Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24478/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 October 2018	**On 25 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR REZAUL HAQUE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bandegani, Counsel
For the Respondent: Mr S Whitwell, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Raymond dismissing his appeal against the refusal of the respondent to grant him leave to remain in the United Kingdom on the basis that he had not achieved ten years' continuous lawful residence due to having overstayed.

2. The appellant is a citizen of Bangladesh born on 9 January 1987.

3. As the chronology of his immigration history is at the core of this claim, I shall set out what the respondent said in her Reasons for Refusal Letter.

4. The appellant first entered the United Kingdom on 7 May 2006 with entry clearance as a student, which was valid from 13 April 2006 until 31 December 2007.

5. He applied for leave to remain as a student on 14 December 2007, and was granted leave in this capacity on 17 January 2008 until 31 October 2008.

6. He applied for leave to remain as a student on 22 October 2008, however his application was refused on 12 March 2009. He lodged an appeal on 30 March 2009, and his case was reconsidered. On 22 November 2010 he was granted leave until 22 February 2011.

7. He applied for leave to remain as a Tier 4 (General) Student on 22 February 2011, and was granted leave in this capacity on 23 April 2012 until 23 August 2012.

8. He applied for leave to remain as a Tier 4 (General) Student on 22 August 2012, and was granted leave in this capacity on 20 November 2012 until 30 January 2015.

9. The appellant applied for leave outside the Rules on 20 February 2015. The application was refused on 29 May 2015. He requested a reconsideration on 21 September 2015. His case was reconsidered, and the refusal decision was upheld in a letter dated 1 December 2015. He lodged an appeal on 4 February 2016; however, he withdrew his appeal on 24 May 2016.

10. On 1 June 2016 he applied for indefinite leave to remain under ten years' long residency. The application was refused on 20 September 2016. His appeal against this decision was refused by FtTJ Raymond under paragraph 276B and under Article 8 of the ECHR.

11. The appellant was granted permission to appeal on the basis that there is an arguable error of law in the judge's consideration of whether the appellant could benefit from Section 3C leave and thus allow the appellant to have resided lawfully in the UK for at least ten years. It follows from this that the judge's article 8 findings may be flawed.

12. Mr Bandegani submitted that in the respondent's letter of 1 December 2015, detailing the appellant's immigration history, the matters that were being challenged by the appellant and the respondent's response to the matters raised by the appellant, the respondent did not say that her decision on 29 May 2015 was withdrawn in a technical sense. This meant that the application made by the appellant on 20 February 2015 remained unresolved. The appellant wanted reconsideration of the respondent's decision of 29 May 2015 and the Secretary of State refused to reconsider her decision. It was as a result of the pre-action protocol letter indicating

that the appellant intended to apply for judicial review that the Secretary of State decided to reconsider her decision.

13. Mr Bandegani submitted that as a result the Secretary of State's decision of 29 May 2015 was not lawfully made because the Secretary of State subsequently made a decision on 27 January 2016 where the Secretary of State gave notice that the application made by the appellant was not totally or clearly unfounded. The Secretary of State had in response to the PAP letter agreed to review the claim which she had accepted was not hopeless on any view. Her decision on 27 January 2016 carried an in-country right of appeal. The appellant exercised his right of appeal and chose to withdraw it because by that time the appellant had accrued ten years' lawful residence for the purposes of paragraph 276B, having entered the UK lawfully on 16 May 2006.

14. Mr Bandegani submitted that even if I were to find that for the purposes of the Immigration Rule there is not full satisfaction of the requirements of the Immigration Rules, I would have to consider the judge's analysis of the appellant's Article 8 claim. This is because the Secretary of State would have to demonstrate why it is not legally right that this chronology gives satisfaction of Rule 276B given that there is no break in his stay and that materially bears on the proportionality assessment which is a matter for the judge.

15. Mr. Bandegani submitted that the judge went on a flight of fancy from paragraph 63 where he talks about the certification decision under Section 94 of the Nationality, Immigration and Asylum Act 2002 having been lawfully made when their argument was that the decision of 29 May 2015 was not maintained and that Section 353 was not relied on by the Secretary of State. Mr. Bandegani submitted that the judge did not properly confront the arguments made by Mr Biggs, the appellant's Counsel below.

16. Mr Whitwell submitted that it is common ground that the respondent's decision of 29 May 2015 was not formally withdrawn. He said the decision was a merits-based decision. The appellant challenged the decision because he was not given an in-country right of appeal. The PAP letter dated 24 November 2015 did not take issue with the respondent's decision on the merits. It merely said that the appellant should have an in-country right of appeal. The Secretary of State agreed and re-made the decision and upheld it. So, the argument that the Secretary of State's decision was unlawful is not right. So, the judge's decision should be maintained.

17. In reply, Mr Bandegani submitted that if the Section 94 decision was lawful it would have been maintained otherwise the Secretary of State would have made a decision that it was not in accordance with the law. She did not say that.

18. He submitted there are two key decisions in respect of the decision dated 27 January 2016. If the Secretary of State is now saying that she was right to certify the claim, then why did she choose not to certify it in January 2016. He said we cannot segregate a merits-based assessment from the certificate because the certificate bites on the merits.

Findings

19. At the heart of this appeal is the refusal of the appellant's application for indefinite leave to remain on the basis of ten years' long residence. He made the application on 1 June 2016 and it was refused on 20 September 2016.

20. The respondent considered the application under paragraph 276B of the Immigration Rules which lays down the requirements that have to be met by an applicant for indefinite leave to remain on the basis of long residence in the United Kingdom. They are:

    (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom.

    (v) the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less be disregarded … and any period of overstaying pending the determination of an application made within that 28 day period

21. The respondent noted that in light of the appellant's immigration history, that following the expiry of the refusal of his application for leave outside the Rules on 29 May 2015, the appellant has not had valid leave in any capacity. Although he applied for a reconsideration of this decision on 21 September 2015, this did not extend his leave by virtue of Section 3C and as such, he has not had valid leave since the date of refusal. The refusal decision was upheld and he was not granted leave to remain.

22. The respondent then says:

    *"**Therefore you were without lawful leave between 29 May 2015 and present, a period of over 28 days. As such your period of continuous lawful residence is considered to have been broken at this point. With that in mind, you have not demonstrated ten years' continuous lawful residence and cannot satisfy the requirement of paragraph 276B(i)(a) and (v)**".*

23. The appellant challenged this decision.

24. It is common ground between the parties that the respondent's decision of 29 May 2015 was not formally withdrawn. It was a merits-based decision,

which was maintained upon reconsideration on 27 January 2016. The certification of the claim was withdrawn, and the appellant was granted an in country right of appeal. On 4 February 2016, the appellant exercised his right of appeal by lodging an appeal against the refusal of the application that he made on 20 February 2015. He withdrew his appeal on 24 May 2016. On 1 June 2016 he applied for indefinite leave to remain under 10 years long residency.

25. In the light of the above, I find that the judge's references to s.94 of the Nationality, Immigration and Asylum Act 2002 and paragraph 353 of the Immigrations Rules at paragraphs 62 to 66 had no relevance to the issue that was before him.

26. I understood Mr. Bandegani's submission to mean that by 27 January 2016 when the respondent finally made a decision on the appellant's application of 20 February 2015, the appellant had accrued 10 years' lawful residence for the purposes of paragraph 276B, having entered the UK lawfully on 16 May 2006. Mr. Bandegani did not make any reference at all to s.3C leave. The grounds argued that in all the circumstances the appellant was entitled to reside in the UK given that he was entitled to reside in the UK until his appeal was determined (s.78 of the Nationality, Immigration and Asylum Act 2002). It was argued that the judge failed to engage with this argument and proceeded on the basis that the appellant's case would be answered if the appellant did not have leave by virtue of s.3C of the 1971 Act despite it having been expressly conceded that the appellant did not have leave to remain after 31 January 2015.

27. I find that if it was expressly conceded that the appellant did not have leave to remain after 31 January 2015, then it means that the appellant could not meet all the requirements of paragraph 276B. He may have met the requirement of 10 years continuous residence because the period of 28 days overstay is disregarded by virtue of subparagraph (iv) but that does not mean that all of the10 years' were *"lawful"* .

28. The judge said at paragraph 61 "that after the refusal on 29 May 2015 of his application outside the Rules made on 20 February 2015 at a time when he had overstayed some twenty days after expiry of his Tier 4 Student leave on 30 January 2015 and which can be ignored under Section 276B(v), the appellant did not have 3C leave because it was considered that his private life application outside of the Rules was unfounded, being therefore as a result certified on that basis under Section 94(1) of the 2002 Act, with effect that his right of appeal could only be exercised outside the UK."

29. I find that the judge misunderstood the respondent's decision.

30. In order for Section 3C of the Immigration Act 1971 to operate, a person who has limited leave to enter or remain in the UK and wishes to apply for variation of that leave, has to make the application for variation before his

leave expires. Section 3C will then come into operation by extending leave if the leave expires without the application for variation having been decided or withdrawn.

31. In this case the appellant's leave to remain as a Tier 4 (General) Student which was granted on 20 November 2012 expired on 30 January 2015. The appellant's application for leave to remain outside the Rules was not made before his leave expired on 30 January 2015. It was made on 20 February 2015 at a time when he did not have existing leave to remain in the UK. Consequently, he did not have the protection of s3C leave. Accordingly, I accept the decision in the respondent's reasons for refusal letter that although he applied for reconsideration of the decision on 21 September 2015, this did not extend his leave by virtue of Section 3C and as such he has not had valid leave since the date of refusal, the refusal date being 29 May 2015. Therefore, I find that the arguments about the certification of the decision of 29 May 2015 and the removal of the certificate following reconsideration are of no relevance to this appeal.

32. So, whilst the judge was wrong to consider the certification or otherwise of the respondent's decision, I find that his dismissal of the appellant's appeal should stand. This is because when the appellant made the application for leave to remain under ten years' long residence on 1 June 2016 it was out of time, because his lawful leave had expired on 30 January 2015 which meant that he did not have ten years' lawful residence in the UK.

33. The appellant's appeal is dismissed.

No anonymity direction is made.

Signed Date; 22 October 2018

Deputy Upper Tribunal Judge Eshun

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 22 October 2018

Deputy Upper Tribunal Judge Eshun