Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/39411/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated on**
5 January 2015	**16 February 2015**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

BEYSAGUR BAZORKIN

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Malins QC
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant, a citizen of Russia, against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision made on 6 September 2013 refusing his application for leave to remain on the grounds of his long residence and to remove him from the UK. Permission to appeal was granted by the First-tier Tribunal in a decision dated 19 November 2014.

Background

2. The appellant's immigration history is set out in [3] of the decision of the First-tier Tribunal. In brief summary, he first entered the UK on 2 July 2001 with a six month visit visa. He was granted a further visit visa in 2002 which was extended until August 2003. On 31 August 2003 he entered the UK with entry clearance as a student and his leave in this capacity was extended on a number of subsequent occasions until 26 February 2013. On 25 February 2013 he applied for indefinite leave to remain on the basis of 10 years continuous residence. However, his application was refused because he was unable to meet the requirements of the rules relating to continuity of residence as he had been absent from the UK for a total of 587 days between 31 August 2003 and 28 October 2012. His application was also considered under appendix FM but for the reasons the respondent gave, summarised in [6] of the decision he was not able to meet those requirements. The appellant appealed against this decision.

3. At the hearing before the First-tier Tribunal, it was conceded that the appellant could not meet the requirements of the rules either in relation to his long residence application or with regard to private and family life set out in appendix FM [29]. Accordingly, the appeal proceeded on article 8 grounds only.

4. The judge accepted that the respondent's decision interfered with the appellant's right to respect for his private life [33]. His sister also lived in the UK but the judge found that there was no special dependency between them above and beyond that which normally exists between adult members of the same family. The appellant was married and lived with his wife in the UK. She is a Russian citizen and has leave to remain as a student until March 2015. At the time of the hearing before the First-tier Tribunal the appellant's wife was pregnant (a son was subsequently born on 1 December 2014). The judge accepted that there might be some practical short term difficulties for the appellant or his wife should he be required to leave either before her confinement or shortly after but she was not satisfied that the short term consequences for the appellant or his wife's family life were of such gravity to engage article 8.

5. However, taking into account the fact that the appellant had spent most of the last 12 years living in the UK and stood to lose the opportunity of conducting business affairs here and the extent of his ties to the community in general, the judge was satisfied that the consequences of removal were of sufficient gravity to engage the respondent's obligations under article 8. There was no issue about whether the respondent's decision was in accordance with the law or whether it was for a legitimate aim within article 8(2). As the judge correctly identified, the issue for her was whether the proposed removal of the appellant was necessary and proportionate to a legitimate aim.

6. The judge referred to the opinion of Lord Bingham in Huang v Secretary of State [2007] 2AC 167 and to the provisions contained in section 117B of

the 2002 Act as introduced by the Immigration Act 2014. These require that when considering the public interest question a Tribunal must in particular have regard in all cases to the considerations listed in section 117B. These were set out in full by the judge at [32] of her decision. Having referred to the observations of Lord Bingham in Huang about the importance of the Immigration Rules in providing the framework for immigration control she commented [41] that whilst it was true that there were no obvious language, economic or other public policy considerations mentioned in section 117B that fell to be considered in the appellant's case, the important fact remained that the requirements of the rules were not met.

7. The judge went to set out her findings as follows:

> "42 The appellant's private life has been built up whilst his status remains temporary with no legitimate expectation that he would be entitled to settle, set up his business and make a life for himself and his wife here. He has not lost all ties to Russia, he speaks the language spoken there and there are no barriers to him re-establishing himself there of any significance given his financial and educational standing. The public interest being served by the application of the rules in a consistent and fair manner triumphs over the appellant's personal considerations and those of his wife.
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> 43 It is also relevant to the balancing exercise that the appellant can seek to enter or remain in another capacity either as a Tier 1 Entrepreneur or as a dependant of his student wife. I accept Mr Malins' submission that qualification under such rules or the intention of the appellant to make an application under the tier 1 route is in one sense a separate matter. However the appellant has in part based his claim on his ability to be financially self reliant and his business activities that he would not be able to pursue.
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> 44 To allow the appellant to rely on his entrepreneurial endeavours as forming part of the reasons why his article 8 claim should succeed would run the risk that he is favoured above other potential candidates for entry or leave to remain in such capacity. The requirement that he should make the relevant application and demonstrate that he qualifies for leave to remain in this capacity would be removed. This would serve to override the proper application of immigration controls and would not be in the public interest.
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> 45 The appellant appears to have been honest, hardworking and law abiding whilst studying in the United Kingdom. His application under the long residence rule appears to have been misplaced rather than disingenuous in any way. If he seeks to be admitted and qualifies for entry and/or leave to remain in other capacity there is nothing to suggest that he would be anything other than an asset to the community. Nevertheless, having had regard to all the evidence I find that the respondent's decision is both necessary and proportionate and is not unlawful as being incompatible with the respondent's obligations under article 8 of the ECHR."

The Grounds

8. Mr Malins submitted that the judge erred in law firstly by giving no weight whatever to the fact that the appellant was fluent in English and secondly by positively rejecting the requirement in the Act in respect of financial independence as being in the public interest by directing herself at [43] and [44] of her decision that this was not relevant and that it was adverse to the article 8 case that he could qualify as a Tier 1 applicant, further erring by saying that to allow the appellant to rely on his entrepreneurial endeavours as forming part of the reason why his article 8 claim should succeed would run the risk that he was favoured above other potential candidates for entry in such capacity.

9. It was Mr Malins' submission that this in fact was what Parliament had intended: financial independence for whatever reason was a matter properly to be taken into account as a factor in the public interest. Finally, he submitted that the judge had erred by proceeding on the basis that an article 8 case should be decided only by reference to the rules by commenting that whilst it was true that there were no obvious language economic or other public policy considerations mentioned in section 117B to be considered in the appellant's case, the important fact remained that the requirement of the rules were not met.

10. Mr Tarlow submitted that the judge did not err in law. She had taken all relevant factors into account. The individual factors set out in s117B, whether taken individually or cumulatively, could not be treated as a trump card for either party. There had been no material error in the judge's approach to or assessment of the evidence.

Assessment of whether there is an Error of Law

11. The issue for me at this stage of the hearing is whether the First-tier Tribunal erred in law such that the decision should be set aside. In substance the submission on behalf of the appellant is that the judge has failed to comply with the statutory obligation in s117A(2) that when considering the public interest question she must in particular have regard in all cases to the considerations listed in section 117B. It was argued firstly that the judge failed to give any weight to the fact that the appellant was fluent in English as required by s117B(2). It is clear from the evidence that the appellant is able not just to speak English but is fluent. His evidence on this matter at [20] is confirmed by the extent of his education in English [12] and in any event the judge described the appellant as honest, hardworking and law abiding whilst studying in the UK and so clearly accepted his evidence on issues of primary fact.

12. In respect of the provision of s.117B(3) the complaint is that the judge in effect discounted this factor on the basis that it would favour the appellant over other potential candidates seeking leave to enter under the rules. An application under the rules turns simply on whether the requirements of the rules are met. The fact that there is an application which might

successfully be made under the rules does not without more prevent an article 8 case succeeding and is not justification in itself for discounting a factor otherwise required to be taken into account by primary legislation. Nonetheless, the fact that there is or may be a route within the rules to obtain leave is a relevant matter to be considered in the overall assessment of proportionality.

13. The statutory requirement is to have regard to all the considerations listed in s117B and the fact that an applicant is able to meet the requirements of s117B (2) and (3) does not simply mean that no adverse inferences should be drawn against him but they are to be treated as positive factors to put into the balance. I accept Mr Malins' submission that the judge failed to give the appellant the benefit of those positive factors in the assessment of proportionality and so erred in law. I am satisfied that the error is such that the decision should be set aside.

14. Finally, it was argued that in essence the judge thought that the article 8 case should be decided only by reference to the rules but I am not satisfied that this submission is made out. The point the judge was making was that article 8 has to be assessed in the context of the immigration rules, a point which comes out of Lord Bingham's comments in Huang referred to by the judge and reaffirmed by the provisions of paragraph FM of the current Immigration Rules.

15. In summary, I am satisfied that the judge erred in law by failing to have proper regard to the positive element in the public interest of the matters set out in s117B (2) and (3) rather than regarding them simply as matters not being counted to the detriment of the appellant.

16. I was satisfied after hearing submissions on what the proper course would be if I found that there was an error of law, that I should to proceed to re-make the decision. I gave the parties an opportunity of making further submissions. Mr Malins accepted that there was no dispute about the facts and referred to the judge's findings that the appellant appeared to be honest, hard-working and law abiding and the fact that she had accepted his evidence. The only additional matter since the hearing before the judge was the birth of the appellant's son on 1 December 2014 at UCL, paid for privately with no recourse to public funds. He emphasised the appellant's fluency in English, his entrepreneurial skills and his actual and potential contribution to society in the UK. He submitted that these factors taken with the positive elements in the public interest identified in s117B indicated that the respondent's decision was unnecessary and disproportionate. Mr Tarlow did not seek to make any further submissions.

Re-making the Decision

17. I need not repeat the facts which are set out above and in the decision of the First-tier Tribunal. This is a case where the appellant was not able to meet the requirements of the rules he had sought to rely on in his application. He could not bring himself within the long residence

requirements as he could not show 10 years continuous lawful residence nor could he meet the requirements of para 276 ADE. In the light of the provisions of appendix FM the respondent went on to consider whether there were any sufficiently compassionate or compelling issues making it appropriate to allow the appellant to remain in the UK exceptionally outside the rules.

18. The approach to the assessment of proportionality in these circumstances has been considered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 and more recently in R(MM) Lebanon [2014] EWCA Civ 985. Where the immigration rules are not a complete code as in the present case the proportionality test will be more at large albeit guided by the Huang test in UK and by Strasbourg case law. In the light of the provisions of 117A, regard must now be had to the considerations set out in statute.

19. The appellant is entitled to have taken to account in his favour his length of residence in the UK, the social ties he has formed and the actual and potential financial benefits to the community of the projects he has been involved with. He is fluent in English and he is financially independent. He is a potential asset to the community and that is a factor to be taken into account in accordance with UE (Nigeria) [2010] ECWA Civ975. The other side of the balance is that whilst his private life has not being established as at time when he has been in the UK unlawfully nor has his immigration status been precarious, the fact remains that his status has been temporary with no legitimate expectation that he would be entitled to settle. Further, he cannot meet the requirements of the rules that he sought to rely on in his appeal.

20. In evidence before the First-tier Tribunal the appellant was asked why he had not made an application for leave to remain as an entrepreneur and his response was that if could succeed on the basis of 10 years residence, there was no reason for him to make such an application [25] and in re-examination he said he was in the process of making an application for leave to remain in that category and felt that he met the requirements [26]. The fact that he might be able to meet these requirements in the circumstances of this appeal is part of the factual background when assessing proportionality. The fact that a successful article 8 appeal would mean that he could stay without meeting the requirements of the rules does not in itself mean that he is being favoured over other applicants as each case turns on its own facts and is not a factor which in itself should count against him. But the fact remains that if he wishes to remain as an entrepreneur there is a public interest in requiring him to meet the requirements of the rules and this is a factor, albeit not determinative, to take into account.

21. This is not a case where the appellant has lost his ties to Russia. The judge found that he retained significant family and social ties there and that there would be no barriers to him re-establishing himself there given his financial and educational standing. His wife is Russian as is their son. His

best interests are to be with his parents and there is nothing to suggest that they would act in any way contrary to those best interests.

22. I am not satisfied that the factors in favour of the appellant outweigh the public interest in maintaining a policy of effective immigration control: see not only Lord Bingham in Huang at [18] but also Laws LJ in UE (Nigeria) at [36]. In summary, taking all the relevant factors into account and having regard to the provisions of s117B I am satisfied that whilst article 8 (1) is engaged, the respondent has shown that the decision to refuse further leave to remain and to remove the appellant is necessary and proportionate to a legitimate aim within article 8 (2).

Decision

23. The first-tier Tribunal erred in law and I set aside the decision. I substitute a decision dismissing the appeal on both immigration and human rights grounds.

Signed Date 28 January 2015

Upper Tribunal Judge Latter