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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46023/2014

THE IMMIGRATION ACTS

At Field House
On 29th October 2015

Decision and Reasons Promulgated
On 21st December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR CARL GRAY
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G. Counsel, instructed by JI Solicitors
For the Respondent: Mr C. Avery, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

2. The appellant is a national of Jamaica born on the 1st September 1959.

3. On 14 May 2006 he applied for indefinite leave to remain under the 14-year long residence rule contained at paragraph 276B of the immigration rules then in place.

4. There was gross delay on the part of the respondent in reaching a decision despite various reminders from the appellant's representatives and the intervention of his Member of Parliament. The appellant's representatives had to threaten judicial review proceedings which eventually resulted in a decision, albeit a negative one, on the 30 October 2014. In the decision and in the subsequent appeals the respondent has continued to accept that 14 years residence under the former rules continues to be the test applicable.(*contra* Singh v Secretary of State for the Home Department [2015] EWCA Civ 74)

5. The application was refused on the basis the appellant had not established 14 years continuous residence as required under paragraph 276B(i)(b).

6. Paragraph 276 B (b) required not only 14 years continuous residence but also consideration of whether it would be undesirable to grant indefinite leave. Regard was to be had to the applicant's age; connections with the United Kingdom; personal history; domestic circumstances; any criminality; any compassionate circumstances and any representations made.

7. The refusal letter set out paragraph 276B in its entirety which included the public interest considerations. However, it focused on the 14 years residence not being established and makes no comment on the public interest considerations.

8. The respondent then went on to consider paragraph 276 ADE which had been introduced in the interval and appendix FM. There is reference to his personal circumstances and criminal convictions.

The First Tier

9. The grounds of appeal consisted of generalities. The appellant's appeal was heard at Hatton Cross on 18 May 2015 before Judge Adio of the First-tier tribunal. The appellant was represented by Counsel. The respondent did not arrange representation.

10. In the decision allowing the appellant's appeal Judge Adio set out the reasons for refusal in respect of paragraph 276B. The judge summarised what took place at the hearing. The judge found as a fact that the appellant has been in the United Kingdom for over 14 years. At para.15 onwards the judge gave a number of reasons. Firstly, the appellant had adopted his witness statement in which he said he had been in the United Kingdom for over 14 years. He was not subject to cross-examination, there being no presenting officer in attendance. In his statement he indicated that he came to the United Kingdom in 1964 at the age of 5 to join his parents. The judge referred to a school record produced showing he

attended a primary school on 21 September 1964 and a secondary school to 1983. The judge then referred to a record of criminal convictions spanning 1977 to 2003. Furthermore, there was documentation the appellant had five children born in the United Kingdom in 1981, 1983, 1986 and 1990 and 1995. Based on this the judge concluded he had been residing in the United Kingdom for more than 14 years.

11. At paragraph 17 judge referred to public interest considerations. He noted the appellant had committed criminal offences. The offences including robbery, theft, burglary and possession of class A drugs .The judge noted the last offence was in 2009. The judge noted the appellant came here as a child and concluded in later life, due to homeless and bad company, he had lost his way. He had five children here as well as siblings. No deportation proceedings had been taken. The judge found he had no ties with Jamaica and that his life was more stable now and he was in a training programme and had accommodation.

12. In seeking permission to appeal to the Upper Tribunal submitted that satisfactory evidence of residence the requisite period had not been provided. It was commented that only one of his children gave oral evidence. Even if the appellant had been here for 14 years it was contended the judge had failed to consider the public interest considerations in paragraph 276B (ii) adequately.

13. Mr Avery pointed out the burden of proof was upon the appellant to show the necessary 14 years residence. On the evidence there are gaps particularly after his conviction in 2003. Regarding the public interest considerations a submitted it was telling that the appellant was relying upon his criminal convictions to show his presence in the United Kingdom. He said the appellant had an appalling criminal record and submitted the judge was dismissive of this at paragraph 19 of the decision. The appellant's representative relied upon the skeleton argument advanced in the first-tier tribunal. It was pointed out the appellant had lived for 31 years in the United Kingdom on his account and the judge had proper regard to rehabilitation.

Consideration.

14. The issue in the present proceedings is whether on the evidence the outcome was one open to the judge. The first criticism made by the respondent is that the judge did not have sufficient evidence upon which to base a finding of 14 years continuous residence.

15. It is my conclusion the judge gave adequate reasons based upon rational logic. The first piece of evidence was from the appellant himself. The judge chose to accept this as true. It was open to the respondent to send a presenting officer to the hearing to test the evidence but this was not done. There was also evidence relating to the appellant’s schooling. Furthermore, there was a record of offences from 1977 to 2003 indicating his presence in the country. Furthermore, he is the father of five children

born between 1981 and 1995: again, further evidence of his presence. All these points are rational and demonstrate his presence as effectively as paper evidence. There is nothing to suggest he ever left United Kingdom and to do so would mean he would face difficulty in returning.

16. It is also contended that the judge did not deal adequately with the requirements of paragraph 276 B (ii) and the public interest considerations. Because the refusal letter makes no comment on this aspect of the rules I had regard to Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC).This dealt with the situation where the decision maker has failed to exercise a discretion. In that case the Tribunal's jurisdiction is limited to a decision that the failure renders the decision 'not in accordance with the law' (s.86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task. This point was not raised in the leave application and would mean the Secretary of State was arguing her decision was unlawful. The point was also not raised at hearing.

17. On reflection, I do not find the present decision concerns the exercise of discretion as meant in the reported case. It could be argued that no issue was taken by the respondent on the public interest question because it was not referred to in the refusal letter. A more likely alternative however, is that the respondent saw no need to plead this in the alternative but was relying on the 14 year issue. Public interest considerations were referred to in relation to the new rules. Whatever the format of the reasons for refusal letter it is clear that the decision maker had this in mind.

18. The Judge does set out the public interest considerations at paragraph 17. The decision indicates awareness that the rules required not only 14 years residence but also a balancing of public interest considerations. It is my conclusion the judge adequately has regard to these factors which are set out at paragraph 17 to 19 of the decision.

19. The respondent seeks to criticise the judge for commenting on the fact deportation proceedings were never taken. In my view it was a legitimate comment on the part of the judge, particularly as the appellant had been detained for substantial periods on a number of occasions.

20. In conclusion, I find the judge presented a balanced decision in which the relevant factors are set out and logical reasons for the conclusions given. I find the respondent is now simply trying to reargue the case, having failed to arrange a presenting officer at the original hearing .Consequently, I see no material error of law and the decision shall stand.

Decision.

The Secretary of States appeal is dismissed.

The decision of First–tier Judge Adio allowing Mr. Gray’s appeal shall stand.

Deputy Upper Tribunal Judge Farrelly