Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24252/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 June 2014	**On 17th July 2014**

Before

THE HONOURABLE MRS JUSTICE SIMLER
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR MEERA MUHIADEEN HALEEMUDEEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson of Counsel
For the Respondent: Mr G Saunders, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the resumed hearing of an appeal by Mr Haleemudeen in the circumstances we will describe shortly, following remission of his appeal by the Court of Appeal.

2. Mr Haleemudeen is a national of Sri Lanka born on 27 September 1972. His appeal has a chequered history. The underlying decision that is the subject of challenge is a decision of the Secretary of State dated 16 October 2012. By that decision Mr Haleemudeen's application dated 28 February 2012 to vary his leave to indefinite leave to remain in the United Kingdom on the basis of ten years' continuous lawful residence under paragraph 276B of the Immigration Rules HC 395 (as they then stood) was refused, and at the same time the Secretary of State determined that removal from the UK would not breach his Article 8 rights.

3. We note, and it is accepted, that the removal decision that accompanied the refusal to vary was impermissible and not in accordance with section 47 of the Immigration, Asylum and Nationality Act 2006 (before its amendment) as held by the Upper Tribunal in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) (subsequently approved by the Court of Appeal). Section 47 was amended with effect from 8 May 2013 by section 51 Crime and Courts Act 2013 so that removal decisions taken simultaneously with refusals to vary are now lawful; but that could not have affected the lawfulness of the removal decision here. Nevertheless the unlawfulness of the removal decision does not affect the potential lawfulness of the refusal to vary and accordingly the refusal to vary dated 16 October 2012 was lawful, subject to any successful challenge on appeal by Mr Haleemudeen.

4. Mr Haleemudeen appealed the refusal to vary his leave and by a decision of the First-tier Tribunal ("FTT") promulgated on 3 January 2013, Judge Brown allowed the appeal on Article 8 grounds but dismissed the appeal under the Immigration Rules. That decision was appealed and by a decision promulgated on 7 March 2013, Deputy Upper Tribunal Judge Bruce concluded that the FTT decision was in error of law because the reasons given were not sufficient. The decision was set aside and she directed that it be remade following a further oral hearing. By a decision promulgated in June 2013 the Upper Tribunal remade the decision, finding that removing Mr Haleemudeen would not be disproportionate or unlawful and therefore dismissed his appeal against the Secretary of State's decision.

5. Permission to appeal to the Court of Appeal was given by Upper Tribunal Judge Hugo Storey in July 2013, and the appeal was heard in February 2014. The Court of Appeal concluded that the FTT Judge erred in his approach to Article 8 because he did not consider the appellant's case for remaining in the UK on the basis of his private and family life in the context of the Secretary of State's policy as contained in the new Immigration Rules introduced on 9 July 2012. Further, although the Court of Appeal held that the Upper Tribunal was entitled as a consequence to set aside the FTT's decision as flawed for failure to take account of relevant considerations, namely the new rules and the policy contained in them. The Court held that the Upper Tribunal Judge thereafter fell into error, in particular in her calculation of continuous lawful residence for the purposes of the ten year lawful residence rule in paragraph 276B and that this had vitiated her assessment of the Article 8 question. There was also a suggestion that she inadequately recognised the expectation Mr Haleemudeen would have as a consequence of his status in the UK under the Highly Skilled Migrant Programme and the Tier 1 (General) Migrant provisions.

6. Consequently, having concluded that the errors were material and having considered and decided that it was not inevitable that on a reconsideration the Secretary of State's decision would be found to be a proportionate interference with the appellant's rights by order dated 2 May 2014, the Court of Appeal allowed the appeal and remitted the Article 8 issue to be redetermined by the Upper Tribunal.

7. Thus the appeal came before us to determine the Article 8 issue. Mr Haleemudeen was represented by Mr Richardson and the Secretary of State was represented by Mr Saunders. Both have made focused clear submissions that have assisted us greatly.

8. Mr Richardson did not call Mr Haleemudeen to give further evidence to us because the parties are agreed that the facts having now been found by a number of Tribunals are undisputed and are largely reflected in the decision of the Court of Appeal.

9. We deal with the facts in short summary as follows. Mr Haleemudeen is now aged 41. He arrived in the UK initially on 22 September 2001 with valid leave to enter as a student and has been in this country lawfully ever since. On 26 March 2007, shortly before his final student visa was due to expire, he applied to vary his leave to remain as a highly skilled migrant. That application was refused on 19 April 2007. Although as a result Mr Haleemudeen's presence in the UK was without leave after 31 March 2007, it remained lawful because he had an in country right of appeal against that decision. Section 3C (2)(b) of the Immigration Act 1971 provides that a person's leave is extended during the period in which he can appeal against an immigration decision, and applied in his case.

10. On 28 April 2007 before the expiry of that period, Mr Haleemudeen returned to Sri Lanka in order to re-apply for a highly skilled migrant visa from Colombo. That application was successful and on 22 October 2007 he returned to this country with a highly skilled migrant visa valid until 28 July 2009. He was accompanied by his wife, whom he had married in 2005, and their then 21 month old daughter. A second child was born in the UK on 10 May 2008 and Mr Haleemudeen was subsequently granted leave under the Tier 1 (General) Migrant scheme (that replaced the Highly Skilled Migrant Visa Programme) from 28 July 2009 until 28 July 2012.

11. As a person admitted under those programmes, Mr Haleemudeen had an expectation that provided he complied with the Immigration Rules this was a route to obtaining permanent settlement in this country. Consistently with that understanding he brought his family to the UK, no doubt on the footing that provided he complied with the Rules and was a good citizen he would be working towards settled status. The private life that he established with his family as a consequence of that permission was not based on any precarious or temporary status in the United Kingdom but was based on the understanding that he was working towards a settled status here.

12. On 20 September 2010, however, at Barkingside Magistrates' Court Mr Haleemudeen pleaded guilty to driving without insurance and without a licence and was fined £245. He stated that the offences were committed because his international

driver's licence had lost its validity in the United Kingdom after a year and he only had a provisional driving licence at that stage. That explanation was not entirely accepted by the FTT because by the time the offences were committed Mr Haleemudeen had been living and working in the UK for quite some time. Nevertheless it is right to recognise that the offences are not at the highest end of the offending scale and we accept that these are strict liability offences committed by him without any intention of doing so, as Judge Bruce found.

13. The significance of the convictions is that one of the requirements for indefinite leave on the ground of continuous lawful residence that was in force at the time of Mr Haleemudeen's application was that an applicant does not have any unspent convictions. Mr Haleemudeen's convictions were not spent either on the date of his application for indefinite leave or on the date of the Secretary of State's decision. The convictions will not in fact become spent under the Rehabilitation of Offenders Act 1974 until 19 September 2015.

14. The current position is that Mr Haleemudeen is the assistant manager of a Tesco Express shop in Whitechapel. His wife is a part-time student and hopes to become a nursery school teacher. The couple made many good friends in this country and Mr Haleemudeen undertakes charity work for the Sri Lankan Muslim community in East London which has been the family's home. The oldest daughter, who is now aged 8½, has been here since she was 21 months old, and the youngest daughter is now aged 6. Both girls are settled in school and have established friends and, as Mr Richardson described it, are beginning a process of extending their horizons beyond the family unit itself. They are doing well at school, enjoying the normal lives of children their age. The oldest daughter is being treated for asthma but that is not inhibiting her ability to enjoy school and the life that she has with her family here.

15. Mr Haleemudeen's application for a variation to indefinite leave to remain in the UK was made on 28 February 2012 on the basis of his continuous lawful residence in the UK for ten years. There were a number of gaps in that residence but these were explained and accepted by the Secretary of State as not causing a break in his continuous residence.

16. The basis of the Secretary of State's refusal under the Rules was set out in the decision letter as follows:

> "Under paragraph 276B(iii) one of the requirements to be met by an applicant for leave to remain on the grounds of long residence … is that the applicant does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974.
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> On 20 September 2010 at Barkingside Magistrates' Court you were convicted with the offence of driving without insurance and driving otherwise than in accordance with a licence, for which you received a fine of £245. This conviction will not become spent under the terms of the Rehabilitation of Offenders Act 1974 until 19 September 2015.

> For the reason outlined above your application has been refused under paragraph 276D with reference to paragraph 276B(iii) of HC 395, (as amended)."

17. Accordingly it is to be inferred that had Mr Haleemudeen not had that conviction or had the Rules otherwise provided in respect of that conviction, Mr Haleemudeen's application would have been accepted under the Immigration Rules as qualifying him for indefinite leave to remain as a consequence of his ten years' lawful residence here.

The Proper Approach to this Case

18. The first question to be addressed is whether the new Immigration Rules in force from 9 July 2012 apply to this appeal. Mr Richardson relies upon **Edgehill and Another [2014] EWCA Civ 402** for the submission that the post-July 2012 Immigration Rules governing the way in which the Article 8 evaluation exercise is to be conducted do not apply. The appellant's application was made on 28 February 2012, before the entry into force of the new Rules on 9 July 2012, and the transitional provisions do not cause those Rules to have effect here. We are told by him that **Edgehill** was not cited to the Court of Appeal (on this appeal) and is therefore not discussed. It is unfortunate that that is the case given the basis on which this appeal was allowed originally by the Upper Tribunal and subsequently by the Court of Appeal.

19. Nevertheless, Mr Saunders on behalf of the Secretary of State has conceded that Mr Richardson is correct and has not sought to argue the contrary. He takes no point on the basis on which the Court of Appeal remitted this matter and concedes that the approach adopted in **Edgehill** does apply.

20. Having considered the Court of Appeal's decision in both **Edgehill** and in this case, it is clear that there was no discussion at all in the Court of Appeal's judgment in this case of the effect of the transitional provisions on the obligation to consider Article 8 in accordance with the new Rules. At that stage, the Secretary of State's position (as argued in **Edgehill)** was that the Article 8 consideration under the new Rules is actually a consideration outside the Rules and therefore the new Rules apply to any Article 8 consideration irrespective of the transitional provisions. Mr Richardson has very frankly explained that the view was taken on this appeal, perhaps unwisely, that this argument was correct. Notwithstanding that, in **Edgehill** the Court of Appeal dealt with the transitional provisions head on and given Mr Saunders' concession, we consider it appropriate to adopt the **Edgehill** approach here.

21. Accordingly the comments of the Court of Appeal about the formidable hurdle that stands in the way of Mr Haleemudeen succeeding on appeal are thrown into some doubt. In particular, at paragraph 64 Lord Justice Beatson said this:

> "I have not found it easy to assess whether it is inevitable that on reconsideration the Secretary of State's decision will be found to be a proportionate interference with Mr Haleenmudeen's rights. The provisions of

paragraph 276ADE and Appendix FM undoubtedly constitute a formidable hurdle for him to overcome. The significant shortfall from the twenty year residence requirement and the fact that Mr Haleemudeen's wife and children do not meet the requirements of paragraphs R-LTRP and E-LTRPT and the family's remaining links in Sri Lanka, including owning a property there, provide significant support for Mr Hall's submission."

22. Undoubtedly there would have been a formidable hurdle for Mr Haleemudeen to overcome had the new Rules applied; but in light of **Edgehill** we must consider his case without deferring to the new Immigration Rules' codification of the Article 8 considerations. The approach we therefore adopt is in accordance with the approach set out in **Huang** at paragraphs 16 and 17,:

> "16. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391, an article 10 case, in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed. It is to be noted that both *Samaroo* and *Farrakhan* (cases on which the Secretary of State seeks to place especial reliance as examples of the court attaching very considerable weight to decisions of his taken in an immigration context) were not merely challenges by way of judicial review rather than appeals but cases where Parliament had specifically excluded any right of appeal.
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> 17. Counsel for the Secretary of State nevertheless put his case much higher even than that. She relied by analogy on the decision of the House in *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, where the House considered the article 8 right to respect for the home. It held that the right of a public authority landlord to enforce a claim for possession under domestic law against an occupier whose right to occupy (if any) had ended and who was entitled to no protection in domestic law would in most cases automatically supply the justification required by article 8(2), and the courts would assume that domestic law struck the proper balance, at any rate unless the contrary were shown. So here, it was said, the appellate immigration authority should assume that the Immigration Rules and supplementary instructions, made by the responsible minister and laid before Parliament, had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the

> community. The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain, are not in any event represented. It must be remembered that if an applicant qualifies for the grant of leave to enter or remain under the Rules and is refused leave, the immigration appeal authority must allow such applicant's appeal by virtue of paragraph 21(1)(a) of Part III of Schedule 4 to the 1999 Act. It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8."

Our Evaluation

23. Against that background we turn to consider the difficult evaluative proportionality assessment. As indicated, the Secretary of State's refusal of this appellant's claim based on ten years' continuous residence under the Rules as they then stood was based on paragraph 276B (iii) and his unspent convictions. Absent those, his lawful presence in the UK met the requirements for a grant of indefinite leave to remain on the date of his application and on the date of the decision and original appeal.

24. In the circumstances, Mr Richardson relies as a matter of significance on the fact that the Rules changed on 13 December 2012 and no longer identify as a barrier to the grant of indefinite leave to remain the fact of an unspent conviction. That change in the Rules remains unaltered today. Indeed Mr Saunders accepted that the appellant would be likely to succeed under Rule 276B of the Immigration Rules today based on ten years' continuous residence. We agree with Mr Richardson that this is significant in any assessment of the Article 8 proportionality issue, as is the fact that the Rules provide for a grant of indefinite leave to remain to someone who has been lawfully resident for ten years. Mr Saunders argued that the fact of thirteen years' residence now clocked up by Mr Haleemudeen should be considered on its own without reference to either ten years' lawful residence or fourteen years' continuous residence but we cannot accept that. However, at paragraph 55 the Court of Appeal said in this case:

> "The position taken by Mr Hall does not fit with his principal argument when dealing with whether the FTT had erred. It is to be recalled that, in that context, he submitted that a tribunal considering Article 8 must give primary consideration to the Secretary of State's policy as it is contained in the new Rules and to the status of the Rules as a code. The submission that the provisions in the Rules on the meaning of continuous lawful residence should not be taken into consideration once it has been concluded that the Rules do not apply appears to have an element of unjustified cherry-picking. This is because the provision on continuous residence in paragraph 276A applies to paragraph 276ADE as well as to paragraph 276B. The effect of Mr Hall's submissions, if

> accepted, would be that when considering proportionality under the general law and outside the Rules, those parts of paragraphs 276ADE and Appendix FM which reflect the more stringent policy must be considered but the court should not have regard to those provisions which, like those on continuous lawful residence, moderate that stringency."

And then at paragraph 57:

> "I reject the submission that provisions such as that on the meaning of 'continuous lawful residence' in paragraph 276A should be disregarded once a case falls outside the Rules. This is because although they are not dispositive once it is clear that the case is not within the Rules they provide guidance about the policy of the Secretary of State in the same way as the provisions in paragraph 276ADE and Appendix FM do."

25. Accordingly, although not dispositive, once it is clear that the case is not within the Rules, the Rules nevertheless provide guidance about the policy of the Secretary of State in relation to her attitude to convictions that are unspent and the meaning of continuous lawful residence. Given the Rules no longer contain a barrier by reference to unspent convictions and that the appellant would succeed in establishing continuous lawful residence, we accept that is a powerful indicator in relation to the proportionality assessment and weighs strongly in favour of the appellant when considering the Secretary of State's need to maintain effective immigration control in this case.

26. There is no dispute that the appellant did not meet the requirements of the Immigration Rules at the date of the decision. That must be our starting point. In most cases the Rules will strike the proportionality assessment properly and will be the end of the matter since the authorities make it clear that the focus of any assessment of whether interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with those provisions. Where an appellant does not meet the requirements of the Rules there must be compelling circumstances that mean that refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8 that leave should be granted under Article 8.

27. Here, Mr Haleemudeen has never breached Immigration Rules or Immigration Law. Although he committed a strict liability driving offence he did that without any intention of doing so and the offence was in the scale of things on the less serious side. We have already referred to the Secretary of State's change of policy in this regard and to the fact that it would not have been a barrier to his application if made after 13 December 2012. Mr Haleemudeen has always worked hard. He has contributed to the community of the UK paying his taxes and by way of substantial student fees. The family has integrated well into the community in East London that has been their home for many years and he has done good works in that community.

28. We recognise that the family would move as a unit were a removal decision to take effect and that it could be said in those circumstances that the best interests of the children are normally served by remaining as a family unit. These are, as Mr Saunders urged, normal happy children who will no doubt transition, albeit following a period of disruption, well to Sri Lanka.

29. We consider as a weighty factor in this case the fact that Mr Haleemudeen's family and private life in this country has been built not on any precarious or temporary status but on a properly formed expectation based on the Immigration Rules and representations made by the Secretary of State in her Highly Skilled Migrant and General Migrant programmes that he was working towards settled status in this country.

30. We have to balance against those considerations the public interest at stake here and whether it is both necessary and proportionate to require this family to leave the UK. Given their lawful presence here at all times, the legitimate aims served by any removal can only be the need to preserve the predictability and certainty of decision-making in an immigration context in the public interest, and the maintenance of immigration control. Given the change in the Rules that now means the unspent conviction would not be a barrier to a long residence application and the rationale for that change which must be that the new Rules are more reflective of the Secretary of State's policy and her interests, the aim is weaker here and is more easily outweighed by the compelling circumstances of an individual case.

31. The Article 8 exercise is always a difficult evaluative exercise but we have concluded that the powerful factors in Mr Haleemudeen's case do outweigh the policy interests in the removal of this family. We therefore allow his appeal on Article 8 grounds by reference to the features we have just described.

Signed Date

Mrs Justice Simler