IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06061/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th August 2015	**On 20th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR JETMIR VLADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Malhotra, Counsel, instructed by Norton Folgate Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is an Albanian and Australian national who applied for entry clearance to the United Kingdom as a returning resident here. His application was refused by the Entry Clearance Officer (ECO) and his subsequent appeal dismissed by First-tier Tribunal Judge Bart-Stewart in a decision promulgated on 6 February 2015.

2. Grounds of Appeal were lodged and it was noted by First-tier Tribunal Judge Pirotta that the application had properly raised concerns that the judge may have made a material error of law and there was "*merit in the*

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application on the issue of the application of paragraph 19 alone. Leave is not granted to pursue the other grounds".

3. A Rule 24 notice was lodged by the Secretary of State indicating that the judge had considered the matter under the provisions of Immigration Rule 19 and concluded there were insufficient matters going in favour of the Appellant. It was said no material error of law was disclosed.

4. Thus the matter came before me on the above date.

5. Prior to the hearing the Appellant's solicitors had lodged an updated index and additional bundle of documents highlighting a number of documents that were not before the judge. For the Appellant Ms Malhotra properly accepted that as this was an error of law hearing I was not permitted to look at the additional documents lodged as they were not documents lodged before First-tier Tribunal Judge Bart-Stewart.

6. Ms Malhotra relied on her grounds set out in the skeleton argument at N1 to N4. Those grounds focused on the basis that permission had been granted solely on the basis of Section 19 of the Immigration Act 2014 and in particular Section 117B. The Appellant's case was that he had three school-going British children who are established in this country in their home and within their extended family unit with uncles, aunts and grandparents. The Appellant's wife is a British national who works as a nurse, is a tax payer, and has lived in this country for the majority of her life. In the circumstances it would not be reasonable to expect the children to relocate especially since the family had returned to re-establish themselves here. In addition there were "special" circumstances surrounding this case. The Appellant had enjoyed the benefit of indefinite leave to remain and had failed to satisfy the returning resident rule due to an error. He had a British wife and children. The uncertainty of his immigration status was placing a heavy burden on him and his family.

7. Ms Malhotra accepted that given that the Grounds of Appeal had focused on the discretion available to the judge under Section 19 of the Immigration Rules, it did seem probable that permission had been granted on the judge's exercise of discretion under that paragraph. It was important to note that even at the date of decision the family were returning to an established set up in this country. In response to comments from Ms Isherwood, Ms Malhotra said that the Appellant had in fact been in the UK form 2001 to 2005 as a failed asylum seeker. The judge had therefore made an important factual error in regard to the Appellant's length of residence here and given that error the discretion should have been exercised differently. I was asked to order a rehearing in this case.

8. For the Home Office Ms Isherwood relied on her rule 24 notice. There was no material error in law. The background was that the Appellant was a failed asylum seeker. It was important to note that at the date of decision by the ECO was 10th April 2014. The judge had weighed up the evidence under paragraphs 19 of the Immigration Rules and had made the appropriate decision.

9. I reserved my decision.

Conclusions

10. The basic facts in this case are non-contentious. The Appellant is someone who had indefinite leave to remain in the United Kingdom which was granted on 15th November 2008. He and his wife relocated to Australia to live there in April 2009. They have three British children.

11. They decided to make their home in the United Kingdom and given that all, apart from the Appellant, are British citizens, there was no difficulty with that decision except that the Appellant had to apply for entry clearance. He did so in his capacity as a returning resident. The ECO considered his application under paragraph 18 of the Immigration Rules and noted that because he had been living outside of the UK for over two years and had not lived here for most of his life, he was not satisfied that the Appellant met the requirements of paragraph 18(ii). He therefore refused the application. There is no quibble from the Appellant about that part of the decision.

12. However, as the judge pointed out, the ECO had a discretion under paragraph 19 of the Rules which neither the ECO nor the Entry Clearance Manager who reviewed the Grounds of Appeal had considered. The judge explained that the facts to be assessed included the length of the Appellant's original residence, the time that he has been outside the United Kingdom, the reason for the delay, the reasons for going abroad and the intentions, the nature of family ties here and whether he had a home in the United Kingdom and if admitted would received residency.

13. The judge noted that the ECO had said that the Appellant entered here for settlement on 11th September 2006 and left on 17th April 2009, meaning he had lived in the UK for only three years. She recorded that Ms Malhotra had said that the Appellant had lived in the UK from 2009 although the grounds of application make it clear that this was not said. The judge noted that the family had decided to relocate to Australia where the Appellant's wife had secured employment and there was no suggestion that the intention was to be away for less than two years. The judge noted that the Appellant lived with his wife and children there and the family were settled. Indeed, he had obtained Australian citizenship which was further evidence of strengthening ties outside the UK. Overall the judge found that there were insufficient factors in the Appellant's favour that would have merited the exercise of discretion in the Appellant’s favour under paragraph 19 as at the date of decision.

14. What emerged before the judge was that both the Appellant and his wife were unaware that there was a “two year cut off” (see paragraph 8 of the decision) and because he had been given “indefinite” leave he considered that he could return at any stage.

15. One particular point of criticism from Ms Malhotra was that the judge had erred in stating that the Appellant had lived in the UK for only three years. I was told that, in fact, he had been here from 2001 to 2005 when he was attempting to obtain asylum. That information does not appear to have

been placed before the judge who probably relied on the evidence contained in the statement of the Appellant who said (J1 of the bundle) that he obtained leave to remain as a spouse of a British national on 8th September 2006 and arrived here to stay with his spouse on 11th September 2006, departing the UK to work in Australia on 17th April 2009. His previous history of being a failed asylum seeker was not disclosed in the statement. Furthermore in his application form at question 28 he gives his date of arrival as 11th September 2006. At question 91 he was asked how long he had been resident in the UK and the answer given was "2 years and 7 months". From the information given to the judge she was entitled to conclude that the Appellant had lived here for a relatively short period of time. Certainly there is no suggestion that the Appellant has lived most of his life here. The judge set out the terms of paragraph 19 of the Rules and focused on the issues raised there and whether or not it would be appropriate for discretion to be exercised in the Appellant's favour.

16. What the judge was bound to do, which she did do, was to look at matters as they stood at the date of decision: see **<u>DR</u> (ECO: post decision evidence) Morocco* [2005] UKIAT 00038**. She looked at the facts presented to her and what factors were relevant to apply in the issue of discretion under paragraph 19 of the Rules. The reasons she gave, which are stated above, are clear and coherent. In order to succeed in this case the Appellant has to show that the judge has made an error in law and that the reasons given are perverse and irrational.

17. By a wide margin the Appellant fails to show that. It follows that there is no error of law in this decision which must stand.

18. In passing I would only observe that the Appellant was present at the hearing and the parties told me that he was an overstayer. The fact that he has not succeeded in coming here as a returning resident under the Rules does not preclude him trying to succeed in another application and presumably he can ask the Secretary of State to exercise her discretion to allow him leave to remain here under Article 8 ECHR given the current family circumstances. Alternatively he can return to one of his countries of nationality and make an application for entry clearance.

<u>Notice of Decision</u>

19. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

20. I do not set aside the decision.

21. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald