Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09641/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2015	**On 4 February 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TAYEB OUTMOUNE

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr D O'Callaghan, instructed by Kilby Jones Solicitors LLP

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Tootell promulgated on 31 October 2014 allowing Mr Outmoune's appeal against the refusal of his application for indefinite leave to remain by the Secretary of State dated 10 February 2014 which also contained a decision to remove him as an illegal entrant.

2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Mr Outmoune as the appellant, reflecting their positions before the First-tier Tribunal.

3. It was common ground before me that the appellant entered the United Kingdom illegally at some point in 1997 and has remained here illegally since then, some seventeen years; see [50] of the determination of Judge Tootell.

4. On 6 July 2012 he made an application for indefinite leave to remain under the provisions of paragraph 276B of the Immigration Rules then in force, that paragraph allowing for indefinite leave to remain where somebody had been in the United Kingdom illegally for fourteen years. The application was refused as it was invalid for want of a fee. It was also common ground before me that the failure to submit a valid application was the fault of the appellant's previous representatives against whom he has since obtained a positive finding of negligence and costs and damages through the Solicitors Regulation Authority.

5. Notwithstanding the action taken against the previous legal representatives, however, by the time that the appellant submitted a further application for indefinite leave to remain paragraph 276B was no longer in force and it was not disputed before me that he could not meet the new long residence provisions contained in paragraph 276ADE of the Immigration Rules.

6. The appellant's case before the First-tier Tribunal was that he should still be granted further leave under Article 8 ECHR. First-tier Tribunal Judge Tootell found at [59] that there were "compelling circumstances" which required a full Article 8 proportionality assessment. The "compelling circumstances" were that the appellant had lived in the UK for seventeen years and that he had made what would have been a successful application on long residence grounds in 2012 were it not for the negligence of his previous solicitors in July 2012.

7. Concerning the invalid application arising from the negligence of the previous legal representatives, at [59] Judge Tootell states that had a valid application been made in July 2012 prior to the introduction of paragraph 276ADE "then [the appellant] may well have been eligible for settlement under paragraph 276B".

8. At [60] she proceeds to a second-stage Razgar Article 8 assessment.

9. At [66] to [69] Judge Tootell set out her proportionality assessment, the first four Razgar questions having been answered in the appellant's favour. Those reasons read as follows:

> "66. In this assessment, I have had regard as I must to the requirements of Section 117B of the 2014 Immigration Act, which sets out the weight which must be attributed to various factors in the public interest balancing exercise. Whilst I acknowledge that little weight is to be placed on private life which was established whilst a person was without status, this is not the same as stating that no weight is to be accorded to it.

67. Furthermore, I must also recognise that the Appellant has resided in the UK for the past seventeen years which is by any reckoning a considerable period of time. Eighteen months ago subject to meeting all of the requirements of Paragraph 276 it was not considered to be in the public interest to return a person who had been in the UK for fourteen years. It is hard to see what has changed since July 2012. In a further three years when the appellant would have acquired twenty years' residence in the UK, it will again no longer be in the public interest to remove the appellant.

68. I also note and take into account, that this appellant speaks English, has worked for almost the entirety of his sojourn in the UK and paid taxes and national insurance contributions. He is according to him, fully integrated into UK society.

69. I do not condone the appellant's actions in evading immigration control, nor take it lightly. Clearly it is reprehensible conduct, capable of constituting a criminal offence. Indeed I have considered it as a significant factor to be weighed/balanced against the grant of leave despite the fact that no prosecution has been brought against the appellant on this basis.

70. Having considered all of the factors however and carried out the required balancing exercise, I am satisfied that his situation would appear to fall squarely within what was envisaged under the former paragraph 276 and therefore when taken with the other factors referred to above, that the public interest does not require the appellant's removal from the UK. I therefore find on balance that the respondent's decision represents a disproportionate interference in this appellant's right to respect for his private life."

10. The respondent's grounds of appeal challenge those findings as, although the judge referred to the correct provisions of paragraph 117B [at 66] and the little weight to be placed on a private life established while somebody is in the UK unlawfully, she did not apply that principle in practice at [67].

11. The grounds of appeal also maintain that the requirement of the Immigration Rules for twenty years' residence where somebody is in the UK unlawfully is a legitimate provision passed by Parliament to be taken into account as a starting and central factor in the proportionality assessment. The First-tier Tribunal judge erred in failing to do so and erred at [67] in suggesting that the expectation of 20 years' unlawful residence was in some way arbitrary.

12. It is my view that the respondent's grounds both have merit.

13. Having stated at [66] that little weight was to be placed on the appellant's private life the judge immediately goes on at [67] to place weight on the appellant's seventeen years' illegal residence "which is by any reckoning a considerable period of time" and only three years' short of the twenty year requirement of the Immigration Rules. To paraphrase, the approach taken by the judge here is that "little weight is to be placed on a private life formed whilst the appellant is here illegally unless the period is a

considerable period of time, three years' short of the period set down by the Immigration Rules".

14. There appeared to me merit in Mr Jarvis characterisation of this as, in effect, an impermissible "near-miss" argument; see Patel and others v SSHD [2013] UKSC 72 at paragraphs [55] and [56]. It is also an error of law regarding the weight afforded to the appellant's period of residence formed whilst he was here illegally.

15. It is also my view that First-tier Tribunal Judge Tootell erred in the comments at [67] where she appears to look behind or reduce the importance of the provisions of paragraph 276ADE, stating that the fourteen year provisions of paragraph 276B had applied relatively recently and that "it is hard to see what has changed since July 2012" when paragraph 276ADE was introduced.

16. It was not for the judge to question the changes to the Immigration Rules brought in on 12 July 2012 but to apply them. The case of Haleemudeen v SSHD [2014] EWCA Civ 558 is authority for the correct approach to the part played by the Immigration Rules in a second stage Article 8 assessment. In particular, at [40] and [41]:

> "40. I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr. Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.
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> 41. The FTT's decision on Mr Haleemudeen's Article 8 appeal is contained in [34]-[41], which I summarised and set out in part at [21] – [23] above. Those paragraphs do not refer, either expressly or implicitly, to paragraph 276ADE of the rules or to Appendix FM. None of the new more particularised features of the policy are identified or even referred to in general terms. The only reference to the provisions is in the FTT's summary (at [30]) of Mr. Richardson's submission that the reference to the new Rules in the refusal letter was of little relevance because at the time of Mr. Haleemudeen's application those Rules had not been promulgated and thus did not apply to his case. That submission could not succeed in view

> of the decision of the House of Lords in *Odelola's* case, to which I refer at [25] above."

and at [47]:

> 47. ... The passages from the judgments in the cases of *Nagre* and *MF (Nigeria)* appear to give the Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights. But, even if Mr Richardson is correct to characterise the relevance of the Rules as only a starting point, the single reference in [39] of the FTT's decision to "apparent harshness" does not in my judgment suffice. I do not consider that it is necessary to use the terms "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the tribunal's decision. In this case, as I have stated, the FTT gave no explanation of why this is so, or identified particular features of Mr Haleemudeen's case which justified considering proportionality outside the Rules.

17. It is also my view that the comment set out above from [59] and the further comment at [70] that "I am satisfied that his situation would appear to fall squarely within what was envisaged under the former paragraph 276" are materially incorrect. It was not sufficient under paragraph 276B simply to have incurred seventeen years' or fourteen years' illegal residence in the UK. Paragraph 276B(ii) set out that there was also a requirement to have regard "to the public interest" and there being "no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence" those factors including "personal history, including character, conduct, associations and employment record;" as at paragraph 276B(ii)(c).

18. This appellant does not dispute that he deliberately entered the UK illegally, remained here illegally for over fourteen years employing different aliases to evade immigration control and only when he thought he could succeed under the fourteen year Rule did he approach the respondent; see [11] and [49] of the determination of the First-tier Tribunal. Where that is so it is not at all clear to me that he would "fall squarely" within paragraph 276B. He cannot pray in aid the case of Aissaoui v SSHD [2008] EWCA Civ 37 where that case allowed for failure under paragraph 276B where there was "deliberate and blatant attempts to evade or circumvent the control, for example by using forged documents, absconding, contracting a marriage of convenience etc.".

19. For those reasons I find a material error of law in the Article 8 assessment of the First-tier Tribunal such that the decision must be set aside and remade.

20. To a great extent, my own assessment of this matter is contained in my reasons for finding an error of law in the decision of the First-tier Tribunal. I accept that the appellant was subject to negligent advice and action by his previous solicitors which led to his application under paragraph 276B being rejected as invalid. It is not my view that that entitles him to some

kind of expectation that his application under paragraph 276B would have been granted. Whether it would or not it is sufficiently unclear so as not to afford the appellant the right to have much weight placed in his favour as regards that invalid application.

21. Where that is so I am left with an illegal entrant who has used aliases to avoid immigration control and whose seventeen year residence I must, following primary statute, weigh very little. Even taking into account the fact that he has worked and paid tax and national insurance contributions cannot, in my assessment, assist him. It cannot possibly be said that where he came to the UK as an adult and has on his own evidence retained contact with his family in Algeria (see [49] of Judge Tootell's decision), that he would be unable to re-establish a private life in Algeria or that any difficulties in doing so after being in the UK for seventeen years could outweigh the public interest in his removal.

22. It is my view that the decision to remove the appellant is proportionate and that the appeal under Article 8 ECHR should be refused.

Decision

23. The decision of the First-tier Tribunal discloses an error on a point of law in the Article 8 assessment and the decision is set aside to be remade.

24. I remake the Article 8 appeal as refused.

Signed  Date: 4 February 2015

Upper Tribunal Judge Pitt