Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number IA/27210/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower
On 29th June 2015

Decision and Reasons Promulgated
On 16th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

KINGDOM MAXWELL MCHIKOMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Lawrence (Counsel, instructed by The Law Partnership Solicitors)
For the Respondent: Mr I Richards (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant's application for leave to remain (LTR) in the UK was made on the 27th of May 2010. There followed a series of decisions to refuse the application made by the Secretary of State but without making a decision to issue removal directions. Accordingly none of the earlier decisions carried a right of appeal and at different stages each was withdrawn.

2. The decision against which the Appellant appealed was made on the 13th of June 2014. The appeal was herd by First-tier Tribunal Judge Crawford at

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Stoke on the 25th of September 2014 and dismissed in a decision promulgated on the 1st of October 2014.

3. The Appellant sought permission to appeal on a number of grounds which were concisely drafted. Firstly it was argued that the Judge should have granted an adjournment to allow the Appellant to obtain evidence of the family proceedings that had been launched. The Judge was wrong to find that the Appellant did not have family life with his son. The pre July 2012 law had not been properly considered and there was no reference to the long residence of the Appellant. As the case involved a child it should have been treated more delicately.

4. The application was granted by Judge Froom on the 14th of November 2014 who observed that at the date of the hearing the Appellant had been in the UK for more than 10 years and that the Judge, having been referred to Edgehill had not considered paragraph 276B of the rules, there was an arguable misdirection at paragraph 7. Additionally there was no legal burden on the Appellant to show that the decision would not be proportionate and there was no reference to the Respondent's 4 year delay in making a decision.

5. At the hearing before the Upper Tribunal both parties made representations which are set out in the Record of Proceedings. Both maintained their respective positions with regard to the approach of the Judge and the correctness of the decision.

6. In relation to the application for an adjournment I indicated at the hearing that I was satisfied that there was no error in the Judge’s approach. The application dated back, at the date of the hearing, over 4 years and there had been ample time for the case to be prepared. Whilst there is no legal requirement to provide corroboration a Judge is entitled to have regard to supporting evidence that might be expected and he noted that there was almost nothing to support what the Appellant said.

7. Given that the Appellant maintained that he had regular contact with his son the lack of evidence in support was something the Judge was bound to have regard to and it was too late on the day of the hearing to address that absence. There was not even a copy of the application that the Appellant had made to the family court. Fairness is obtained, in part at least, by giving a party the opportunity to prepare and present their case, the Appellant had had that opportunity and there was nothing wrong in the Judge’s decision to continue with the hearing.

8. The delay point is not as important as it might at first appear. Delay does not, by itself, give rise to any substantive right. It might give an Appellant more time in which their family or private life is strengthened and foster in them a belief that their position is more durable than might at first have appeared. The private and family life that is thereby established falls to be assessed as part of the article 8 exercise if that is reached.

9. As the application had been made before the 9th of July 2012 the Appellant's case was to be considered under the Immigration Rules as they stood on the 8th of July 2012, subject to the observations in the case of Singh [2015] EWCA Civ 74, which post-dates the decision but clarifies the law.

10. The Judge noted in the decision that having referred to Edgehill the Appellant's representative moved on to article 8, the Record of Proceedings shows that is a correct summary of what was said as it was accepted that the Appellant did not have 20 years continuous residence in the UK. There appears to have been no submissions made with regard to paragraph 276B and the Judge did not consider that aspect of the case.

11. In the Upper Tribunal it was submitted on behalf of the Secretary of State that if the Appellant's representative had thought that the Appellant could succeed under paragraph 276B he would have made submissions on the point. It was plain he would struggle with the rule and in any event the Appellant's circumstances were fully analysed in paragraph 17 of the decision.

12. The Appellant's application was made in May 2010 and so pre-dated the introduction of Appendix FM and the other reforms to the Immigration Rules on the 9th of July 2012. The appealable decision for the Appellant was made on the 17th of June 2014 and was a removal decision under 47 of the Immigration, Asylum and Nationality Act 2006.

13. The effect of the various rule changes and the ability of the Secretary of State to consider a pre 9th of July 2012 application under the post 8th of July 2012 rules relating to private and family life were considered in the case of Singh. In the judgment of Underhill LJ it was decided that after the 6th of September 2012 the Secretary of State was entitled to apply the new rules to pre 9th of July 2012 applications.

14. To have succeeded under paragraph 276B the Appellant would need to show 10 years lawful residence and to meet the other requirements of the rule. It was not argued that he could meet the requirements set out in the Immigration Rules and having regard to the lack of evidence provided at the hearing concerning the Appellant's connections to the UK and his previous convictions that was an approach that the Appellant's representative was entitled to take and the Judge was entitled to rely on it.

15. Whilst it may have been helpful if there had been a further reference to paragraph 276B the findings made by the Judge, which are not challenged, show that the Appellant would not have met the requirements and accordingly any error in that regard cannot be regarded as being material.

16. In any event article 8 has to be assessed against the background of the Immigration Rules and the factors set out therein. The inability of the Appellant to meet the requirements of the rules was a significant factor and there were no compelling circumstances that would have justified allowing the appeal under article 8.

17. The decision was open to the Judge for the reasons given and contains no error of law.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 16 July 2015