IN THE UPPER TRIBUNAL

R (on the application of Hoomragh Chua) v Secretary of State for the Home Department IJR [2014] UKUT 00440(IAC)

F ield House

Friday, 5 September 2014

BEFORE

UPPER TRIBUNAL JUDGE CRAIG

Between

HOOMRAGH CHUA

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr E Munir, instructed by Bukhari Chambers Solicitors appeared on behalf of the Applicant.

Ms J Smyth, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

JUDGE CRAIG: The applicant in this case Mr Chua is a national of Mauritius who was born on 25 February 1964. He arrived in this country lawfully in 2001 as a visitor. It is said on his behalf that he had a small extension of leave granted although this has not been confirmed by the respondent. Whether or not this is the case is not relevant for the purposes of this application because it is common ground that at any rate since 2002 his stay in this country has at all times been without leave and during this period he has also worked although he has had no permission to do so.

2.
On 5 July 2012 the applicant applied to regularise his status by making an application for leave to remain outside the Immigration Rules. The claim was essentially on the basis of his Article 8 rights and has been fairly summarised in a skeleton argument which was provided for the purposes of this hearing by Ms Smyth who represents the respondent and reference will be made to the circumstances in which this was produced below. At paragraph 8 of the skeleton the applicant's claim is summarised as follows:

"In essence the claimant's Article 8 claim boils down to the following:

(a) He has been in the UK for over eleven years (the vast majority of it unlawfully);

(b) he lives with his sister;

(c) he plays a role in the lives of his family members (principally his siblings and nieces and nephews – his nephew submitted a letter saying that the claimant helped him with maths and 'pointed out the dangers of life for the youth') and

(d) he has a number of friends in the UK. He does not claim to have a relationship with a British citizen or person settled and present in the UK, nor any children."

3.
This application was refused by the respondent on 12 August 2013 and the refusal letter is dated the same date. Turning to the refusal letter the respondent first considered whether or not the applicant satisfied the requirements of paragraph 276ADE of the Rules and having considered that he did not for reasons which I will summarise below then considered whether or not the application raised or contained any exceptional circumstances such that when considering the right to respect for private and family life contained in Article 8 of the ECHR, consideration was warranted outside the requirements of the Immigration Rules.

4.
With regard to the requirements under paragraph 276ADE the relevant part of that paragraph under which the application had to be considered was paragraph 276ADE(vi) which requires that the applicant at the date of application "is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK".

5.
As the respondent noted within the refusal letter the applicant was aged over 18 and had lived continuously in the UK for under twenty years and accordingly in order to succeed under the Rules would have to show (in order to meet the requirements of paragraph 276ADE(vi)) that he had no ties including social, cultural or family with his home country.

6.
With regard to this aspect of the claim the respondent's decision was as follows:

"Having spent 37 years in your home country and in the absence of any evidence to the contrary, it is not accepted that in the period of time that you have been in the UK you have lost ties to your home country".

For this reason the respondent was not satisfied that the applicant could meet the requirements of paragraph 276ADE(vi).

7.
With regard to whether or not his application raised any exceptional circumstances such that consideration was warranted under Article 8 outside the requirements of paragraph 276ADE the respondent considered that no such exceptional circumstances were raised and accordingly the application had to be refused.

8.
The decision was made as noted on 12 August 2013 and these proceedings were brought on 7 November 2013 nearly three months after the date of the decision being challenged. Although the Rules provide as a long stop that an application will be out of time if not made within three months of the date of the decision being challenged, they do provide that the application should in any event be made promptly which arguably this application was not. However, this is not a point which has been taken on behalf of the respondent and so the application fell to be considered on its merits.

9.

Permission to bring these proceedings was granted, perhaps generously on the facts of this case, by another Upper Tribunal Judge for the following reasons:

“(1) As to the adequacy of the reasoning in the decision of 12/8/13, the extent of justification contained in the Acknowledgment of Service contrasts with the decision itself.

(2) The applicant’s criticism of the absence of a removal decision lacks reference to case law and to policy, but may be capable of development.”

10.
I should note at this stage that in the decision granting permission to bring these proceedings case management directions were set out and these included the following:

“• The applicant must serve a skeleton argument and trial bundle on the Tribunal and on any other person provided with the application form, no later than 21 days before the date of the hearing of the judicial review.

• The respondent and any other person wishing to make representations at the hearing must serve a skeleton argument on the Tribunal and on the applicant, no later than 14 days before the date of the hearing of the judicial review.

• The applicant must file an agreed bundle of authorities, not less than 3 days before the date of the hearing of the judicial review.”

11.
Regrettably those representing the applicant took no steps to comply with these directions. No justification for this has been advanced before the Tribunal. A skeleton argument was not served in advance of the hearing and a bundle was not produced, and nor was an authorities bundle produced by the applicant. The consequence of this has been that those representing the respondent were unable to submit their arguments within the timeframe envisaged in the directions and they waited until they could wait no longer before serving the skeleton argument to which I have already referred and a bundle of authorities which were very helpfully prepared by them although the directions envisaged that this bundle would be produced by the applicant. I should note in this regard that the respondent’s solicitors wrote to the applicant’s solicitors as long ago as 21 August 2014 in which they stated as follows:

“The applicant was due to file and serve his skeleton argument by 15 August 2014. Such skeleton argument has not been received by the Treasury Solicitor’s department. The respondent is due to file and serve her skeleton argument by 22 August 2014 but is not in a position to do so without sight of that skeleton prepared by the applicant.

I should be grateful if the applicant’s skeleton argument could be provided forthwith so that the respondent has the opportunity to both respond and to prepare the upcoming hearing.”

12.
Although the respondent was not able to have prepared a skeleton argument on her behalf until very late in the proceedings, this document was prepared by Ms Smyth of Counsel and has dealt with every aspect of this application, although had the respondent known in advance which of the applicant’s submissions were being pursued, this document would not have had to be so lengthy. I should state in this regard that Mr Munir who represented the applicant before the Tribunal today was not instructed until yesterday and had had no involvement in this application before then and I make no criticism

whatsoever of his representation. He did the best he could in circumstances which must have been exceptionally embarrassing for him as he was put in a position where he had to submit a skeleton argument at the time of hearing knowing full well that this document should have been prepared and submitted some three weeks earlier. As I say he did the best he could and it is not his fault in any way that the directions given were not complied with. However, it is reprehensible that they were not and that no proper explanation has been put before the Tribunal as to why not. The upshot is that the substantive application is now before me and I have heard submissions on behalf of both parties and have also had put before me, albeit very late in the day, skeleton arguments on behalf of both parties.

13.
The applicant's case can be summarised as follows and this is the way in which the case was argued before me by Mr Munir. The applicant no longer has any ties in Mauritius as he has been in this country now for about thirteen years. He has no relatives in Mauritius now. As to "exceptional circumstances" the reason why the respondent should have considered his application properly under Article 8 is because he has been here a very long time and he lives with his sister and her family as a family unit. Although in the grounds, as referred to by the judge when granting permission to appeal, it is argued that the respondent should have made a removal decision carrying with it an in-country right of appeal, this argument was never developed and Mr Munir quite properly did not pursue this submission before the Tribunal. Although permission was granted partly on the basis that such an argument might be "developed" it has not been and indeed in my judgment it is quite clear on the authority of the Court of Appeal in R (Daley-Murdock) v SSHD [2011] EWCA Civ 161 read in conjunction with the decision of the Supreme Court in Patel & Others v SSHD [2013] UKSC 72, such an argument could not possibly succeed. It is now well-established that the decision as to whether, and if so when to make a removal decision is a matter for the respondent to decide and the appropriate course for someone who has no right to remain in this country especially once an application for leave to remain has been refused is to leave voluntarily. In the event that such a person does not, it is for the Secretary of State to decide at what stage it is appropriate to make a removal decision and indeed in circumstances where such a removal decision might be appealed whether to certify that such an appeal would be without merit.

14.
Accordingly I turn now to consider the merits of the claim itself which is essentially in two parts. The first is that the decision was unlawful because the respondent failed to give adequate consideration as to whether or not the applicant had any ties remaining with Mauritius. The second part is that even if he did, on the basis of his having been here for eleven years before the decision and living with his sister, the respondent should have considered that these factors were sufficient to warrant consideration outside the provisions of paragraph 276ADE(vi) of the Rules under Article 8.

15.
Dealing with the first submission first, this seems to me to be completely unarguable. I asked Mr Munir if he could point to any evidence at all within what had been submitted to the respondent with the application and prior to the decision to the effect that the applicant no longer had any ties (including social, cultural or family) with Mauritius. Mr Munir's initial response was that it was "simply the fact that he has been away for so long and hasn't been back". Although Mr Munir then submitted that the applicant had no relatives in Mauritius and referred to a letter which had been sent and which was at page 57 of the bundle, in fact as he was eventually obliged to concede the letter does not say (as Mr Munir put it "in so many words") that the applicant does not have any family ties remaining in Mauritius. There was and remains no evidence at all that the applicant does

not have either social, cultural or family ties in Mauritius and, in those circumstances, (and in the absence of any evidence to the contrary), the respondent's decision not to accept that having spent some 37 years in Mauritius, the applicant had lost all ties to his home country in the period of time he had been in the UK, was an entirely rational one and is clearly within the range of reasonable decisions which were open to her. In this regard, although I would have reached this decision independently, I note that in a different application before Andrew Thomas QC sitting as a judge of the High Court in the case of Osawemwenze v SSHD [2014] EWHC 1564 (Admin) a similar argument was made which was determined as follows at paragraphs 18 and 19:

"18. No evidence has been placed before the court to support the claimant's case that he has lost all ties to Nigeria. I am told, and I accept, that his parents in Nigeria have both died. However, his witness statement simply does not address the issue of social, cultural or family ties at all. Mr Bloomer [Counsel for the applicant in that case] invites me to draw the inference that after 15 years such ties as there were must have diminished. However, the difficulty with drawing an inference based simply on the passage of years is that sub-paragraph (iii) provides for a 20 year qualifying period for an applicant over the age of 25. The Defendant has in drafting the new rules considered the circumstances in which time alone might give rise to the relevant inference, and 15 years is not enough.

19. Mr Mandalia [Counsel for the Secretary of State] referred me to the decision of Burnett J in R (Kotecha) v SSHD [2011] EWHC 2070 (Admin), in which it was held (at para 56) that ' it is … for the applicant to place before the Secretary of State all material upon which he relies to suggest that the consequences of removal would interfere with the Article 8 rights of the family'. The burden of proof is on the applicant to show that there are obstacles to relocating (see para 21). In my view there is no evidence to support the bare assertion that the Claimant has lost all ties to Nigeria. Indeed, both Ms Andrew and Fred are Nigerian citizens. In my view, the claim cannot succeed on this ground."

16.
In this case, there is no reason to suppose that merely because this applicant had been in this country for eleven years before making the application he would have lost all his social, cultural or family ties with Mauritius. There is simply no evidential basis upon which such a finding could be properly made and certainly no basis for arguing that the respondent's decision in this claim was in any way irrational.

17.
I now turn to consider whether or not there is any possible argument which could properly be advanced that the respondent failed properly to consider whether or not there were any factors outside the provisions of paragraph 276ADE as to warrant consideration under Article 8 outside the Rules and in my judgment it is entirely clear that it was open to the respondent to consider that there were not. There is now a very large body of case law which establishes that it is only in rare cases (such as to make this the exception rather than the rule) where it can be said that where a claim cannot succeed under paragraph 276ADE of the Rules, nonetheless it would be unjustifiably harsh to order the removal of an applicant. These cases include MF (Nigeria) [2013] EWCA Civ 1192 (the decision of the Court of Appeal), Nagre [2013] EWHC 721 (Admin) (the decision of Sales J), Gulshan [2013] UKUT 00640 (IAC), Ahmed [2014] EWHC 300 (Admin), Shahzad [2014] UKUT 00085, Haleemudeen [2014] EWHC 558 and MM & Others [2014] EWCA Civ 985 (the last two being decisions of the Court of Appeal). It is instructive to set out relevant paragraphs from the judgement of Beatson LJ in Haleemudeen , as follows:

“These new provisions in the Immigration Rules [in particular referring to paragraph 276ADE] are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country in which to settle in it. Overall the Secretary of State’s policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than previously had been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them... [40].

In Nagre ’s case, Sales J stated ... that it is necessary to find ‘particular factors in individual cases of especially compelling force in favour of a grant of leave to remain’ even though those factors are not fully reflected in and dealt with in the new Rules and ‘to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave’.... Mr Richardson’s preferred position was that the Rules are only the starting point for an assessment of proportionality. It was with evident reluctance that he accepted that, at least in this court, in light of the authorities, it is necessary to find ‘compelling circumstances’ for going outside the Rules” [43 and 44].

18.
It is accordingly clear that the decision maker is entitled not to dot every “I” or cross every “T” with regard to any argument under Article 8 unless there are compelling circumstances which require that decision maker to consider factors outside the substantive paragraphs of the Rules. In this case there are in my judgment no such compelling circumstances. The highest that this applicant’s case can be put is that he has now been here thirteen years (only eleven at the time of the application) and that he lives with his sister as part of a family unit. Ms Smyth pointed out that the evidence even on this was not wholly consistent because it was not at all clear whether or not he was living with his sister or sister-in-law and precisely who that person was, but I will assume in favour of the applicant that he does have at least a private life in this country with some of his family with whom he lives. However there is nothing unusual about this and there is no factor which could be said to be so compelling as to require a decision maker to consider whether Article 8 considerations might apply outside the requirements of the Rules. It is not suggested that he has any children in this country nor is it suggested that he has a relationship with either a British citizen or someone else who is settled in this country.

19.
For the sake of completeness I should also take into consideration that pursuant to sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 which was inserted by section 19 of the Immigration Act 2014 and came into force on 20 July 2014, it is provided (sections 117B(4) and (5)) that little weight should be given to a private life established by a person who is in the UK unlawfully, or at a time when his immigration status is precarious. However, it is not necessary in this case for me to consider the effect of these provisions (which were not in force when the challenge was made but which nonetheless would be relevant were I to consider granting judicial review which is a discretionary remedy) because even in the absence of these provisions this application is completely hopeless.

20.
In summary therefore I find that the decision under challenge was in all respects a decision which was open to the respondent and there was nothing irrational about it.

21.

I would wish in conclusion to thank both Counsel for their assistance in this case. Ms Smyth particularly has prepared this case extremely conscientiously (in the event more thoroughly than was necessary but she cannot be criticised for that because until today she had no idea what arguments might be advanced on behalf of the applicant) and her oral submissions have been both succinct and persuasive. Mr Munir has had the unenviable task of advancing a case which on the material he had could not possibly succeed but where he was instructed far too late to give any meaningful advice as to whether or not it was even worth proceeding.

Costs

22.
Having given my judgment I have heard submissions on behalf of both parties with regard to costs and I summarily award costs to the respondent in the sum of £3,200. This sum is inclusive of such VAT as is payable in respect of Counsel's fees. As the respondent was unable to inform the court as to whether or not VAT would be recoverable in respect of the other costs of the Treasury Solicitors I do not award any other VAT in respect of costs and as the amounts involved are relatively small I do not consider it proportionate to delay my award of costs in order to consider this aspect of costs further. I have been told that there were costs wasted as a result of the failure of the applicant's solicitors to comply with the directions which had been made as they should have done. I am told that this is in respect of some hours' work but that precisely what sum has been wasted has not yet been quantified. In these circumstances I give permission to the respondent to make an application for the applicant's solicitors to pay such costs as are attributable to this failure provided that such application is made within 7 days of today's date (and I make it clear that this is from today's date and not from whatever date this judgment is in fact sent to the parties, which will not be today). If such an application is made then the sum claimed and the basis on which it is claimed should be stated precisely within the application.

Permission to Appeal

23.
Although no application has been made for permission to appeal, I am nonetheless obliged to consider whether or not to grant permission to appeal pursuant to rule 44 (4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I refuse permission to appeal because there is no error of law in my judgment.

Signed:

Upper Tribunal Judge Craig

Dated: 15 September 2014