



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12278/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 September 2018

Decision & Reasons Promulgated
On 21 September 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MR JEFFREY MCLEAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H Gore instructed by R Spio & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 20 April 2016 refusing his application for leave to remain under Article 8 and Appendix FM and paragraph 276ADE of HC 395.
2. The judge allowed his appeal, but in a decision on 6 August 2018 I found errors of law in the judge's decision and directed that the matter be reheard.
3. The immigration history of the appellant is of some complexity, and is of material relevance to the issues in the case. He claims to have entered the United Kingdom in November 1999. He applied for leave to remain as a spouse on 9 May 2002. This was

refused on 11 April 2007. He appealed that decision to an Immigration Judge who heard his appeal on 31 May 2007. She noted that on 20 April 2000 the appellant had submitted an application for leave to remain as a student, that application being refused on 20 April 2001. The respondent said that notice of decision and appeal papers were correctly served on the appellant's then solicitors at the address known to them at the time by first class recorded delivery post. This correspondence was subsequently returned undelivered by the Royal Mail. The appellant said he was unaware of the decision and never received notification of it. At the hearing before the judge the Presenting Officer was unable to provide any evidence as to the address to which the notice had been sent in April 2001. In the absence of evidence from the Home Office on the address point the judge found the appellant's claim that he received no communication from the Home Office to be truthful, and resolved the issue in his favour. He therefore found that he had not received the notice of decision as required by section 4 of the 1979 Immigration Act and was therefore entitled to assume that his leave to remain continued to be extended by section 3C of the Immigration Act 1971.

4. In the meantime, the appellant had applied on 9 May 2002 for leave to remain on the basis of his marriage to a British citizen. That was refused in the letter of 11 April 2007. On 13 April 2007 he was served with a notice of decision to remove an unsuccessful human rights claim and informed of his rights of appeal. Hence the appeal came before the Immigration Judge. In light of her earlier findings the judge found that the appellant did have an in-country right to apply for an extension of leave under paragraph 284 of HC 395 as he had not received notice of the decision refusing his application for leave to remain as a student. He found the appellant and his wife to be truthful witnesses and that he met all the requirements of paragraph 284 of HC 395 and accordingly allowed his appeal.
5. The Secretary of State appealed that decision on the basis that the judge had materially erred in law in allowing the appeal by finding that the appellant satisfied paragraph 284 of the Immigration Rules insofar as the section 3C leave extended his leave which then entitled him to make an in-country application under the Rules. It was asserted that he was only granted six months' leave and therefore the extension of his leave by section 3C could not assist him. There appears to have been no challenge to the conclusion that the decision relating to the student application had never been served on the appellant.
6. The Senior Immigration Judge who heard the Secretary of State's appeal in January 2008 found that the effect of the failure to serve the notice of decision in respect of the appellant's application for an extension of leave as a student meant that the decision did not take effect. In this regard he cited Lord Steyn's opinion in Anufriyeva [2003] UKHR 36. The judge said that the effect of section 3C(4) of the 1971 Act was that the application for leave to remain as a spouse made during the extension of the appellant's leave as a visitor pending the determination of his application to remain as a student was invalid. Therefore, the decision made upon his application for leave to remain as a spouse was invalid and the Tribunal had no jurisdiction to entertain an appeal against the decision of the Secretary of State.

7. The judge went on to state that it was apparent that the appellant received notice of the decision refusing the application for leave to remain as a student during the course of the appeal since there was a copy of the notice of decision in the Home Office bundle which was served upon his representatives. He had not appealed the decision so the extension of his leave as a visitor had come to an end and section 3C of the 1971 Act no longer prevented him from making an application for leave to remain in the United Kingdom as a spouse. The appellant therefore had no right of appeal before the Immigration Judge and as a consequence her decision was set aside.
8. Subsequently the appellant was granted leave to remain on 16 May 2013, that visa expiring on 16 November 2015. There was a suggestion that he had made an application which led to that grant of leave in 2013. Mr Melvin, to whom I am very grateful for his very thorough and careful examination of the Home Office file, accepted that he could not find an application in 2009 or in 2013, so it was not argued on the respondent's behalf that a paid application was made but it seemed that further submissions had been treated as an application in 2013 rather than the decision then being the result of a further application. The applications in 2009 and 2010 had not been decided.
9. In her submissions Mrs Gore argued that the appeal should be allowed on the basis that the starting point was the Upper Tribunal decision in 2008. The appellant had made a student application which was pending when he got married and sent off the spouse application in 2002 and that was refused in 2007. The Secretary of State had made no reference to the student application so it was still pending. The Secretary of State had told the appellant that he had a right of appeal against the spouse decision that had been exercised and was allowed by the Immigration Judge. The Upper Tribunal Judge had found that there was no jurisdiction to make that decision as there was a pending application. The issue before the Immigration Judge was whether the appellant had received a decision on the variation application. In 2007 the Secretary of State had argued that a decision was sent and returned and the judge had not accepted service had taken place and the appellant's evidence had been accepted. This was important as, if the application had been rejected on grounds of lack of jurisdiction, the Secretary of State would have to decide the student application and already knew because of the 2002 paid application that the appellant was married and had been found credible by the judge. The Secretary of State might have decided not to grant the student application but there was an Article 8 issue and he was obliged to take all factors known to him into consideration. As of today, therefore no properly made decision on the student application had occurred. The only applications the appellant said he had made were the student application and the spouse application. The Home Office may have looked through all the documents in 2013 and seen there had been delays and interviews but the marriage was genuine and therefore made the grant of limited leave in 2013.
10. This was significant as the appellant had remained legally between 1999 and 2013 when the Secretary of State appreciated the delay and granted leave to remain. That leave had expired in 2015 but prior to its expiry he had applied to extend his leave and

this was refused and that was the decision under appeal. He and his wife are still married, but were separated. Proportionality was the main issue. He had been in the United Kingdom for nearly twenty years, it was argued legally, and ought to have been granted leave to remain after ten years' legal stay. The circumstances were exceptional in light of the background that Mrs Gore had set out. The appeal should be allowed under Article 8.

11. In his submissions Mr Melvin relied on and developed points made in his written submissions. He emphasised that this is a human rights application and not an indefinite leave to remain application. No such application had been made. It was accepted that there had been delay on the part of the Secretary of State. There were problems between 2009 and the 2013 grant of leave with information, visits and documents so the delay on the part of the Secretary of State was not solely his fault.
12. As regards proportionality, the appellant had spent 31 years in Jamaica and on coming to the United Kingdom as a visitor had remained since then. He could not meet the requirements of the Immigration Rules. There were not very significant obstacles to return to Jamaica. Also there was a significant family presence there. Reliance was placed on the situation of the delay in respect of earlier applications. It was accepted that he had a private life in the United Kingdom but there was little evidence before the Tribunal of friends or community involvement and it appeared to be based on blaming the Home Office to outweigh the need for exceptional circumstances to show that Article 8 rights had been breached. There was little before the Tribunal of exceptional circumstances outside the delay by the Home Office. It was Mr Melvin's understanding that once the student visa had been refused and had been delivered to his solicitors at the address that the Home Office had, though the judge had found otherwise, another application had been made that nullified the student application and it was refused and jurisdiction finished in 2008 so the section 3C leave finished then. The next period of leave was between 2013 and 2015. It was difficult to see how ten years' continuous grant of leave could be found as argued. That was relevant to proportionality. He had worked but there was little about his private life or integration. His speaking English was a neutral factor. There were no exceptional compelling circumstances outside the Rules with no-one dependent on him and no new partner or children.
13. By way of reply Mrs Gore argued that no evidence had been put in with respect to what Mr Melvin said about problems with the marriage as the reason for delay. The appellant said he was chasing the application and it was unclear what was happening. He had been told that there were backlogs. Checks about the genuineness of a marriage did not take ten years. That could not be the reason for the ten year delay. The appellant had told the judge that he had no representation at the time of the student variation application. There was no evidence of the documents being served on the solicitors and none had been provided to the judge, hence her finding. The appellant had worked continuously and if it had been illegal the Home Office would have done something about it given his regular contact with them. The refusal letter did not rely on any point about a lack of section 3C extension. The Upper Tribunal had found that there was a pending application as a matter of law and there would be

an extension of stay. There was a legitimate expectation that everything known about him would be considered.

14. He had applied in 2002. No 2013 application had been provided. His 2002 application was what was reviewed in 2013, the appellant argued, and he was granted leave to remain. As regards proportionality, he would be a citizen if his application had been dealt with in time. There was relevant public interest. An MP had assisted him to chase the application. He had had section 3C leave from 2000 to 2013 and he was given limited leave after as he had applied to extend that leave before it ran out. He had acted properly throughout. It was not a question of relying on delay. The appellant had made applications when he could. The appeal should be allowed.
15. I reserved my determination.
16. It seems clear from the matters set out above that, giving the appellant the benefit of the doubt he arrived in the United Kingdom in 1999 and applied for leave to remain as a spouse on 9 May 2002. This was refused on 11 April 2007. According to his evidence to the Immigration Judge in 2007, he had come with a six month visit visa, and made an application in April 2000 to vary his leave to student visa. As I have set out above, the judge did not accept that he was ever sent the notice of decision refusing that application. It is however clear from the decision of the Senior Immigration Judge in 2008, at paragraph 8, that the appellant received the notice of decision refusing the application for leave to remain as a student during the course of the marriage appeal since there was a copy of the notice of decision in the Home Office bundle which was served on his representatives. The Senior Immigration Judge made it clear that he had not appealed that decision so the extension of his leave as a visitor had come to an end.
17. It seems clear therefore that from then on, the appellant was without leave. The Senior Immigration Judge made it clear that as a consequence of the extension of his leave as a visitor coming to an end he was not prevented by section 3C from making an application for leave to remain in the United Kingdom as a spouse. Clearly, he would have had to do that in light of the judge's findings that his application for leave to remain as a spouse was invalid in light what the judge said about Anufriyeva and the effect of section 3C(4).
18. It does not appear that the appellant made such an application however. As a consequence, it would seem, of the making of various representations and submissions over the intervening period, he was granted leave to remain under Article 8, on 16 May 2003 until 16 November 2015. Then he applied on 18 November 2015 for leave to remain in the United Kingdom and the refusal of that decision is the decision under appeal. There is therefore a period of time between 2008 and 2013 when the appellant was without leave. I do not accept the submission made on his behalf that he had 3C leave during that period.
19. In his witness statement of 9 September 2018, the appellant says that between 2010 and 2013 he and his wife were chasing the Home Office because he had not been granted leave and he did not know what was happening. They contacted their MP who

contacted the Home Office who said there was a backlog. They went for an interview in 2011 or 2012 and then were granted the period of leave in 2013 to which I have referred above. It is clear that the appellant was represented by Counsel before the Senior Immigration Judge in January 2008. It is also clear from paragraph 9 of his decision that his counsel agreed with the judge's conclusions. It is entirely unclear why he did not take up the suggestion of making an application for leave to remain in the United Kingdom as a spouse. It is clear from the judge's decision and from the facts that as a consequence of the notice of decision refusing his application for leave to remain as a student being served on his representatives, he no longer had an extension of leave as a visitor from that time and remained without leave for the ensuing five years.

20. As a consequence therefore, though there was a period between 2002 and 2007 when the application for leave to remain as a spouse was outstanding, I do not consider that any of the periods of time when the appellant was without leave thereafter were as a consequence of any delay on the part of the respondent.
21. The Article 8 claim therefore has to be considered in the context of the situation of a person who has been in the United Kingdom by date of decision for some seventeen years and by now some nineteen years, had leave between 1999 and 2008 but no leave between 2008 and 2013, but has had leave thereafter. As Mr Melvin argued, the case is essentially one of private life only, given that he is separated from his wife and the claim is no longer put forward on that basis. He does not have any children in the United Kingdom. It has not been shown that he can meet any of the requirements of the Immigration Rules as regards private or family life.
22. As regards exceptional circumstances outside the Rules, as the respondent noted in the decision letter, he spent some 31 years in Jamaica before coming to the United Kingdom, his mother lives there and there would be no significant difficulties in reintegrating there. Also, contact with friends and any family in the United Kingdom could be maintained from Jamaica. The claim is to a large extent one based on the amount of time he has been in the United Kingdom, and even though one must factor into that the period of delay on the part of the Home Office as set out above, I do not think that that is such as to make any material difference to the balance that has to be carried out in assessing the proportionality of the respondent's decision. In my view the decision is a properly sound one, I do not consider it has been shown that the appellant's removal from the United Kingdom would be disproportionate. His appeal in respect of Article 8 is therefore dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 17 September 2018

Upper Tribunal Judge Allen