



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/03499/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 24 January 2018**

**Decision & Reasons
Promulgated
On 05 April 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR RAJA INDERKUMAR THAKUR
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms Ahmad

For the Respondent: Mr Subramanian

DECISION AND REASONS

1. The appellant is a citizen of India born in 1983. He appealed against a decision of the Secretary of State made on 14 January 2016 to refuse his application for indefinite leave to remain on the basis of ten years continuous residence.

2. The Secretary of State considered that the requirements of paragraphs 276B, R-LTRP, EX1 and 276ADE of the Immigration Rules were not met and there were no exceptional circumstances justifying a grant of leave under Article 8.
3. For convenience, I retain the terms as they were before the First-Tier Tribunal, namely Mr Thakur is the appellant and the Secretary of State the respondent.
4. The immigration history is that he entered the UK with entry clearance as a working holidaymaker in June 2005. He then made a series of in time applications to obtain further leave, the last of which (Tier 1 highly skilled post-study migrant) expired on 14 August 2014. On that date he made an in time application for a further (Tier 2 skilled worker) leave.
5. On 16 August 2014 he had an accident which required surgery and he was discharged with limited mobility on 19 August 2014. As a result his employer informed him that he could not continue to sponsor him. Hence he was unable to submit a certificate of sponsorship within the given time and his application made on 14 August 2014 was refused on 23 October 2014 as invalid.
6. On 19 November 2014 when still incapacitated he made an out of time application for LTR which was refused with no appeal on 16 April 2015. On 12 May 2015 he made a Judicial Review application (subsequently dismissed on withdrawal) challenging the validity of the 16 April 2015 refusal. On 16 July 2015 he made an out of time application for ILR on the basis of long residency which was refused on 14 January 2016 and is the subject of the current appeal.

First tier hearing

7. Following a hearing at Taylor House on 21 September 2017 Judge of the First-Tier Burns allowed the appeal which was only on human rights grounds.
8. He was clear that the appellant did not have ten years continuous lawful residence. Section 3C Immigration Act 1971 leave extended his lawful residence from the date of his last refusal until no later than the end of October 2014 [10].
9. However, the judge considered that there were exceptional circumstances not within the reasonable control of the appellant. One of the exceptional circumstances found was that the appellant should have been granted a right of appeal on 16 April 2015 and so he would not have been an overstayer until the appeal was determined [19].

10. Second, he considered it to be an exceptional circumstance that there was no evidence but that the appellant would have had continued sponsorship were it not for his serious accident.
11. The judge went on to find that the relationship between the appellant and his partner, Miss Lewis, a British citizen, was loving, genuine and subsisting and that they had family life together. He found it not reasonable to expect them to continue their relationship in either India or the Philippines, the country from which Miss Lewis originated.
12. He found that the exceptional circumstances to which he had referred were critical to the outcome of the appeal such that less weight should be given to the objective of effective immigration control.

Error of law hearing

13. The respondent sought permission to appeal which was granted on 9 November 2017.
14. At the error of law hearing before me Ms Ahmad's major point was that the judge erred in finding that the appellant had been unlawfully in the UK only since April 2015 rather than October 2014. He had created section 3C extension leave where none existed.
15. Her secondary submission was that the judge failed to make a clear finding on whether there is an existing relationship between the appellant and Miss Lewis and that if he had, in finding that private and family life considerations outweighed the public interest.
16. In response Mr Subramanian emphasised that the appellant had always obeyed the Immigration Rules. The judge's findings, in particular, that he would have attained the ten year requirement but for his serious injury and that such amounted to an exceptional circumstance was one that was open to him. His findings on the relationship were clear. Looked at in the round his decision was sustainable. He asked me to uphold the decision.
17. I reserved my decision.

Consideration

18. In considering this matter I find that the decision shows error of law. The judge referred (at [21]) to Home Office Guidance 'Long Residence and Private Life' which informs Home Office workers that 'when refusing an application on the grounds it was made by an appellant who has overstayed by more than 28 days, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.'

19. One of the exceptional circumstances the judge found was that the appellant should have been granted a right of appeal on 16 April 2015 and so he would not have been an overstayer until that appeal was determined [19].
20. The problem is that the appellant did not have leave when he made the application which was decided on 16 April 2015. If a further application is made within 28 days it is not section 3C leave. Instead, if the application succeeds then the late application is disregarded as it was made during a grace period. It does not create leave in itself. Accordingly, even if he had been granted a right of appeal in the 16 April 2015 decision he would still have been an overstayer when he made the application for ILR.
21. It is clear that the judge did go on to make findings about the relationship between the appellant and Miss Lewis. He found it to be loving, genuine and subsisting and that they have family life together. Such was a finding open to him on the evidence.
22. However, I consider that in erring in his finding that the appellant should have been granted a right of appeal to the April 2015 decision and that if he had he might not have been an overstayer at all, and that such amounted to an exceptional circumstance must taint his conclusion that less weight should be given to the objective of immigration control.
23. I set aside the decision to be remade.

Remaking of decision

24. Mr Subramanian indicated that in such event there would be no further evidence. Ms Ahmad had nothing else to add.
25. In reaching my decision I see no reason to doubt that the appellant and Miss Lewis have a loving, genuine and subsisting relationship which began when he was here lawfully. They have been living together in a close personal relationship since mid 2015. There was no challenge by Ms Ahmad that it would not be reasonable for Miss Lewis and the appellant to try to continue their life in either India or the Philippines. I see no reason to reach a different view from that of the First-Tier Tribunal. Miss Lewis is a British citizen who has been here for many years. She has not been to her country of origin since 2001. She has never been to India. She cannot speak any Indian languages. She is nearly 60 years of age. The appellant's family in India do not approve of the appellant's relationship with Miss Lewis. Miss Lewis in addition has significant physical disabilities and relies on the appellant for moral and physical support.
26. The appellant until the difficulties caused by his serious injury had been lawfully in the UK since 2005 and productive. Like the First-Tier Judge I find that there is no evidence to suggest that but for his serious accident

in August 2014 he would not have been able to enjoy continued sponsorship so as to obtain a further period of leave in October 2014 which, had he obtained it, would have given him his ten years continuous lawful residence.

27. I note also the evidence, again not challenged, that the appellant has accommodation with Miss Lewis and receives remittances from his family in India. Also that he has worked in the UK in the past, has degrees in business management and administration and if granted leave is likely to get work promptly.
28. In ***SS (Congo) and Others*** [2015] EWCA Civ 387 (at [56]) it was held that the fact that a case was a 'near miss' in relation to satisfying the requirements of the Rules would not show that compelling reasons existed requiring the grant of leave outside the Rules. However, if a claimant could show that there were individual interests at stake covered by Article 8 which gave rise to a claim that compelling circumstances exist to justify the grant of leave outside the Rules, the fact that the case was a 'near miss' might be a relevant factor which tipped the balance in his favour. In ***MM (Lebanon) [2017] UKSC 10*** the Supreme Court when allowing the appeal of the appellant SS from ***SS (Congo)*** said at [103] the issue was not whether there was a 'near miss' [from the maintenance figures in the Rules] but the weight to be given to any factors weighing against the policy reasons relied on by the respondent to justify an extreme interference with family life.
29. I consider the appellant's family circumstances as detailed above and his falling some months short of achieving ten years continuous lawful residence through no fault of his own, to tip the balance in his favour.
30. I conclude that in the particular circumstances of this case the public interest is outweighed by the private and family life considerations and that refusal is disproportionate.
31. The appeal succeeds.

Notice of Decision

The decision of the First-Tier Tribunal showed error of law. It is set aside and remade as follows:-

The appeal is allowed.

No anonymity order made.

Signed

Date 29 March 2018

Upper Tribunal Judge Conway

