Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04404/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th February 2019	**On 19th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MANNAN RANA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I MacDonald QC (Counsel), instructed by Adam Bernard Solicitors
For the Respondent: Mr L Tarlow (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

This is an appeal against a determination of First-tier Tribunal Judge Boyes, promulgated on 8th November 2018, following a hearing at Hatton Cross on 19th September 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

The Appellant is a male, a citizen of Pakistan, 3rd December 1988, and was born on 3rd December 1988. He appealed against the decision of the Respondent dated 31st January 2018, refusing to grant him indefinite leave to remain.

The Salient Facts

The salient facts are not in dispute. The Appellant entered the UK on 30th August 2007. He entered as a student. He had leave until 31st July 2009. He was granted further periods of leave to remain until 31st October 2009. All of his subsequent applications for leave to remain were made in time. He had continuous lawful residence from 30th August 2007 until 30th January 2015. On 29th January 2015, however, he made an application for further leave to remain on human rights grounds. His application was refused. He appealed. The appeal was heard by First-tier Tribunal Judge Mill on 18th May 2016 and dismissed on 25th May 2016. It is accepted by all concerned that the Appellant's appeal rights were exhausted on 2nd March 2017. Thereafter, the Appellant remained in the UK. He did so until he made an application for further leave to remain on family and private life grounds on 14th March 2017. On 3rd August 2017 he made a variation of leave to remain on the basis of ten years' lawful continuous residence in this country. It is the refusal of that application that is the subject matter of this appeal. This is because the Respondent Secretary of State maintains that the Appellant had not accrued ten years' lawful residence and did not meet the requirements of paragraph 276B(i)(a) of the Immigration Rules.

The Judge's Findings

Judge Boyes on 19th September 2018 had regard to the continuous lawful residence provisions of the Immigration Rules, drawing specific attention to the Rule in relation to ten years' continuous lawful residence at paragraph 276A(b). This refers to "lawful residence" as meaning "continuous residence" (that is, pursuant to existing leave to enter or remain). Under Rule 39E of the Immigration Rules, if an application was made within fourteen days of the applicant's leave expiring, then there is what is referred to as "exceptions for overstayers".

At the hearing before Judge Boyes, however, Counsel at the time did not rely upon paragraph 39E, although he was made aware of this, and the judge observed that:

> "This is quite right because paragraph 39E when read together with paragraph 276B(iii) dictates whether or not an applicant is treated as being in the UK in breach of the Immigration Rules at the time that the application is made. Paragraph 39E does not create 'lawful' residence for the purposes of 276A(b)" (see the determination of Judge Boyes at paragraph 22).

The judge went on to state that:

> "The main thrust of the argument put to me was that whilst the Appellant did not have Section 3C leave during the time that he was waiting for his most recent application to determine, he was permitted to remain in the UK whilst waiting for the decision. He made his application during the fourteen days permitted by Rule 39E. It is submitted that there is no real difference between being present with 3C leave whilst waiting for an application to be determined and being present with the grace of the Respondent. The public interest of maintaining effective immigration controls should therefore weigh against him when the proportionality balancing exercise is undertaken" (paragraph 30).

The judge went on to say that this argument was not tenable because:

> "The difficulty with this argument is that the whole premise upon which the legibility under paragraph 276B is having accrued ten years of lawful residence. The fact that the Appellant was permitted to remain whilst waiting for the outcome of his application is not tantamount to being granted leave during this period" (paragraph 31).

This being so, the judge's firm conclusion was that:

> "In the circumstances, I do not consider that the fact that the Appellant was permitted to remain whilst waiting for his most recent application and appeal to be determined weighs heavily in his favour when the proportionality balancing exercise is undertaken" (paragraph 33).

The appeal was dismissed.

Grounds of Application

The grounds of application state that the judge was mistaken, as a matter of law, in coming to this conclusion because, once the Appellant's Section 3C leave ended, which was accepted by all concerned to have ended on 2nd March 2017 when the Appellant became appeal rights exhausted, he then had, under Section 39E, the option of applying for further leave to remain with in fourteen days. As the judge recognises in his statement of fact (at paragraph 6), the Appellant applied for further leave on private and family life grounds on 14th March 2017. This was within the fourteen day period allowed. The Appellant, by virtue of having exercised his right of appeal under Section 39E, was now a person with "lawful residence", and it was wrong to suggest that during this period he was simply in the UK as a matter of grace on the part of the Home Office. If he did indeed have lawful residence during that time, then this could be factored into the overall calculation of his ten year period of lawful residence to enable him to apply for indefinite leave. When on 3rd August 2017 the Appellant made a variation of leave, which he was entitled to do under the Immigration Rules, he was seeking to avail himself of having been in this country for ten years, and that would have been ten years of lawful residence,

which he could place reliance upon for the purposes of his indefinite leave to remain application.

On 14th January 2019 permission to appeal was granted by the Upper Tribunal. The Tribunal stated that there was an interesting point of construction raised here. This was whether a period of overstaying once the applicant's leave has expired falls to be disregarded (in a manner that it can count as lawful leave for the ten year period of lawful stay) if paragraph 39 applies. Or, whether it is a case that this is limited to the issue of whether the applicant is to be treated as an overstayer and so cannot meet the requirement of paragraph 276B(v). The Tribunal in granting permission went on to say that the wording of paragraph 276B(v) when dealing with "previous periods of overstaying" arguably requires qualifying periods without leave to be "disregarded" in the sense of counting towards "lawful continuous leave". The issue is, in part, whether the two parts of paragraph 276B(v) should be read as having different effects.

Submissions

At the hearing before me on 19th February 2019, Mr Ian MacDonald QC, appearing on behalf of the Appellant, relied upon his well-crafted and succinct skeleton argument. He submitted that at paragraph 276B(v) has to be read in conjunction with paragraph 39E of the Immigration Rules because the former makes it clear that the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

> " (v) The applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. ..."

Therefore, the effect of paragraph 276B(v) is that the Appellant's continuity of residence is treated as continuous if there is only a period of overstaying of fourteen days during which he has made an application. It is true that the judge does draw attention to these provisions (at paragraph 22) but he neglects to demonstrate that for the purposes of lawful residence in paragraph 276B(v) Section 39E has to be considered. When the judge states (at paragraph 30) that the Appellant made his application "during the fourteen days permitted by Rule 39E" the judge does not cross-refer to paragraph 276B(v). On the contrary, the judge's view is that the Appellant is simply allowed to remain in this country by grace of the Respondent and this is where the error of law stands.

Second, submitted Mr MacDonald QC, the judge also erred in stating that, "I do not consider that the fact that the Appellant was permitted to remain whilst waiting for his most recent application and appeals to be determined, weighs heavily in his favour when the proportionality balancing exercise is undertaken" (at paragraph 33). This is because if the Appellant had continuous lawful leave at the time, then the public interest in favour of immigration control simply falls away.

Third, the judge was plainly wrong in stating (at paragraph 32) that the Section 3C(4) provision excludes a person from making an application for variation of a leave whilst leave is extended by virtue of Section 3C. However, in the Appellant's case Section 3C no longer applied once the Appellant had exhausted his appeal rights on 2nd March 2017. His application made on 14th March 2017 was well after this date and Section 3C did not apply.

In short, accordingly, Mr MacDonald submitted that the Appellant's appeal should have been allowed on the basis that his claim was "Rules-compatible". I should make a finding of an error of law and simply remake the decision and allow the appeal.

For his part, Mr Tarlow submitted that the Appellant's application was varied to a long residence application on 4th August 2017. This was before the Appellant could claim ten years' continuous lawful residence. He had arrived in the UK, after all, only on 30th August 2007. Even if paragraph 39 applied, this could not create lawful residence but merely allow the Appellant to be lawfully present in the UK at the date of the application.

Error of Law

I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, this is a case where the Appellant has actually complied with the Immigration Rules. Once he became appeal rights exhausted on 2nd March 2017, he could make a Section 39E application for further leave, provided he did so within fourteen days, and the Appellant so applied on 14th March 2017. The effect of such a Section 39E application was that the Appellant then could claim to have lawful residence because under paragraph 276B(v), which specifically deals with requirements to be met by "an applicant for indefinite leave to remain on the ground of long residence", if a paragraph 39E application had been made then "any current period of overstaying will be disregarded".

It is incorrect, therefore, to refer to this period as one where the Appellant is remaining in the UK with grace of the Respondent Secretary of State. The Appellant was moreover allowed to vary his leave, once he had made an application, so that the variation that was subsequently made after 14th March 2017 on 3rd August 2017, by which time the Appellant had been in the UK for ten years, was one that was entirely open to him. The Appellant, in short, was "Rules-compliant" and stood to succeed under the Immigration Rules.

Second, as far as proportionality is concerned, it was not correct to say that the fact that he had made this application would not weigh heavily in his favour in the proportionality exercise, because there was no public interest consideration to weigh heavily against him, as he had not flouted the Immigration Rules, and had merely exercised the rights that he had under the Immigration Rules. This was an Appellant who did not have any adverse immigration history. His was, in fact, a human rights appeal. It was therefore strongly in his favour that he had set out to comply with the Immigration Rules at every stage and to make

his application consistently in accordance with them. The normal weight to be granted to public interest in favour of immigration control did not apply in this case.

Remaking the Decision

I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons I have set out above. A common mistake in many of these cases is that a consideration of the Appellant's situation stops at the point where his Section 3C leave ends. That is of course correct at one level. However, where it is necessary to do so, consideration must be given to paragraph 276B(v), which is dealing with continuity of legal residence in relation to an application for "indefinite leave to remain on the ground of long residence", because it is this provision that expressly draws attention to a paragraph 39E application, which may have been made at the end of the Section 3C leave, and where that is the case, proper consideration must be given to this as a separate matter. On that basis, this appeal is allowed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that It falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 18th March 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 18th Mach 2019