and subsisting relationship with his wife who, as a British Citizen, is a "qualifying partner". The relationship with his wife was not formed at a time when the Appellant was in the United Kingdom unlawfully. In our judgement, as stated above, it would be unreasonable to expect either child to leave the United Kingdom both of whom were born here, are established in school and nursery here, have established relationships here and have close relatives here with whom they interact on a regular basis including cousins, uncles, aunts and a grandmother. It is therefore not in the public interest for the Appellant to be removed.

32. It follows that in our judgement the Respondent's decision is a disproportionate interference in the Appellant's established family and private life in the United Kingdom and that his appeal is therefore allowed.

Summary

33. The decision of the First-tier Tribunal involved the making of a material error of law and has been set aside.

34. We remake the decision of the First-tier Tribunal by allowing the Appellant's appeal by virtue of Article 8 of the Human Rights Convention.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal