Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12643/2016**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 12 October 2017	**On : 13 October 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SHIBBIR AHAMMAD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Anzani, instructed by Connaughts
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 17 August 1981. He has been given permission to appeal against the decision of Residence Judge of the First-tier Tribunal Zucker dismissing his appeal against the respondent's decision to refuse his application for indefinite leave to remain on the basis of ten years' continuous lawful residence.

2. The appellant entered the United Kingdom on 4 January 2007 with entry clearance as a student valid until 30 April 2009 and was subsequently granted further periods of leave to remain as a student, a Tier 4 General Student Migrant and a Tier 1 Post-Study Work Migrant until 19 March 2014. On 4 February 2014 he made an application for further leave to remain as a Tier 4

General Student Migrant. That application was refused on 18 June 2014 with a right of appeal. The appellant lodged an appeal but withdrew the appeal on 3 August 2015 and became appeal rights exhausted that day.

3. On 18 August 2015 the appellant submitted an application for leave to remain as a Tier 2 General Migrant. His application was refused on 7 October 2015 and that decision was maintained on an administrative review in a decision dated 2 November 2015. On 26 November 2015 the appellant applied for indefinite leave to remain on the basis of ten years' continuous lawful residence. His application was refused on 11 May 2016.

4. The appellant's application was refused under paragraphs 322(2) and 322(1A) of the immigration rules on the basis of having made false representations in his previous application of 18 August 2015 by submitting a false certificate of sponsorship number and having used deception in his current application. The respondent went on to consider paragraph 276B of the immigration rules with regard to the appellant's length of residence in the UK and concluded that he had failed to demonstrate ten years' continuous lawful residence in the UK for the purposes of paragraph 276B(i)(a), that he could not satisfy the requirement in paragraph 276B(v) since his application of 26 November 2015 had been made over a month after his lawful leave had ceased and that he failed to meet the requirements of paragraph 276B(ii)(c) and (iii) as a result of the false representations he had made in his application of 18 August 2015. The respondent then considered Article 8 and concluded that the appellant did not meet the eligibility requirements for the purposes of paragraph R-LTRP.1.1(d)(ii) of Appendix FM as his partner was not British and was not settled in the UK and did not meet the eligibility requirements as a parent for the purposes of paragraph R-LTRPT.1.1(d) as his child was five years of age and was not British or settled in the UK. It was considered further that the paragraph EX.1 did not apply. The respondent considered, in addition, that the appellant could not meet the criteria in paragraph 276ADE(1) on the basis of private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision. His appeal was heard by Resident First-tier Tribunal Judge Zucker on 17 July 2017, by which time there were two children in the family, one aged six years and eight months and the other aged under one year. The judge did not accept that the respondent had discharged the burden of proving deception and therefore did not uphold the decisions made under paragraph 322(2) and (1A). He then went on to consider whether or not the appellant had demonstrated ten years' continuous lawful residence in the UK. He considered that the appellant had had no lawful leave after withdrawing his Tier 4 appeal on 3 August 2015 and that the continuity of residence was therefore broken. He rejected the appellant's argument that, since his application of 18 August 2015 had been made within 28 days, his leave was considered to be continuous. Turning to the appellant's human rights, the judge considered that he could not meet the requirements in Appendix FM or paragraph 276ADE(1) and that there were no circumstances justifying a grant of leave outside the immigration rules. He accordingly dismissed the appeal under the immigration rules and on human rights grounds.

6. Permission to appeal to the Upper Tribunal was sought by the appellant on the grounds that the judge had failed to consider the correct construction in regard to the 28 day period, as the appellant had submitted a new application within 15 days of withdrawing his appeal, on 18 August 2015, and thus within the 28 days' grace period; that the judge had failed to assess the respondent's failure to apply discretion in view of the 28 days' grace period; and that the judge had failed properly to assess the appellant's and his family's human rights and the best interests of his children.

7. Permission was granted in relation to the judge's consideration of the application of paragraph 276B(v) of the immigration rules with respect to the 28 day grace period.

Appeal Hearing

8. At the hearing both parties made submissions.

9. Ms Anzani, quite properly, conceded that there was no merit in the first two grounds of appeal and that the 28 day argument was ill-founded. She therefore focussed on the third ground of appeal which challenged the judge's findings on Article 8, in particular those relating to the best interests of the eldest child who was aged six years and eight months. Ms Anzani submitted that the judge's consideration of the best interests of the appellant's daughter was insufficient and there was no acknowledgement that the respondent's decision had been silent on the children's best interests.

10. Mr Nath submitted that the judge had considered the best interests of the children and had made findings open to him on the evidence.

11. Ms Anzani did not seek to respond.

Consideration and findings

12. As Ms Anzani properly identified, the grounds relying on the 28 days' "grace" period were ill-founded. I see no need to go into the matter in any further detail. The judge dealt with the issue properly at [10] and was fully entitled to conclude that the appellant had failed to demonstrate ten years' continuous lawful residence in the UK.

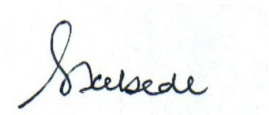
13. As for the third ground, permission was not granted on that basis, but neither was it explicitly addressed or refused in the permission decision. In any event there is no merit in that ground. The appellant's eldest child plainly did not fall within the criteria in paragraph 276ADE(1)(iv) as she was only five years of age at the time of submitting the application. Clearly she had not lived in the UK for seven years and the question of reasonableness therefore did not arise. Neither was the appellant's eldest child seven years of age at the date of the hearing and therefore that was not a relevant consideration in relation to Article 8 outside the immigration rules. As to the matter of the best interests of the children, that was given full and adequate consideration by the judge at [14]. The fact that the respondent had not specifically addressed the matter in

the refusal decision was not material when it was a matter fully addressed by the judge in any event. At [14] and [15] the judge considered all relevant matters for the purposes of assessing proportionality with respect to Article 8 outside the rules, referring specifically to the factors in section 117B of the Nationality, Immigration and Asylum Act 2002. On the evidence available to him, and for the reasons fully and properly given, the judge was unarguably entitled to conclude as he did and to dismiss the appeal on the basis that he did.

14. I find no errors of law in the judge's decision. I uphold the decision.

DECISION

15. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed 
Upper Tribunal Judge Kebede Dated: 12 October 2017