Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31025/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st June, 2017 and	**On 10th July 2017**
Sent to Promulgation	
On 10th June 2017	

Before

Upper Tribunal Judge Chalkley

Between

MR THOMAS ADOMAKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Bond of Counsel instructed by Irving & Co Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Ghana, who was born on 25th February, 1966 and who first arrived in the United Kingdom as a visitor on 7th December,

1991. He made a claim for asylum which was refused and in 2003 he made a further application for leave to remain on long residence grounds. The respondent appears to have acknowledged this application on 30th June, 2003, but made no decision on that application.

2. The appellant then made a further application for leave to remain on 15th May, 2012, but this application was refused on 23rd January, 2014, with no right of appeal. The Secretary of State indicated that documents submitted by the appellant did not cover the period from 1999 to 2004 and the respondent was not therefore satisfied that the appellant met the requirements of paragraph 276A4 with reference to paragraph 276A1 and 276B(i)(b) of Statement of Changes in Immigration Rules, HC 395, as amended ("immigration rules").

3. The appellant instructed solicitors to write pre-action judicial review protocol letters to the respondent and on 30th September, 2014, the Secretary of State again refused the appellant's application and indicated that the appellant had no right of appeal. The appellant commenced judicial review proceedings, but those proceedings were settled by agreement on the Secretary of State agreeing to make a fresh decision within three months. A further decision was made on 8th September, 2015, but unfortunately that too refused the appellant's application and the appellant gave Notice of Appeal.

4. The appellant's grounds were that the decision of the Secretary of State was not in accordance with the Immigration Rules and that he had met the requirements of paragraph 276B of the immigration rules as he had accrued fourteen years' unlawful residence in the United Kingdom. They also asserted that the appellant's Article 8 rights would be breached, given the length of time that he had lived in the United Kingdom.

5. The appellant's appeal was heard by First-tier Tribunal Judge Gribble at Birmingham on 25th July, 2016. At paragraph 21 of her determination, the judge said this:-

> *"The appellant has no right of appeal on the grounds that the requirements of the Immigration Rules are met. His right of appeal is solely on the ground that the decision breaches his rights under the Human Rights Act. I am satisfied that his long residence in the UK provides a sufficiently compelling or exceptional circumstance to warrant consideration of the case directly through the test laid down in Razgar v SSHD [2004] UKHL 27."*

6. Having considered the appellant's Article 8 rights, the judge concluded that the public interest in maintaining effective immigration control, weighty as it was, was outweighed by factors in favour of the appellant and that the decision of the respondent was therefore disproportionate. The judge allowed the appellant's appeal on human rights grounds finding that the appellant met the requirements of paragraph 276ADE(iii) of the immigration rules.

7. The appellant sought and obtained permission to appeal. In granting permission to appeal Upper Tribunal Judge Joanna McWilliam said this:-

> *"It is arguable that the appellant made an application under the Rules before July 2012. If that is the case, it is arguable that the appeal should have been considered under para 276B(i)(b) of the Rules; see Home Office guidance relied on by the appellant dated August 2015. The parties will need to address the Tribunal in respect of Khalid and Singh [2015] EWCA Civ 74."*

8. At the hearing before me, Miss Bond made extensive and eloquent submissions. Counsel kindly provided me with a copy of the decisions in *Edgehill & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 204, although she did not actually refer me to that decision, and she also provided me with a copy of the decision in *Singh and Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74.

9. Counsel told me that the appellant relied on Chapter 8 Transitional Provisions Guidance published by the Secretary of State and in particular on paragraph 9.2.3. She also relied on Transitional Appeal Guidance issued by the Secretary of State and provided me with copies. By way of clarification Miss Bond agreed that the appeal before me was, as the judge had indicated, in respect of the Secretary of State's decision of 8th September, 2015 but, she added, there should also have been a right of appeal in favour of the appellant against the earlier decisions of the Secretary of State, namely the decisions of 30th September, 2014 and the earlier decision of 23rd January, 2014. She explained that the decision of the Secretary of State of 30th September, 2014 resulted in the application by the appellant for judicial review. Those proceedings were settled by agreement between the parties on the basis that the Secretary of State would within three months reconsider her earlier decision. The Secretary of State had agreed to those judicial review proceedings being compromised by agreement and the matter was reconsidered by the Secretary of State, but the decision of 8th September, 2015 resulted in a similar refusal. At the time of the decision of 8th September, 2015, the Secretary of State's long residence guidance was in force and paragraph 9.2.3 makes clear that applications under paragraph 276B(i)(b) which were made before but not decided by 9th July, 2012, and reconsiderations, as this was, would be decided or reconsidered in accordance with that paragraph. The Transitional Appeals Guidance was also in force and this provides:-

> "These appeal rights conferred to exist for decisions made on or after 6th April, 2015 where:
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> . ...
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> . ...
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> . any other application was made before 6th April, 2015 [which of course this application was] the outcome of which is an appealable decision under pre-Immigration Act 2014 regime, unless the decision was a refusal of an asylum or human rights claim."

She submitted that this application was not either an asylum or human rights claim, it was a claim under paragraph 276B of the Immigration Rules. The Guidance was in force and gives the appellant a right of appeal and the Transitional Appeals Guidance says that the Tribunal has jurisdiction. The appellant had a legitimate expectation that his application would be granted. She then drew my attention to what the Court of Appeal had said at paragraphs 79 and 80 of *Singh and Khalid*. There Lady Justice Arden said this:-

> "79. I also agree that these appeals should be dismissed, but with the following qualification. I respectfully would not go so far as my Lords in paragraph 40 above and would not say that the distinction made by Mr Blundell is necessarily without foundation or that the reasoning of Jackson LJ necessarily goes so far as to decide that the Secretary of State can never rely on the new Rules in determining an application of the kind referred to in the implementation provision (as defined in paragraph 7 above). For my own part I would urge circumspection about those parts of the old Rules which we have not expressly considered, and leave them open to argument in an appropriate case when they arise.
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> 80. In Edgehill this court decided that a provision in the old Rules that a person should be entitled to indefinite leave to remain ('ILR') after 14 years' continuous residence applied to an application to which the implementation provision applied to the exclusion of a provision in the new Rules increasing the minimum period of years of residence to 20 years. That was the question which Jackson LJ posed at the start of the relevant passage and the question which he answered at the end of it. That ruling must apply to other specific provisions which are different in the new Rules from those in the old Rules."

10. I then agreed to adjourn briefly to allow Miss Bond to obtain from her instructing solicitors a copy of the grounds for judicial review. Before adjourning, it transpired that Miss Bond had a copy in her file and so I briefly adjourned in order that the usher could take photocopies. On resuming the hearing, Miss Bond told me that the appellant should have been given a right of appeal against both decisions taken on 23rd January, 2014 and on 30th September, 2014. The appellant should have granted a right of appeal because they were both decisions under long residence applications. She reminded me of her earlier submission that under paragraph 9.2.3 of the Guidance there is a right of appeal, so the decision of 30th September, 2014, should have given the appellant a right of appeal against that decision. She told me that the Upper Tribunal had jurisdiction to consider the decision of 30th September, 2014, because the Secretary of State's reconsideration under the JR proceedings which the Secretary of State compromised were compromised on the basis that a fresh decision would be taken.

11. She submitted that the new decision was appealable under the Guidance and should have been considered under the old immigration rules and, therefore, the judge had materially erred in law. The Secretary of State erred in law by failing to apply her own guidance.

12. Responding briefly Mr Wilding submitted that the appellant was effectively creating "fog and smoke" and that the issue before the Tribunal was much more straightforward. The issue was, he submitted, whether, at the

relevant date of the decision under appeal, there was a transitional provision which allowed the appellant to argue that he met the requirements of paragraph 276B of the immigration rules, notwithstanding that the immigration rule had been withdrawn some three years previously. He submitted that the only thing relevant was the decision of the Court of Appeal in *Singh and Khalid*. At paragraph 32 of that decision the court pointed out that the starting point must be that the decision of the House of Lords in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25 which establishes the general rule that changes in the immigration rules apply not only to applications for leave to enter or remain on or after the date they take effect, but also to applications pending as at that date. But it was recognised that that would not be so where the Statement of Changes in question contained an express indication to the contrary: see per Lord Brown at paragraph 39 (p. 1241B). At paragraph 44 of *Singh and Khalid* the court took account of the position under paragraph HC 565 which, at paragraph 75, sets into Part 8 three new paragraphs, A277A, A277C, to follow immediately after paragraph A277. At paragraph A277C it says:-

> "Subject to paragraphs A277 to A280 and paragraph GEN.1.9. of Appendix FM of these Rules, where the Secretary of State is considering any application to which the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these Rules do not already apply, she will also do so in line with those provisions."

The court pointed out at paragraph 44 that HC 565 has no equivalent to the implementation provision in HC 194, so that in accordance with the principle in *Odelola,* it applies to applications pending as at the date of implementation. Before 12th September, 2012, there were transitional provisions where pending applications were considered under the old immigration rules. However, HC 565, effective from 6th September, 2012, has no transitional provisions. There was a window between 9th July, 2012 and 6th September, 2012, where the applicant had to be dealt with under the old immigration rules, but the immigration rules HC 565 took that provision away.

13. He submitted that the judge had not erred when, at paragraph 21 of his decision he said that the appellant had no right of appeal on the grounds that the requirements of the immigration rules were met. At the date of the decision of 30th September, 2014 and at the date of decision on 8th September, 2015 the rule had been withdrawn.

14 The Immigration Judge could not have considered the appeal under paragraph 276B, because paragraph 276B had been withdrawn. As to the Guidance, he submitted that the Secretary of State's decision does comply with the Guidance. In both decisions, the Secretary of State very clearly did consider paragraph 276B, but at both dates of decision that particular immigration rule had been deleted, therefore, the appellant's appeal could not have been allowed under that rule because at the date of the hearing before the judge the Rule no longer existed.

15. Turning to Counsel's submissions on the Guidance, he submitted that the Guidance does not assist, because the old rule has in fact been considered by the Secretary of State in the decisions. In fact, the appellant has, Mr Wilding told me, been granted leave to remain in any event, because the judge had allowed the human rights appeal. It is not right to say that the appeal before the Tribunal today and the appeal before the First-tier was an old style appeal. The Guidance accurately reflects what the commencement order says and is that part which has been highlighted, namely that the appeal rights continue to exist for decisions made on or after 6th April, 2015 where any other application was made before 6th April, 2015 the outcome of which was an appealable decision under the pre-Immigration Act 2014 regime, unless the decision was a refusal of an asylum or human rights claim. The decision of 8th September, 2015, which is the only decision which the appellant appealed to the First-tier Tribunal in respect of, was in fact a rejection of his human rights claim. Immigration Rules HC 565 had withdrawn the long residency provisions and so there was no right of appeal, but it did not matter because as at the date of decision the rule had been withdrawn and fall out of the transitional window between 9th July and 6th September, 2012. The decision of the Secretary of State of 30th September, 2014 is not, he submitted, relevant. It was not an appealable decision to this Tribunal and it has not been appealed to this Tribunal. The only matter that is relevant is the decision of September, 2015.

16. As to Counsel's submission that the Guidance itself gives the appellant a legitimate expectation that his application would be granted, it is a fact that paragraph 276B of the old immigration rules was considered, but the appellant simply failed to meet their requirements.

17. Counsel suggested that the Transitional Appeals Guidance was subsequent to the decision in *Singh and Khalid*. It is suggested that it is arguable that the appellant's case comes within paragraph 9.2.3 of the Guidance. This submission was rejected by the judge, but based on his credibility findings, the Secretary of State should have allowed the appellant's appeal. The Transitional Appeals Guidance applies and on the basis of the judge's findings of fact, the appellant should succeed in his appeal.

18. I reserved my decision.

19. The appeal being considered by the First-tier Tribunal was in respect of a decision taken by the Secretary of State on 8th September, 2015. I reject Counsel's submission that in some way the earlier decisions of the Secretary of State are incorporated into this appeal. They are very clearly not. The Secretary of State made earlier decisions and they had been challenged by way of judicial review, but those proceedings were settled amicably between the parties on the basis that the Secretary of State would reconsider the appellant's circumstances. The Secretary of State has reconsidered those circumstances and it is her reconsideration which leads to this appeal, not her earlier decisions.. The relevant decision

before me therefore must be that of 8th September, 2015. I am not concerned with the earlier decisions of the Secretary of State of 23rd January, 2014 and 30th September, 2014.

20. When one looks at the decision of 8th September, 2015, one sees that it is a decision based on an application under paragraph 276B of what I shall refer to as being the old rules. The Secretary of State was not satisfied on the evidence placed before her that the appellant had at least fourteen years' unlawful residence in the United Kingdom and could meet the requirements of paragraph 276A4 with reference to paragraph 276A1 and paragraphs 276B(i)(b). The Secretary of State felt that there was insufficient documentary evidence to support the appellant's claims for the years 1999 to 2004 and there was no evidence to cover the years 1999 to 2004. The Secretary of State refused the appellant's application, but in doing so granted a right of appeal to the First-tier Tribunal.

21. On 9th July, 2012, the Secretary of State introduced new immigration rules and between 9th July, 2012 and 6th September, 2012 applications had to be dealt with under the old rules in accordance with the decision in *Edgehill & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 204.

22. When the Secretary of State took her decision of 30th September, 2014, the immigration rule which she considered no longer existed. I accept the submissions made by Mr Wilding that the judge did not err. The decision does, with very great respect to the submissions made by Miss Bond, come within paragraph 9.2.3 of the long residence guidance. The appellant's appeal could not be allowed because the relevant Rule had been deleted, notwithstanding the fact that at the date of the hearing of the appeal before the judge, the judge found in making his findings that the appellant has been in the United Kingdom continuously since 7th December, 1991 and therefore did, as at the date of the hearing before the judge, namely 25th July, 2016 meet the requirements of paragraph 276B. However, by that time the rule had been withdrawn. The only course for the judge was to consider the matter as he did and allow the appellant's appeal on human rights grounds. The grounds of appeal to the First-tier Tribunal submitted as an alternative ground that the appellant has established his presence in the United Kingdom, such that his removal would breach Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

23. I accept Mr Wilding's submissions in respect of the guidance on transitional appeals. This was a decision against a refusal of a human rights claim. It very clearly says that that is what it was, at the top of page 5 of the reasons for decision which accompanied the letter from the Home Office to the appellant of 8th September, 2015. I also adopt Mr Wilding's submissions in respect of Miss Bond's brief submission on legitimate expectation. She had submitted that the appellant had a legitimate expectation that his application would be dealt with under the long residence guidance and under the Transitional Appeals Guidance. Mr

Wilding submitted that the Secretary of State had clearly applied her guidance and considered paragraph 276B, although at the date of consideration it had been withdrawn.

24. One matter which Mr Wilding did not specifically address me on was the submission that on the basis of the judge's findings of fact the Secretary of State should have allowed the appeal. The judge effectively found that the requirements of the Immigration Rules had been met because the appellant had been in the United Kingdom, according to the judge's findings, continuously since 7th December, 1991. Miss Bond's submission was that on the basis of that finding the Secretary of State should have allowed the appellant's appeal under paragraph 276B and granted the appellant indefinite leave to remain. However, at the date of the findings, 25th July, 2006, the immigration rule under which the application had originally been made had been withdrawn for over four years.

Notice of Decision

25. I have concluded that the making of the decision by First-tier Tribunal Judge Gribble did not involve the making of a material error of law and I uphold the judge's decision. The judge was right to find that the appellant had no right of appeal in respect of his application under Immigration Rules which had been withdrawn.

26. No anonymity direction is made.

Richard Chalkley
A Judge of the Upper Tribunal.

10th June 2017

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Richard Chalkley
A Judge of the Upper Tribunal.