



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/33248/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

Determination

On: 5 August 2014

Promulgated

Prepared: 28 August 2014

On 1 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE

Appellant

and

MR MANJIT SINGH

Respondent

Representation

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer

**For the Respondent: Mr B Halligan, counsel, instructed by Marks and
Marks Solicitors**

DETERMINATION AND REASONS

1. I shall refer to the appellant as the "secretary of state for the Home Department" and to the respondent as "the claimant."
2. The secretary of state appeals with permission against the determination of First-tier Tribunal Judge Bradshaw, promulgated on 28 May 2014 allowing the claimant's appeal on human rights grounds.

3. The background to the appeal is as follows: The claimant asserted that he entered the UK in 1999 without entry clearance. On 21 June 2012, his solicitors applied for indefinite leave to remain the UK alleging that he had been residing continuously in the UK for over 14 years. As at the date of the application however, he had not resided for 14 years.
4. It was however only a year after submitting his application, namely, on 30 July 2013 that a decision was made by the secretary of state to remove the claimant from the UK.
5. The Secretary of State stated in her reasons for refusal dated 30 July 2012 that the claimant had applied for indefinite leave to remain on the basis of his length of residence.
6. It was contended that his application for such leave was only submitted on 22 July 2012. It was on that basis that the secretary of state contended that paragraph 276B of the Immigration Rules ceased to be a provision under the rules as at 9 July 2012.
7. His application was thus considered 'outside of the rules.' It was also considered under the provisions of paragraph 276ADE of the rules. It was refused under paragraph 276CE.
8. At the hearing before the First-tier Tribunal, it was submitted on his behalf that the application had been made prior to 9 July 2012 - para 6 of the determination. However, his counsel stated that if that were not accepted he would rely on the fact that there was a good arguable case to be considered under Article 8 "in terms of the Strasbourg jurisdiction." (The claimant was not represented at that hearing by Mr Halligan).
9. The Judge noted at paragraph 8 that the presenting officer on behalf of the secretary of state accepted that the application *had* been received by the secretary of state prior to the new rules coming into force. It was nevertheless 'accordingly agreed' that the Judge should consider the appeal on the basis of an Article 8 case in terms of the claimant's private life under the Strasbourg jurisprudence [8].
10. The Judge went on to find that the claimant ".....was telling the truth in giving his evidence at the hearing" [45].
11. He accordingly accepted that the claimant had been in the UK since April 1999, a period of 15 years. He had a wife and two children in India but had lost touch with them over the years. He had established a private life

in the UK. The claimant is 63 years old and had integrated well into the community in the UK. The Judge found that at this stage of his life, he would find it extremely difficult to go back to India to seek to re-integrate himself into the culture, society and the community there.

12. In reaching his conclusions on the issue of proportionality, the consequences of interference to his private life by his being returned to India "...would reach the standard whereby the fundamental rights of the claimant in terms of Article 8 would be breached" [60]. The appeal was thus allowed on human rights grounds.
13. The secretary of state subsequently applied to appeal against that decision. The grounds did not challenge the finding by the Judge that the claimant had spent 15 years in the UK. It was contended that the claimant's circumstances are not exceptional and that it would not amount to anything unjustifiably harsh for him to be returned. The appeal did not disclose any breach of his moral and physical integrity.
14. On 14 June 2014, First-tier Tribunal Judge Nicholson granted the secretary of state permission to appeal. He noted at paragraph 4 of his decision that counsel for the claimant had submitted that the application was made prior to the introduction of the new rules but that, if that were not accepted, he would rely on Article 8. Why such submission was made was not clear because the Judge at paragraph 8 recorded that in the light of a receipt from the secretary of state dated 21 June 2012, the secretary had indeed accepted at the hearing that the application had been made prior to the introduction of the rules.
15. Judge Nicholson went on to state that it was 'unsurprising' that in those circumstances the secretary of state sought permission to appeal on the basis that the claimant's circumstances were not exceptional. If the appeal had been subject to the new rules, then it is arguable that the Judge's decision was wholly unsustainable.
16. Judge Nicholson, however, went on to state that the difficulty for the purpose of the application for permission is that in accordance with the transitional provisions, where an application for indefinite leave to remain was made before 9 July 2012, and the application had not been decided, it was to be decided in accordance with the rules in force on 8 July 2012.

17. It had been conceded at paragraph 8 of the determination that the application was made prior to the introduction of the new rules. Accordingly, the application should have been considered under paragraph 276B. It was thus arguable that once it was found that the claimant had been in the UK for 15 years, the Judge should have allowed the appeal under paragraph 276B of the rules, or at least that the Article 8 decision was justifiable given that the claimant met the requirements of the rules. If so, the Judge's arguable error of law had no bearing on the outcome of the appeal.
18. Judge Nicholson finally noted that it could also be argued that the Judge should simply have found that the decision was not in accordance with the law in line with **Edgehill and another v Secretary of State for the Home Department [2014] EWCA Civ 402**.
19. At the hearing on 5 August 2014, Mr Deller at the outset accepted that as at the date of the secretary of state's decision on 30 July 2013, the relevant requirements relating to 14 years' continuous residence had been met.
20. However, the secretary of state had not in terms considered the application under paragraph 276B, which would have failed had the secretary considered it shortly after the application was made. However, that is not the case. As at the date of decision, the secretary did not take account of the immigration rules applicable at the date of the receipt of the application.
21. Mr Deller very fairly accepted that the letter from the claimant's solicitors dated 21 June 2012 which accompanied the application contended in terms that the claimant had had a continuous 14 years' residence in the UK. Accordingly, this was an application expressly stated to be for indefinite leave to remain on the basis of his long term residence.
22. The claimant's grounds before the First-tier Tribunal were somewhat generic but it was contended that the decision of the secretary of state was against the weight of the evidence, including the information explaining the facts by way of the witness statement and documents.

23. Mr Deller submitted that once it was raised before the secretary of state, the application had to be considered under paragraph 276B as the application was effectively made and received under that paragraph.
24. Mr Deller referred to the concession by the presenting officer at the hearing at paragraph 8 that the application had been received prior to the new rules coming into force. At that stage, the grounds of appeal could have been adapted so as to contend that the claimant had in fact met the requirements under paragraph 276B.
25. Accordingly, the decision had not been in accordance with the law.
26. Mr Deller accepted that it would make a difference for the appeal to be allowed under paragraph 276B rather than under Article 8 as, unlike Article 8, paragraph 276B of the Rules gives the claimant indefinite leave to remain.
27. Mr Deller accepted that the First-tier Tribunal Judge had thus erred for the reasons given and should have concluded that the application had not been considered, as it should have been, under 276B of the rules as they then were.
28. The Tribunal's finding of fact, namely that the claimant had been here for over 15 years meant that the 14 year continuous residence requirement had been met. That fact had not been challenged.
29. Mr Deller also accepted that the secretary of state did not suggest that there was anything in paragraph 276B that should have prevented the application being granted. There are no apparent reasons why it would have failed if the date upon which the claimant claimed to have arrived in the UK had been accepted. Accordingly, he should have been granted indefinite leave to remain under 276B.

30. He accepted that in the circumstances the determination should be set aside and should be re-made on the basis that the requirement of paragraph 276B had been met.
31. On behalf of the claimant, it was submitted that in any event, the decision in accordance with Article 8 was based on sustainable grounds.

Assessment

32. It is evident that the solicitor's letter dated 21 June 2012 which was sent to the secretary of state plainly contended that the claimant had been continuously residing in the UK for over 14 years. It was also contended in that letter that there was nothing to suggest that his presence is "undesirable to the UK." He had no criminal record apart from a minor traffic violation that is almost four years old, and that should not be taken as an adverse indication regarding his character.
33. I find, as noted by Mr Deller, that there has been no challenge to the finding by the First-tier Tribunal Judge that the claimant had resided continuously in the UK since 1999. Accordingly, as at the date of the secretary of state's decision on 30 July 2013, the claimant had continuously resided in the UK for over 14 years.
34. The First-tier Tribunal Judge had regard to the letter dated 21 June 2012, namely the application for indefinite leave to remain on the basis of his length of residence. At the hearing, Ms. Pos on behalf of the secretary of state accepted that the application had been received prior to the new rules coming into force. Notwithstanding that concession, the claimant's counsel informed the Tribunal that the only basis of the appeal was his Article 8 rights.
35. As noted by First-tier Tribunal Judge Nicholson in granting permission to appeal, it is not clear why that contention was made in the light of the fact that the secretary of state had indeed accepted at the hearing that the application had been made prior to the introduction of the rules.

36. Accordingly, given the concession that the application was made prior to the introduction of the new rules, the application should have been considered under paragraph 276B. Further, given the finding that the claimant had been here for 15 years, the Judge should either have allowed the appeal under paragraph 276B of the rules, or at least found, as noted by Judge Nicolson, that the Article 8 decision was justifiable as the claimant had met the requirements under the rules.
37. In addition, the Judge should also have considered that the secretary of state's decision had in any event not been in accordance with the law as no decision was taken under paragraph 276B of the rules, which should have taken place.
38. I accordingly find that the Judge should in the circumstances have found that the decision was not in accordance with the law as the secretary of state had not considered paragraph 276B of the rules, which were applicable at the date the application was made.
39. I accordingly set aside the decision and re-make it.
40. For the reasons already given and accepted by both parties, I find that as at the date of the secretary of state's decision on 30 July 2013, the claimant had fulfilled the residence requirements under paragraph 276B.
41. Mr Deller has very fairly accepted that there is nothing from the claimant's history which would stand in the way of a successful application under paragraph 276B. There were no public policy issues which prevented that outcome.
42. I accordingly find that the claimant is entitled to be granted indefinite leave to remain in accordance with paragraph 276B of the rules which applied at the time.

Decision

The determination of the First-tier Tribunal contained an error on a point of law. Having set aside the decision, I remake it and allow the claimant's appeal under the Immigration Rules.

Signed

Date 28/8/2014

C R Mailer
Deputy Upper Tribunal Judge