Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10775/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2017	**On 11 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

A. S.
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Smith, Solicitor, Quintessence Solicitors
For the Respondent: Mr Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant made an application for indefinite leave to remain in the UK on the basis of his long residency which was refused on 27 October 2015. He duly appealed that decision to the First-tier Tribunal ["FtT"] and his appeal on Article 8 grounds came before Judge Walker at Taylor House on 22 December 2016 when it was dismissed. The Appellant sought permission to appeal which was refused by the FtT, but when the application was renewed to the Upper Tribunal it was granted by Upper Tribunal Judge Plimmer by decision of 20 September 2017. The grant reads as follows:-

> "Notwithstanding that the Appellant cannot benefit from statutorily extended leave, it is arguable that he was nonetheless residing in the UK lawfully pending the final determination of his in time application to remain on the basis of the EEA Regulations, and as such it is arguable that he meets the ten year "lawful residence" requirement. It is also arguable that this is a relevant factor to take into account for the purposes of Article 8"

and so the matter comes before me today.

2. Having heard both parties it is common ground that the grant of permission is essentially a two-stage identification of arguable propositions and I will treat it as such.

3. The Appellant first entered the UK on 5 June 2005. He did so lawfully and his initial grant of leave was varied on a number of occasions, most recently expiring on 24 January 2014. That left him about eighteen months short of ten years lawful residence. Rather than seeking to vary his leave once more, the Appellant submitted an application for a EEA residence card asserting that he was an extended family member of an EEA national. That application was refused in January 2014 and his appeal against that refusal was dismissed by the FtT in a decision promulgated on 10 April 2015. His appeal rights were exhausted shortly thereafter.

4. It follows from that chronology, as appears indeed to have been common ground before Judge Walker in December 2016 that as at April 2015 the Appellant could not demonstrate that he was entitled to the issue of the residence card for which he had applied. Whether that failure was because he could not demonstrate the appropriate family relationship, or, because he could not demonstrate that the EEA sponsor was exercising treaty rights, is for the purposes of today's hearing immaterial – although it is noteworthy that the Appellant has not sought to explain it, and did not seek to pursue any appeal to the Upper Tribunal against the decision of the FtT. The Appellant was equally unable to demonstrate before Judge Walker that he had at any subsequent date become entitled to the issue of such a residence card.

5. When the appeal came before Judge Walker it was argued that the application for the issue of an EEA residence card, and the subsequent pursuit of an appeal against the refusal, had served to trigger the operation of section 3C of the 1971 Act. That argument in my judgement must fail, and in reality it should never have been advanced. Section 3C of the 1971 Act did not, and could not, apply to the Appellant because he was neither making an application for leave to remain, nor, an application for a variation of existing leave to remain.

6. In the context of the Article 8 appeal against the refusal to grant ILR, (which was the only ground of appeal open to the Appellant) Judge Walker did look at the question of whether or not the Appellant had established that his Article 8 rights were engaged by that refusal. Although he did so briefly it is clear from his decision when read as a whole, and in particular

paragraph 24, that the Appellant had failed to do so. That conclusion was undoubtedly correct, because as the Judge had noted, the Appellant has provided no evidence to suggest that he had established a "family life" for the purposes of Article 8 as at the hearing date in December 2016. He had also provided almost no evidence of the extent of his "private life" as at that date. Indeed the Judge commented that the Appellant's witness statement simply stated that he had been in the UK for twelve years, had not travelled outside the UK, that he had been a law-abiding person, and that he had contributed to the economy at those times when he had permission to work. Although she did not perhaps go on to make it crystal clear what her finding was, it is difficult in those circumstances to see how the evidence relating to the Appellant's "private life" could possibly have engaged Article 8 as at that date. In those circumstances the Appellant's challenge to the decision is doomed to fail.

7. Given the low threshold of engagement for Article 8 the Judge did go on to deal in the alternative with the proportionality balancing exercise, and in doing so she properly directed herself to the public interest in section 117A-D of the 2014 Act. Before me it is argued that the Judge erred by not transposing across into the consideration of a proportionality balancing exercise the fact that the Appellant had been pursuing an appeal before the Tribunal in 2015, even if that was an appeal that was doomed to fail. That argument must fail if the Judge was correct to conclude (as I am satisfied she was) that his Article 8 rights were not engaged by the decision under appeal.

8. Even if the Appellant's Article 8 rights were engaged by the decision under appeal, it is very difficult to see that any Tribunal properly directing itself upon the relevant principles could have concluded that the decision under appeal was disproportionate. The Appellant quite clearly did not meet the requirements of paragraph 276A of the Immigration Rules at the date of his application. He had adduced no evidence to the Judge to establish the true nature and extent of his "private life". Thus there were no witnesses who came forward to give evidence as to his role in the community, or his role as a fellow worker, or any other aspect of his life. His case in relation to his "private life" was in truth the bald and undisputed proposition that he had physically been in the UK for twelve years, albeit he had only been entitled to be present in the UK for the initial eight and a half year period. In those circumstances I am not satisfied that the Judge failed to take into account any argument that she ought to have taken into account in the proportionality balancing exercise.

9. I am satisfied the Judge did not take into account in the proportionality balancing exercise any matter that she should not have taken into account. The decision on the Article 8 appeal was one that was well open to her, was properly reasoned, and displays no arguable error of law. In those circumstances I confirm the decision of the First-tier Tribunal Judge.

Notice of decision

The appeal is dismissed.

An anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge J M Holmes