



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09040/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Decision & Reasons Promulgated
Newport
On 28th October 2015**

On 3rd November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**GFJ
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam of Counsel

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

Anonymity

It has previously been found appropriate, given this appeal involves children and asylum issues, that the Appellant(s) be granted anonymity unless and until the Tribunal directs otherwise. As such, no report of these proceedings shall directly, or indirectly, identify the Appellant (s) or any members of his/her/their family. Failure to comply with this direction could lead to a contempt of court.

1. The Appellant appeals with permission a decision of the First-tier Tribunal, Judge Clemes, promulgated on 6th March 2015, in which the Judge dismissed the Appellant's appeal brought on asylum and human rights grounds. The Grounds of Appeal before me do not challenge the dismissal of the protection claim. Permission was not granted in respect of the challenge that the Judge's consideration failed to assess the best interests of the Appellant's child. The Ground of Appeal upon which permission was granted was directed at the Article 8 decision.
2. Mr Lam before me sought to argue that
 - (i) Immigration Rules Private Life test of paragraph 276ADE:
 - (a) the judge only looked at one sub paragraph i.e. (vi) that of 20 years residence, rather than the one applicable, i.e. to less than 20 years residence at (v) and,
 - (b) when looking at 276 ADE (vi) looked at the wrong version, assessing the quality of ties existing ties, rather than asking whether there were very significant obstacles to re-integration, which Mr Lam asserted was an easier test,
 - (ii) Further the Judge should have revisited the issue when he made his proportionality assessment in the context of Article 8 ECHR at large, and brought forward his own finding that by the time of the hearing if the Appellant had made a new application it might be granted under the 20 year route.
3. The ground at (i) is a spurious gloss on the position as it was before the FtTJ. The Appellant had not applied under the Private Life Rules. He did not appeal on the ground that he met the Rules. If he had he could not have succeeded, whether under the 20 year route or the very significant obstacles provision, because the 20 year route is a time line which is calculated as at the date of application not decision, and the Appellant did not meet it, and in any event, as applies to the each of the time line routes, an application must have been made to the respondent, and no application had been made. Accordingly any appeal on Immigration Rules grounds regardless of the sub paragraph or the test was bound to fail.
4. The ground at (ii) is without merit. Firstly it is clear that the judge was well aware of the position in respect of any fresh application because he states at [28] that such an application made to the respondent might well have to be granted.
5. The Appellant argues that the Judge must have lost sight of the position in assessing the overall Article 8 proportionality exercise is little short of a perversity challenge because it is argued on the basis that if he had had it in mind he would have found the decision proportionate. I am asked to set the decision aside and remake it allowing the appeal on Article 8 grounds.

6. As Mr Lam recognised the force in the application was identified by Upper Tier Judge Southern when he granted permission to the point that when assessing the Appellant's Article 8 position the fact that he had resided in the United Kingdom for a length of time which would mean that the Respondent might well have to grant an application, if made, on the basis of long residence is a matter which arguably renders the decision on proportionality perverse.
7. I note that it was the judge's own understanding, in that it was not the argument put forward by the representative. I note the shortness of the decision to the point that I am satisfied that the judge is unlikely to have forgotten it.
8. I note that it was not submitted to the Judge that the Appellant's length of unlawful residence should be determinative of the overall Article 8 position.
9. The long residence Rules at 276ADE are not determined merely by length of residence, or the context of a valid application supported by the appropriate fee, but also require the satisfaction of suitability requirements.
10. At the date of the Judge's decision the length of residence is but one of the issues, in the absence of an application having been made to the Respondent issues in respect of suitability had not even been investigated or considered by her and the matter was not canvassed before the Judge.
11. Whilst a cursory reading of the Judge's finding at [28] might give rise to the impression that the Judge was indicating that an application based on long residence would be bound to be granted, a careful reading reveals that that is not in fact the case. Whilst the Judge makes a finding in favour of the Appellant in terms of the length of residence such an application requires the Judge does not make any finding as to the outcome of such an application. The requirements of the Rule, as these grounds have illustrated, change from time to time. Even allowing that the Judge was correct in his speculation that such an application might well be granted on the current version it is a speculative position. This is not a case where there was a concession made by the Respondent that in the event that such an application were made it would be granted. I understand that such an application is now outstanding but that does not affect the issue either.
12. The assessment to be made by the judge was an evaluation through the lens of a failure to meet the requirements of the Rules of Article 8 private and family life "outside of the Rules". The assessment was, in the context including factors which amendments to the 2002 act by section 117 of the 2014 Act, none of which it is suggested make Private Life Rules based on length of residence determinative, a question for assessment by the judge.

13. The family had no entitlement to remain under the Rules; the Respondent's decision was a lawful decision in the Rules context. The judge found that removal would not unduly interfere with the Appellant's family life or that of his partner and children, also here unlawfully, as they would be removed as a family unit. The judge found that they would be able to enjoy family and private life in China and there were no real obstacles to their being able to enjoy a future in China.
14. The Judge has adequately considered the position of the Appellant in the round and found that there was nothing in his and his family's position which made removal a disproportionate interference. Looked at the position in the round the ability of the Appellant to make a different Private Life application under the Rules, even allowing that it might be granted, does not render the Judge's own assessment erroneous in law. In short the Judge, whilst recognising the length of residence at 28, and the opportunity open to the Appellant to make a different Rules based Private Life application, was entitled to conclude that as at the date of her consideration the removal decision was not disproportionate. Whilst expressly saying so would have made the point clear to the Appellant, to suggest that the failure to do so is a material error is misconceived not least because it was not the argument on the day.
15. I find that the reasoning of the Judge is adequate, dealing fully with the case as argued, and reaching an evaluative conclusion sustainable on the evidence. I find that the decision of the First-tier Tribunal is not flawed by a material error of law and it stands.

Signed E Davidge

Date 02 November 2015

Deputy Upper Tribunal Judge Davidge