Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36536/2013
IA/41187/2013
IA/41197/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 August 2014	**On 16 September 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR I AW
MRS S S K
MISS N A W

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Wilford, Counsel, instructed by Roelens Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case is Secretary of State for the Home Department and the appellants are now claimants/respondents.

2. The claimants are nationals of Sri Lanka being mother, father and child.

3. The first claimant applied for variation of leave as a Tier 4 (General) Student on 4 November 2011. That was refused but in a determination promulgated on 15 May 2012, Judge Chohan concluded that the refusal was not in accordance with the law and remitted the decision to the respondent to reconsider the case. That was done by the respondent on 21 August 2013.

4. The appellant sought to appeal against that decision which appeal came before First-tier Tribunal Judge Clarke for hearing on 16 May 2014.

5. Seemingly it was accepted at the hearing that the student appeal could not succeed but that the appropriate appeal for consideration was that of long residence under the old Immigration Rules, on the basis that the application had been made in 2011. The determination of **Edgehill and Others v Secretary of State for the Home Department [2014] EWCA Civ 402** was applied.

6. No issue was taken at that hearing other than that was the correct approach to take. I note in that regard the decisions of the Secretary of State dated 24 October 2012 and 21 August 2013. Reference is made in those letters to a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant and for a biometric residence permit.

7. The Judge, at paragraph 14 of the determination, made reference to the periods of leave that were granted and noticed a number of invalidations that arose. The Judge did not know what they meant. It was noted in paragraph 15 of the determination that there was a lack of evidence as to when the applications for leave to remain were submitted and if they were in time or not, and if out of time, whether they were submitted within 28 days of the expiry of leave.

8. Notwithstanding those concerns, however, the Judge went on to find that the first claimant had resided in the United Kingdom for over ten years and allowed the appeal on the basis of long residence, allowing the appeal of the second and third claimants under Article 8 in line with the first claimant.

9. The Secretary of State for the Home Department sought to raise grounds of appeal against that decision, essentially on the basis that no clear findings were in fact made on the element of ten years continuous

residence. It was on that basis that leave to appeal was granted. Thus the matter comes before me in pursuance of that grant.

10. Mr Avery invited my attention to the decision of 21 August 2013 in particular, which sets out the immigration history of the first claimant. It was apparent, he submits, from the face of that chronology that there were periods where the first claimant did not have leave to remain for one reason or another and that those periods exceeded 28 days. Those difficulties are recognised by the Judge at paragraph 14 of the determination but the Judge made no findings upon them. In order to establish continual residence it was necessary for the Judge to have made positive findings as to the seemingly unexplained gaps. The Judge had noted the difficulties but had not resolved them, which amounted to an error of law.

11. Mr Wilford invited me to find that there were documents contained in the bundles submitted on behalf of the claimants which would explain those particular periods. It was not always a question of the date when leave was granted but whether it had been applied for within time. If so valid leave is continued in those circumstances.

12. Paragraph 14 of the determination highlighted in particular two such periods. The first claimant was granted leave until 31 March 2008. The application for further leave to remain was invalidated on 14 April 2008 but he was granted further leave to remain on 20 May 2008. On the face of it a period of one and a half months.

13. Similarly also his grant of leave until 31 May 2008. The application for further leave to remain was invalidated on 10 June 2008 and the first claimant was granted further leave to remain on 15 July 2008. Once again a period of about one and a half months unaccounted for. The Judge clearly did not understand what was meant by the phrase “invalidated” and it is contended by the first claimant that nothing was invalidated in his applications in any event.

14. In that connection my attention was drawn to the decision of 21 August 2013 which sets out the chronology. The chronology makes no reference to any invalidation of the leave. Equally, however, that chronology would seem to be at some variance with the chronology as set out by the Judge in paragraph 14 of the determination. According to that decision letter the first claimant was granted leave until 31 March 2008 and then granted further leave to remain on 6 May 2008 (not on 20 May as indicated by the Judge). Similarly in relation to the period of leave which expired on 31 May 2008 it is said that a further period of leave was granted on 15 June 2008 rather than 15 July 2008 as set out in paragraph 14.

15. The latter period may be of significance as it would be less than 28 days according to the decision of 21 August 2013 but not according to the chronology as set out by the Judge.

16. My attention was drawn to the statement of the first claimant dated 9 May 2014 which it is said helped to explain the issues. For my part I do not find that the explanation is particularly helpful. In paragraph 3 of that statement the first claimant speaks about the visa renewal being around May 2008. The UKBA made a mistake by stamping the incorrect dates such that he had to reapply in June 2008. It was expressed as being a new application. At page 74 of the appellant's bundle there is a letter from the UK Border Agency dated 25 April 2008 thanking the first claimant for the application. To what extent that assists in the matter is far from clear as 25 April 2008 was after the expiry of leave of 31 March 2008 although not seemingly by 28 days.

17. Essentially it was the submissions made to me, on behalf of the first claimant, that there were explanations for the period between the grants of leave such as to show a continuous residence within the guidelines issued on 10 November 2013, making due allowance for the periods of 28 days which were permitted.

18. The first stage in this appeal is clearly to determine whether or not the Judge erred in law in the approach that was taken to these matters. It may of course be open to the claimant to establish the links of residence as between each period of leave on the evidence. It may well have been advanced to the First-tier Tribunal Judge. The concern which is expressed by the Secretary of State for the Home Department and which I uphold, is that that issue was not properly determined. It is not sufficient to highlight the potential difficulties in the linkage without going on to consider the materiality of those concerns to the issue of long residence.

19. Similarly Article 8 is tainted by error finding as to the status of the first claimant.

20. In the circumstances therefore I do find there to be a material error of law such that the decision should be set aside to be remade on all matters.

21. Given the volume of evidence that is likely to be required and the arguments upon it, it is entirely appropriate in accordance with paragraph 7 of the Senior President’s Practice Direction, that the matter be remitted to the First-tier Tribunal for determination by way of rehearing.

22. I indicated to Mr Wilford that the most helpful way of proceeding would be to draw up a schedule linking the evidence showing the chronology of the claimant’s residence in the United Kingdom, the periods of leave and the steps taken to bridge the other periods said to be gaps in the chronology. He indicated that he would be able to undertake that within 28 days.

23. It would then seem appropriate for that schedule, together with any of the supporting evidence not already served, to be sent to the Secretary of

State for the Home Department to consider in that way hopefully the issues are simplified.

24. If reliance is placed upon private and family life, so far as the three remaining claimants are concerned, it would be of assistance to have proper statements and documentation relating to them particularly to the welfare of the child, the third claimant.

25. Subject to the above, I give no further directions being content that they be issued when appropriate by the First-tier Tribunal.

Signed Date

Upper Tribunal Judge King TD