Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20723/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 April 2015	**On 15 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Abdur Rashid Mahbub
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr N Ahmed, instructed by Lincoln's Chambers Solicitors
For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Juss promulgated 8.12.14, allowing the claimant's appeal against the decisions of the Secretary of State, dated 17.4.14, to refuse his application made on 10.1.14 for leave to remain in the UK on the basis of 10 years continuous lawful residence under paragraph 276B of the Immigration Rules, and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 16.10.14.

2. First-tier Tribunal Judge Shimmin granted permission to appeal on 2.2.15.

3. Thus the matter came before me on 10.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Juss should be set aside.

5. The grounds of application, which are poorly drafted, assert that the First-tier Tribunal Judge erred in:

   (a) Finding that the claimant met the requirements of the Rule 276B when there was a gap in his valid leave between 23.1.13 and 10.1.14;

   (b) Resolving conflicts of evidence without adequate evidence;

   (c) Flawed analysis as to whether the claimant's 26.11.09 application, rejected for non-payment of fee and biometric data, could provide sufficient basis to meet Rule 276B.

6. In granting permission to appeal, Judge Shimmin found it arguable that the decision finding Rule 276B has been met was based on inadequate evidence and thus it is arguable that the First-tier Tribunal Judge made material errors of law.

7. The claimant first entered the UK in 2004 with leave as a student, later extended to 30.11.09. A few days before expiry of leave, on 26.11.09 the claimant applied for further leave to remain, which was rejected on 20.3.10 as invalid for want of fee and submission of biometric data. The claimant challenges both issues.

8. A further application was then submitted, on 9.4.10, refused on 18.5.10. The claimant appealed that decision to the First-tier Tribunal. In his decision promulgated 5.8.10, Judge Harris found in the claimant's favour on the payment issue, accepting that he had sent a cheque in payment and pointing out that the letter stating the application was invalid wrongly suggested it had been payment by credit/debit account. However, Judge Harris found against the claimant on the issue of biometric data, pointing out this was a requirement of Rule 34A which had not been met.

9. The claimant then issued Judicial Review proceedings on 21.10.10, which application was dismissed as being academic because the Secretary of State had, without conceding the issues raised, agreed to reconsider the decision of 18.5.10. That Judicial Review was made in respect of not the application rejected for want of fee and biometric data, but of the subsequent application made in April 2010. However, the decision was upheld on 27.5.11. §6 of Judge Juss' decision incorrectly sets out the position in relation to the Judicial Review. However, it is likely that Judge Juss was unaware of the precise chronology set out above and unaware that Judge Harris had already considered the issues raised in relation to validity of the 2009 application.

10. On 5.10.11 the claimant made a further application for leave to remain as a Tier 4 student, which was granted on 2.5.12, until 24.1.13.

11. On 27.7.12 the appellant left the UK, returning on 4.9.12. This is irrelevant to the issues in the appeal and is not relied on by the Secretary of State.

12. On 23.1.13 the appellant made a further application within extant leave for further leave to remain, which was refused on 12.6.13. His appeal against that decision was dismissed and he became appeal rights exhausted on 6.1.14.

13. The application for indefinite leave to remain on the grounds of 10 years continuous lawful residence, which is the subject matter of this appeal, was made on 10.1.14.

14. According to the Secretary of State, it follows from the above that the claimant was in the UK without lawful leave at least between 18.5.10 and 2.5.12, a period calculated by the Secretary of State as 1 year and 11 months. However, the claimant's preceding leave actually expired on 30.11.09 and the exact period depends on whether 3C leave applies for the purpose of 276B. It is not necessary to resolve that issue.

15. In the circumstances, his period of continuous lawful leave was interrupted and he could not demonstrate 10 years continuous lawful leave at the time of his application for leave to remain on that basis on 10.1.14.

16. The application was also refused by the Secretary of State because the claimant claimed no family life in the UK and failed to meet the requirements of paragraph 276ADE in respect of private life, and there were no exceptional or compelling circumstances to justify granting leave to remain outside the Rules.

17. At §12 of the decision, Judge Juss found that the claimant was able to demonstrate 10 years continuous lawful residence, on the basis that his lawful residence was not "punctured" by a period without leave between 2010 and 2012, as the claimant had submitted payment but it was not processed by the Secretary of State and, the judge accepted, he had not been sent any information about the biometric tests.

18. At §6 the judge noted that following the refusal in May 2010 of his application made in April 2010, the claimant made a Judicial Review application on 21.10.10. However, before the Judicial Review was resolved the claimant made a further application in October 2011, which was granted in May 2012.

19. Judge Juss dismissed the article 8 aspect of the appeal, finding that the issue had already been dealt with in the previous decision of Judge Dove of November 2013.

20. The first ground of application asserts the claimant has not had valid leave in the UK since the expiry of his leave on 24.1.13. Given that he did not enter the UK until 17.1.04, he could not have met the 10-year continuous lawful residence requirement at the date of application, regardless as to whether there was a break in continuity. However, it is not necessary to resolve that issue as Mr Whitwell accepted that the 10-year period could go to the date of hearing and was not restricted to the date of application, and the claimant did not become appeal rights exhausted until 6.1.14 and the application was made a few days after that, on the assumption that section 3C leave counts as part of the continuous period of leave. 276B provides that periods of up to 28 days overstaying or unlawful presence will not count.

21. Judge Harris having found for the claimant in relation to the payment, Mr Whitwell felt he could not pursue that issue. Had Judge Juss known of that decision, undoubtedly Devaseelan would have been applied.

22. That leaves only the issue of the biometric data. Rule 34A(iv) provides that if the application form and/or related guidance notes require the applicant to provide the data, it must be provided. However, the claimant's case is that the sequence of events is that the Secretary of State sends out the request for biometric data only after acknowledging receipt of application and taking payment. The request is for the applicant to go to a Post Office within 15 days to provide fingerprints. The claimant states that request was never sent out, which would make sense if no payment were taken. If the claimant is right on this point then the biometric data issue is entirely dependent on the payment issue and as that has been resolved in favour of the claimant so should the biometric data.

23. Unfortunately, Mr Whitwell was not able to confirm or refute the claimant's assertions through Mr Ahmed. The 2009 application and file were not amongst the papers he had. He thus applied for an adjournment to investigate this issue. This was opposed by the claimant, who complained that he had already had several hearings on this issue. Following Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC), if the respondent asserts that an application was not accompanied by a fee, and so was not valid, the respondent has the burden of proof, the same principle must apply to the issue of biometric data. It is for the Secretary of State to demonstrate that it was the failure of the claimant to provide the biometric data.

24. I find that it would not be in the public interest to adjourn the hearing for the procedure to be investigated by Mr Whitwell or the Secretary of State. Enough time has already been taken on this matter. The issue was clearly highlighted by the claimant's case and should have been addressed and resolved before today. I thus refused the application to adjourn.

25. On the failure of the Secretary of State to discharge the burden of demonstrating that there was a failure on the part of the claimant to submit the biometric data, when his case is that it was never sent out and would not be sent out if payment not taken, and on the basis that the payment issue has previously been resolved in the claimant's favour and is no longer pursued by the Secretary of State, it follows that the 2009 application was, after all valid. The consequence of that is that the claimant does not have an interruption in the necessary 10-year period of continuous lawful leave to remain in the UK.

26. It follows that the appeal by the Secretary of State must fail and that there is no material error of law in the decision of the First-tier Tribunal.

Conclusions:

27. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed.

Signed
Deputy Upper Tribunal Judge Pickup

Dated **14 April 2015**

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee was payable and thus there can be no fee award.

Signed
Deputy Upper Tribunal Judge Pickup

Dated **14 April 2015**