Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52385/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 January 2015	**On 28 January 2015**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR DAQI LUO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Appiah
For the Respondent: Ms A Everett

DECISION AND REASONS

1. The appellant is a national of China who was born on 30 March 1985. He appeals against the respondent's decisions of 15 November 2013 to refuse to vary leave to remain in the United Kingdom and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The history of this appeal is that in a determination promulgated on 13 August 2014, following a hearing on 18 July 2014, the First-tier Tribunal Judge allowed the appellant's appeal. The respondent sought and was granted leave to appeal that determination. This led to an error of law hearing in the Upper Tribunal before Deputy Upper Tribunal Judge Robertson on 4 November 2014. The determination that followed the hearing found material errors of law in the original decision which decision was then set aside. The matter was then relisted for a resumed hearing before me.

3. Permission to appeal was granted on the basis that the judge made no findings on whether there was a gap in the appellant's continuous lawful residence in 2004/2005 when an application for further leave to remain was made, although the judge referred to dates when the application was said to have been submitted; the judge stated that the decision was unfair and unreasonable, and therefore concluded that a discretion was available and should have been exercised. However, her conclusion did not follow from a finding of unfairness and unreasonableness. The only reference by the judge was to Immigration Rule 276B, which does not contain a discretionary provision and the judge did not identify what discretion was available; the judge stated that she did not consider the appellant's private and family life rights within the context of the Immigration Rules or outside the Rules yet it was clear from the grounds of appeal that the appellant was relying on his Article 8 rights; and further it was unclear from the determination whether the judge was allowing the appeal to the limited extent that it was not in accordance with the law or outright; the former would have been possible if there was something in law that the respondent needed to consider and the latter would have been possible if the judge had identified what discretion she was exercising. However the determination was silent.

4. As set out in the Deputy Upper Tribunal Judge's determination in essence the appellant applied for leave to remain in the United Kingdom on the basis that he was able to establish that he had at least ten years' continuous lawful residence pursuant to paragraph 276B of HC 395, as amended. The First-tier Tribunal Judge found that the decision of the respondent was not in accordance with the law because a discretion available to her should have been exercised and was not. In view of this the judge stated that she would not go on to consider the appellant's Article 8 rights within or outside the Immigration Rules.

5. The respondent was granted permission to appeal on the basis that the judge did not identify the nature and source of the discretion referred to and thus failed to give adequate reasons for her decision; the residual discretion of the respondent is not a matter for the courts (**Abdi [1996] Imm AR 148**), and although the judge stated that the decision of the respondent was unfair and unreasonable the common law duty of fairness only appertains to procedural fairness. There was no obligation on the respondent to make decisions which were substantively fair (see **Marghia (Procedural fairness) [2014] UKUT 366 (IAC)**).

6. No Rule 24 response on behalf of the appellant was filed.

7. Appellant's Counsel at the error of law hearing accepted that there were difficulties with the determination and that there was no finding as to whether there was a gap in the appellant's continuous lawful residence between 2004 and 2005. Even on the most generous interpretation there was a gap of more than 28 days. Furthermore Immigration Rule 276B did not refer to the exercise of discretion where ten years' continuous lawful residence had not been established and Counsel was unable to identify an Immigration Directorate Instruction relating to the exercise of discretion for those who had remained in the UK and had a gap in excess of 28 days. There was therefore no apparent discretion which could be exercised.

8. Before me Ms Everett on behalf of the respondent had no file. She was provided with a copy of the core bundle and other documents submitted on behalf of the appellant for the resumed hearing. Apart from the original bundle that was provided for use in the First-tier Tribunal the appellant under cover of letters dated 28 November and 12 December 2014 respectively provided a statement from Siyuan Liu and some photographs; a bundle of documents numbered 1 – 39 and a skeleton argument. It was apparent that despite what had been said on the appellant's behalf at the error of law hearing his representative at the hearing before me had identified an Immigration Directorate Instruction which did indeed refer to the exercise of discretion where there had been breaks in lawful residence. I will return to that aspect shortly.

Oral Evidence

9. I heard evidence from the appellant in English. He confirmed to be true the contents of his two statements dated 23 April 2014 and 23 November 2014 respectively. Ms Everett cross-examined the appellant and I heard submissions from both representatives. I have taken a full note of the evidence and submissions.

Findings of Fact

10. I found the appellant to be a credible witness who did his best to provide full and truthful evidence. There is indeed very little dispute as to the facts. The only issue is as to what occurred between October 2004 and February 2005.

11. As there is so little in dispute and I have found the appellant to be a credible witness the main facts are set out hereafter and are taken from the appellant's first statement. He first arrived in the United Kingdom in August 2002 aged 17 and attended Taunton College in Southampton where he took his A levels from September 2002 to June 2004 in mechanical mathematics, chemistry, physics and computing. He then obtained a place at Warwick University where he studied from September 2004 to June 2007. He obtained a BEng degree in Electronic Engineering. He then obtained an internship at Citigroup in 2008 and thereafter

graduated with a MSc degree in Computer Sciences from Oxford University where he studied from September 2009 to October 2010. He then continued his employment with Citigroup from September 2010 under the Tier 2 Skilled Migrant scheme and has the position of Applications Development Manager in the Institutional Client Group up to date.

12. It is not in dispute that the appellant's initial leave was granted from 20 August 2002 until 31 October 2004. The difficulty for him comes in relation to what happened around that time. Contained in the appellant's bundle of documents are emails exchanged between the appellant and the welfare advisor at the University of Warwick Students' Union which exchange mainly took place in April 2014 but commenced with an enquiry from the appellant in an attempt to obtain supporting evidence surrounding his application in 2004 for further leave to remain to undertake studies at the university. In the first email of 3 December 2013 the appellant refers to using a "fantastic" batch service provided by Warwick International Office to submit his student visa application to the Home Office. He refers to guidance provided on what and when documents were required for the visa application and that he had an immigration advisor to validate his application before it was sent off to the Home Office on his behalf.

13. The response from the welfare advisor is that the records were only kept for seven years as required under the law but there was a logbook kept but it did not have a record of the appellant's name. What is interesting in the email from the welfare advisor, Meena Devlukia, timed at 12.18pm on 24 April 2014, is where it is stated that it was the Students' Union who operated the batch scheme and they would have sent off the appellant's application. At this point I adopt what the First-tier Tribunal Judge found in relation to what happened next. I adopt this because I have found the appellant to be credible and the documentation reveals to me on the balance of probabilities the following:-

> 25. The appellant has obtained a copy of his application from Home Office records. It can be seen that he applied on the form FLR(S). The form has various date stamps upon it including one showing it to have been received on 24 December 2004 and another showing it to have been stamped by the Charging Support Team as a valid application on 10 January 2005. The appellant signed and dated the form on 10 December 2004. The letters submitted in support of his application include one from Taunton College dated 6 September 2004 and another from the University of Warwick dated 29 October 2004. The appellant has provided an undated Home Office letter that relates to his application informing him that he has been granted an extension of stay.

14. The appellant accepted in cross-examination that he knew the application was submitted late but he had no control over the process. When signing the form he asked what would happen now it was out of date and he was informed that it should all be okay. To the extent that he obtained the

leave that he was seeking for further studies it was indeed okay although it is unlikely to have been in anyone's contemplation that the delay would potentially affect an application under the long residence rules many years later.

15. The above events lead me to the finding that the appellant had no leave to remain in the United Kingdom from 1 November 2004 until he obtained further leave which, from another document obtained from the Home Office, was granted on 3 February 2005. Although the Home Office says that the application was not made until the 20 January 2005 application of that date – that same document has on it a receipt date of 24 December 2004. On balance therefore the application was overdue from 1 November 2004 until its receipt by the Home Office on 24 December 2004.

16. The Reasons for Refusal Letter at the bottom of page 2 states as follows:-

> Although it is noted that you made an attempt to vary your leave on 19 January 2005, this application was submitted out of time. It should be explained that any time spent following the submission of an out of time application awaiting for consideration of the application is not considered lawful even if that application is subsequently granted. Therefore you were without valid leave between 31 October 2004 and 3 February 2005, a period of approximately three months. As such your period of continuous lawful residence is considered to have been broken at this point.

As I have found in paragraph 15 above the break was in fact for a shorter period than set out in the refusal letter.

17. I note that no reference is made at all in the refusal letter to any IDIs or any use of discretion. The Reasons for Refusal Letter is dated 15 November 2013 and the IDIs quoted in the skeleton argument for the appellant are dated April 2009 and November 2013. These state respectively as follows, according to the skeleton argument on behalf of the appellant, which I have no good reason to suppose are incorrect:-

> **IDIs April 2009**
>
> **<u>Breaks in lawful residence and the use of discretion</u>**
>
> Caseworkers should be satisfied that the applicant has acted lawfully throughout the entire period and has made every attempt to comply with the Immigration Rules. If an applicant has a single short gap in lawful residence through making one single previous application out of time by a few days (not usually more than ten calendar days out of time) caseworkers should use discretion granting ILR, so long as the application meets all the other requirements.
>
> It would not usually be appropriate to exercise discretion when an applicant has more than one gap in their lawful residence due to submitting more than one of their previous applications out of time,

as they would not have shown the necessary commitment to ensuring they have maintained lawful leave throughout their time in the UK.

It may be appropriate to use your judgment in cases where an applicant has submitted a single application more than ten days out of time if there are extenuating reasons for this (e.g. postal strike, hospitalisation, administrative error on our part etc). This must be discussed with a senior caseworker.

IDIs November 2013

Discretion for breaks in lawful residence

You must always discuss the use of discretion with a senior caseworker. You must be satisfied the applicant has acted lawfully throughout the whole ten year period and has made every effort to obey the Immigration Rules. The decision to exercise discretion must not be taken without consent from a senior executive officer (SEO) or equivalent.

Gap(s) in Lawful Residence

You may grant the application if an applicant:

has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days, and

meets all the other requirements for lawful residence.

You can use your judgment and use discretion in cases where there may be exceptional reasons why a single application was made more than 28 days out of time.

18. I am not able to find that there was any error on the part of the university in relation to what transpired to be the out of time application made by the appellant. The evidence is simply not there. I understand that the appellant was aware and made use of the facility whereby the Students' Union helped students make applications. By providing such help it is logical to suppose that many applications would not be rejected because there were found to be documents missing or other evidence not provided. International students may well struggle to understand all that was required of them. It appears that the Student Union's experience was that in circumstances similar to those in which the appellant found himself the Home Office would grant further leave. That is not the same as to say, however, that primary responsibility for ensuring that the application was made in time did not remain with the appellant and that the responsibility somehow shifted to the university.

19. I add that I am satisfied on the evidence before me that the appellant has acted lawfully throughout the entire period that he has been in the United Kingdom and has otherwise complied with the Immigration Rules.

20. The concern that I have is that on the face of the documentation before me and in particular the Reasons for Refusal Letter the respondent has not referred to the IDIs either directly or indirectly. The relevant IDIs refer to the use of discretion and a discussion in relation to the use of discretion with a senior caseworker. There could be no expectation or certainty that even if the IDIs had been considered and discretion used that the appellant would succeed but at the very least he was entitled to have his application considered as set out in the IDIs and to be given an explanation as to why in his particular case discretion would not be used.

21. For these reasons I find that the decision has not been made in accordance with the law and the appeal is allowed to the extent that on the findings of fact that I have made the application is to be reconsidered in accordance with the law. This is by no means a guarantee for the appellant that he will succeed upon further consideration but at least the application will have been dealt with properly.

22. There is an Article 8 private life claim made by the appellant. I have decided that in light of the fact that I have allowed this appeal to the extent that the respondent is required to consider further the application as part of that consideration the respondent will also consider the Article 8 position. Should a further decision be made that is not one that is in the appellant's favour he would have a further right of appeal at that time and if such right of appeal were exercised his Article 8 appeal would be considered also. The appellant's primary objective is to be granted an extension of stay on the ground of long residence in the United Kingdom and not an allowed appeal under Article 8 ECHR.

Decision

23. For the reasons set out above the appeal is allowed to the limited extent that the appellant awaits a lawful decision from the respondent.

24. I was not addressed on the matter of anonymity but the circumstances do not appear to require that an anonymity direction be made and I therefore do not make one.

Signed Date

Upper Tribunal Judge Pinkerton