Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13265/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 13 January 2014	**On 22 January 2014**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

AHMED ZEIDAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, instructed by Kings Court Chambers, Birmingham
For the Respondent: Mr M Diwnycz, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Ahmed Zeidan, was born on 26 September 1982 and is a male citizen of Israel. The appellant appeals to the Upper Tribunal against the decision of the First-tier Tribunal dismissing his appeal against a decision of the respondent dated 3 April 2013 to refuse to vary his leave to remain.

2. The appellant had applied for leave to remain on the basis of long residence (paragraph 276 of HC 395). The First-tier Tribunal found that the appellant had been absent from the United Kingdom for a total period that exceeded that permitted by the Rules. It is accepted by both parties that the appellant was able to show, at the date of the hearing before the First-tier Tribunal on 27 September 2013, the appellant had accrued ten years' continuous lawful residence in accordance with the Rules and not withstanding his absences from the United Kingdom. I was assisted by Mr Slatter's very helpful skeleton argument and note that Mr Diwnycz, for the respondent, agreed with the contents of that document. I shall, therefore, record briefly that I also agreed with the interpretation of the Immigration Rules set out in the skeleton argument which cites the Tribunal's decision in **EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013** at [7]:

> It is thus not open to an appellant to argue simply that, on the date of the hearing, he meets the requirements of the Immigration Rules. He can succeed only if he shows that the decision that was made was one which was not in accordance with the Immigration Rules. Section 85(4) allows him to show that by reference to evidence of matters postdating the decision itself, and it may well be that the effect is that the question for the Tribunal in an in-country case is whether the decision can be justified as a correct one at the date of the hearing. But that does not mean that the Tribunal is the primary decision-maker. The Tribunal's task remains that of hearing appeals against decisions actually made. The correct interpretation of s85(4) is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing: he can succeed only by showing that he would be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal. The subsection does not permit an appellant to change his case under the Immigration Rules for being allowed to remain in the United Kingdom. (That is, of course, without prejudice to the fact that s84(1) may allow the appeal to succeed on different grounds entirely.)

3. The parties do not dispute that the appellant could succeed in his application by proving ten years' continuous legal residence as at the date of the hearing.

4. I agree also with Mr Slatter that the effect of **GK (Long residence – immigration history) Lebanon [2008] UKAIT 00011** (at [23]-[24]) is that I am not in a position to allow the appeal outright but to remit it to the Secretary of State for further consideration of the requirements imposed by paragraph 276C of HC 395:

> The question arises, however, what follows from this finding. At the hearing the parties appeared to be of the view that if I was satisfied the appellant met the relevant requirements of the 10 year continuous lawful residence rule (as contained in paras 276A-B), I should allow the appeal outright. However, the relevant rules also include para 276C which is in discretionary terms:
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> "276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met."

Accordingly, since the respondent has yet to exercise that discretion, I consider I can only allow the appeal (under s.86(3)(a) of the 2002 Act) insofar as I think that the decision was not in accordance with the law (including immigration rules).

DECISION

5. The determination of the First-tier Tribunal promulgated on 17 October 2013 is set aside. I have remade the decision. The appeal is allowed to the limited extent that it is outstanding before the Secretary of State to make a decision under paragraph 276C of the Immigration Rules.

Signed Date 16 January 2014

Upper Tribunal Judge Clive Lane