Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/39002/2013**

THE IMMIGRATION ACTS

Heard at Field House
On 12 January 2015

Determination Promulgated
On 21 January 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr LEONARDO RIANO RODRIGUEZ
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr S Saeed, Solicitor Advocate (Kilic and Kilic Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge JM Holmes on 27 November 2014 against the determination of First-tier Tribunal Judge Norton-Taylor who had allowed the

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Respondent's appeal against the Removal Directions made against him under section 47 of Immigration, Asylum and Nationality Act 2006 to the extent of returning the decision to the Secretary of State for a lawful decision to be made. The determination was promulgated on 11 September 2014.

2. The Respondent is a national of Colombia, born on 29 February 1976. He had sought leave to remain in the United Kingdom on the grounds of continuous lawful long residence under paragraph 276B of the Immigration Rules. Judge Norton-Taylor found that the Respondent met the requirements of the relevant immigration rule and that no gap in his residence had exceeded 28 days, by virtue of the provisions of section 3C of the Immigration Act 1971. The judge found that the Secretary of State had yet to exercise her discretion under sub paragraph 276B(ii) and found that the decision to refuse the Respondent further leave and to remove him was thus defective.

3. Permission to appeal was granted because it was considered arguable that the judge had erred in his finding(s) as to the Respondent's access to section 3C leave. The Respondent had not challenged the rejection by the Secretary of State of his application made on 27 January 2005 for failure to pay the requisite fee. Zahoor [2014] EWHC 2751 (Admin) applied. The applications in question had been invalid and there had been no 3C leave available in consequence.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found. The Respondent filed a rule 24 notice opposing the appeal dated 7 January 2015.

Submissions – error of law

5. Mr Tarlow for the Appellant relied on the grounds on which permission to appeal had been granted and the grant itself. The judge's findings had relied on the application of section 3C, but the Respondent had been deprived of access to section 3C leave because he had made an invalid application. Zahoor (above) explained the relevant law and was persuasive. The replacement application had been made on 11 March 2005, making it out of time, thereby breaking the Respondent's period of lawful residence. Fees were payable on each application at that time. [25] and [31] of the determination were mistaken. The determination should be set aside, and the decision remade, dismissing the appeal.

6. Mr Saeed for the Respondent relied on the rule 24 notice. The facts were different from those considered in Zahoor. The application made on 27 January 2005 was not invalid because it did not fall foul of regulations 11 and 12 of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003. Similarly, the application made on 30 January 2006 was not invalid because it did not fall foul of regulations 13 and 14 of the

Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2005. Alternatively, paragraph 276B(iii) did not specify that it applied solely to valid applications.

7. The judge had found at [24] of his determination that the application dated 21 January 2005 received 27 January 2005 had been submitted before the expiry of the Respondent's existing leave to remain. The Respondent was required by regulation 5 of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003 to use the prescribed from, FLRS 08/2003, which he had done. That form did not specify a fee nor did it demand a fee be sent with the application. Nevertheless there was no dispute that a fee was payable.

8. Regulation 12 of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003 laid down the procedure for invalidation. Regulation 12 (b) required the Secretary of State to notify the applicant within 21 days of a failure to comply with regulation 11(a) or (b), which gave the applicant 28 days from then to comply with the requirements. That was not done. Non payment of the fee was given by the Secretary of State as the reason for rejection. The Secretary of State had not followed her own procedure. The Secretary of State had not notified the Respondent until 28 February 2005, which was too late. The application could not be treated as invalid.

9. Because the application the subject of the appeal had been made after 9 July 2012, gaps of 28 days or less fell to be disregarded, as the judge had correctly stated at [27] of his determination.

10. The second challenged application for further leave to remain had been made on 16 January 2006. On a worst case scenario the delay was 17 days, so the judge could not have been wrong since Immigration Rule 276B(5) applied and the delay fell to be disregarded. The Immigration (Leave to Remain) (Fees) Regulations 2005 applied. Again there was no reference to fees in the 2005 Regulations or in the application form. Zahoor (above) had a different set of facts and was inapplicable. There was no error of law and the determination should stand unchanged.

11. In reply, Mr Tarlow submitted that while Zahoor referred to the 2011 Fees Regulations, there had been earlier fee regulations on which he relied to demonstrate the error of law by the judge. Mr Tarlow was unable to name the earlier regulations. Mr Tarlow indicated that the Home Office were not willing to concede the appeal.

Material error of law finding

12. The tribunal reserved its determination which now follows.

13. It was not in dispute that the Respondent was required to pay a fee in 2005 and again in 2006. The tribunal was not provided with the reference by either party but provision for the payment of fees with applications for various categories of leave to remain was introduced by the Immigration and Asylum Act 1999. An example of such regulations is the Immigration (Leave to remain) (Fees) Regulations 2003. There was no express reference to the consequences of failure to pay the prescribed in the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003 or the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2005. Nor was there any warning on the relevant prescribed application form. That it was considered plain to anyone that the failure to pay the prescribed fee would invalidate the application is demonstrated by the Home Office's rejection of the Respondent's application dated 21 January 2005, and the absence of any challenge by the Respondent. This was not mentioned in the determination.

14. Had the judge fallen into error of law? Two gaps in the Respondent's leave to remain were in dispute, which the judge examined at [23] to [28] of his determination. There is no indication that the issue identified in the grounds of onwards appeal was raised before the judge in express terms, however the Home Office's position had been that the first gap had been in excess of 28 days. Nor was Zahoor cited to the judge. In the tribunal's view, although the judge dealt conscientiously with the appeal, the essential invalidity issue relating to section 3C leave was not addressed by him. He is not to be criticised since the issue was not identified with sufficient clarity by the Home Office, but the issue remains of importance. In the tribunal's view this amounted to a material error of law which requires the determination to be remade. The Secretary of State's appeal is accordingly allowed.

The fresh decision

15. The position of the parties had been made clear and so there was no need for any further submissions. In this part of the determination the parties will be referred to by their original designations, for clarity and convenience.

16. The issue is whether the Appellant acquired any 3C leave in 2005 and also in 2006. BE (application fee: effect of non-payment) Mauritius [2008] UKAIT 00089, where the Asylum and Immigration Tribunal examined regulation 16 of the Immigration and Nationality (Cost Recovery Fees) Regulations 2007 (S.I. 2007/936) and decided that an application for leave to remain which is not accompanied by the specified fee is not a valid application. Subsequent payment does not affect the earlier invalid application. That conclusion was not a surprising one. BE (above) was approved and followed in Zahoor.

17. Zahoor was based in part on an interpretation of regulation 37 of the Immigration and Nationality (Fees) Regulations 2011. Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC) and BE (above) were considered by the court. The facts of Zahoor (which were of some complexity) were significantly different from those of the present appeal. The Home Office now usually collect fees by direct debit from the applicant's bank account. No such facilities were available in 2005, at which time applications had to be accompanied by a cheque or cash. His Honour Judge Anthony Thornton QC, sitting as a Judge of the High Court, concluded that (in 2011) the validity of an application for further leave to remain was determined by whether the specified fee (or facilities for its collection) had been provided. An extension of leave under section 3C of the Immigration Act 1971 could only arise if a valid application had been made. Again, these conclusions are logical and the tribunal considers that Judge Thornton's conclusions are persuasive and should guide it.

18. No parallel to regulation 16 or regulation 37 in any of the regulations in force in 2005 was identified by either side in the current appeal. Mr Saaed's submission was that the failure to submit the specified fee had no consequences for validity and that, in any event, the Secretary of State was bound to contact the Appellant within 21 days if there were a problem with his application.

19. Although the case was attractively argued by Mr Saaed, the tribunal is unable to accept that it can be right. While no doubt the 2007 and 2011 fees regulations have provided additional clarity, it is not easy to see how an application where no fee has been paid could or should be treated as valid. The Home Office records produced show that the Appellant's application recorded as received on 27 January 2005 was "rejected" for non payment of the specified fee. When the Appellant reapplied with the specified fee on 11 March 2005, he was by then without leave to remain. Leave to remain was granted on 18 April 2005. This left a gap in leave of 77 days from the expiry of his last leave to remain on 31 January 2005.

20. The Appellant's solicitors had obtained his immigration records from the Home Office by a subject access request. A copy of the case record sheet appears at page 125 of the Appellant's bundle. There is no indication there that any fee was paid. This may be compared with his previous application, accepted as valid (the fees receipt is noted), but refused because the Appellant had sought to study an excessive number of short courses. There was no right of appeal to that refusal because the Appellant still had extant leave.

21. Because no fee had been paid with the application received on 27 January 2005, in the tribunal's view the provisions of regulation 12 of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2003 did

not apply. They are directed to regulations 11(a) and 11(b), signing and dating of the form and provision of the specified documents and photographs. The payment of the prescribed fee was a separate condition precedent to acceptance of the application. There was no evidence that the fee had been paid. The fact that the Appellant made a further, ultimately successful repeat application, indicates that the fee had not been paid on 27 January 2005. The tribunal so finds. The result is that the Appellant had no leave to remain from 31 January 2005 until 18 April 2005, a gap of 77 days which exceeds the permitted gap of 28 days by some margin. The tribunal so finds.

22. As to the later gap in 2006, this was after the Appellant's next period of leave to remain, which ran from 18 April 2005 to 30 January 2006. The Home Office records show that the Appellant paid the fee due but that his application was submitted 17 days out of time, on 16 February 2006. There had been a previous in time application but again no fee had been sent and it was properly rejected. But because the Appellant had applied out of time, the decision was not made until 8 March 2006, creating a gap in leave of 37 days. The tribunal so finds.

23. Both gaps exceed the 28 period which would fall to be disregarded. The result is that the Appellant failed to show that he had held continuous lawful leave to remain in the United Kingdom for a period of 10 years. His appeal under the Immigration Rules fails and must be dismissed. There was no suggestion that the Appellant qualified under any other potentially relevant Immigration Rule, e.g., paragraph 276ADE.

24. The Appellant had also raised an Article 8 ECHR private life claim. This was not addressed by Judge Norton-Taylor. There had been no need to do so on his view of the appeal. It was in any event very much a subsidiary claim.

25. In his witness statement dated 5 September 2014 the Appellant maintained that he had a subsisting private life in the United Kingdom. He gave no further details. He produced evidence that he had been working. His previous grants of leave had all been in the capacity of student. There was no suggestion that considerations such as those discussed in CDS (Points Based System: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) might have applied to him in his student capacity. He provided no evidence of any exceptional, compelling or compassionate circumstances which might have applied to him.

26. In the skeleton argument dated 4 September 2014, submitted to the First-tier Tribunal, it was said:

"The Appellant submits that his rights under Article 8 ECHR of the ECHR are engaged. The Appellant submits that, in all the circumstances. The

Respondent's decision is disproportionate, and hence breaches his rights under Article 8 ECHR."

27. In the tribunal's view this submission takes matters no further. There was no evidence of any private life which was not transferrable to the Appellant's home country; see, e.g., Nasim and Others (Article 8) [2014] UKUT 00025 (IAC). There is no "near miss" principle: see Miah and ors v SSHD [2012] EWCA Civ 261. There was no evidence of any matter which might have required the Secretary of State to consider the exercise of discretion outside the Immigration Rules in the Appellant's favour: see Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC), MM (Lebanon) [2014**]** EWCA Civ 985 and related authorities.

28. The tribunal finds that the decision to refuse the Appellant further leave to remain and to remove him is proportionate and reflects the legitimate objectives of Article 8.2 ECHR. His appeal under Article 8 ECHR is dismissed.

DECISION

The making of the previous decision involved the making of a material error on a point of law. It is set aside and remade as follows:

The original Appellant's appeal is dismissed

Signed **Dated 20 January 2015**

Deputy Upper Tribunal Judge Manuell

TO THE SECRETARY OF STATE
FEE AWARD

The appeal was dismissed and so there can be no fee award

Signed **Dated 20 January 2015**

Deputy Upper Tribunal Judge Manuell