Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15589/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2018 and 25 January 2019	**On 31 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR VAMSHI ADIYALA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Gherman (07.12.18) and Mr S. Muquit (25.01.19), Counsel instructed by Connaughts Law
For the Respondent: Mr N Bramble (07.12.18) and Ms A. Everett (25.01.19), Senior Home Office Presenting Officers

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Hussain sitting at Hatton Cross on 1 August 2018) dismissing his appeal against the decision of the respondent ("the Department") to refuse to grant him indefinite leave to remain as a person who had accrued at least 10 years' continuous lawful residence under the Rules. The First-tier Tribunal did not make an anonymity direction, and I do not consider that

the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of India, whose date of birth is 12 June 1986. He entered the country on 6 October 2007 with valid entry clearance as a student, and has remained here ever since. On 7 April 2017, he made an application for leave to remain on the grounds of long residence. He varied this application to an application for ILR on the grounds of 10 years' long residence on 26 June 2017 (albeit that he had not at this stage accrued 10 years' residence in the UK).

3. On 16 November 2017 the Department gave their reasons for refusing the appellant's application for indefinite leave to remain in the UK on the basis of long residence, and/or on the basis of private life established in the UK.

4. The Department accepted that, following his arrival in the UK on 6 October 2007, the appellant had had valid leave until 3 April 2017 when his appeal rights were exhausted. From that point on, the appellant had not had lawful leave. The Department's reasoning was that on 7 April 2017 he had applied "*out of time*" for leave to remain based on long residence. Since the application was out of time, his lawful residence was broken "*at this point*". He had become an overstayer on 4 April 2017, and at that point he had only resided in the UK for 9 years and 6 months. Accordingly, he could not demonstrate 10 years' continuous lawful residence in the UK in accordance with the Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. Both parties were legally represented before Judge Hussain. In his subsequent decision promulgated on 26 September 2018, Judge Hussain made a finding of fact which was at variance with the factual concession made by the Department in the refusal.

6. At paragraph [13] he said that he was somewhat confused by the Secretary of State's narrative, because having reflected after the hearing on the narrative of the appellant's immigration history, "*it seems that the appellant has been without leave from 30 November 2012".*

7. The Judge went on to give detailed reasons in paragraphs [14]-[18] as to why he was of the view that the appellant had been without leave from 30 November 2012. His reasoning included the fact that, despite an exhaustive search of the appellant's bundle, he could find no documentary evidence to "*support the appellant's claim"* that until 3 April 2017 he had enjoyed deemed leave under section 3C of the Immigration Act 1971.

8. At paragraphs [19]-[20], he addressed what he characterised as the substance of the appellant's submission, which was that since there was only a gap of three days between 3 April 2017 and 7 April 2017 he should find that, as a matter of substance, that the appellant had in fact

accumulated ten years' residence in this country. The Judge said that there were two problems with that submission: the first of which was that, "*if the Secretary of State's narrative of the appellant's immigration history is accepted, the appellant has been without any leave since 30 November 2012.*"

The Reasons for the Grant of Permission to Appeal

9. On 19 October 2018, First-tier Tribunal Judge Saffer granted permission to appeal for the following reasons:

> "It is arguable that the Judge became confused on an issue that was not contentious between the parties, has not put it to the parties seeking clarification, and that in then finding against the Appellant (despite saying he was 'inclined to accept the Appellant's narrative') he has materially erred."

The Error of Law Hearing in the Upper Tribunal

10. At the hearing before me to determine whether an error of law was made out, Mr Bramble conceded that the Judge had been factually wrong to find that the appellant had been without leave since 30 November 2012. In consultation with Mr Bramble, Ms Gherman (who did not appear below) had prepared a manuscript summary of the appellant's immigration history, which Mr Bramble confirmed that he accepted.

11. After further discussion with the representatives, I agreed to set aside the decision of Judge Hussain as being erroneous in law, and I directed that there should be a resumed hearing before me to remake the decision on the agreed basis that the starting point for remaking was that the appellant had been continuously lawfully resident until 3 August 2017.

12. For reasons which will become apparent, I declined Ms Gherman's initial invitation to immediately proceed to remake the decision in the appellant's favour.

Reasons for Finding an Error of Law on Ground 1, but not on Ground 2

13. There are two grounds of appeal. Ground 1 is that there has been procedural unfairness on the part of the Judge in him making a finding of fact adverse to the appellant that is in conflict with the concession made in the decision letter, and also in conflict with the common understanding of the legal representatives at the hearing in the First-tier Tribunal. Ground 2 is that Judge Hussain failed to have any regard to the exception for overstayers outlined in paragraph 39E and paragraph 276B(v) of the Rules.

Ground 2

14. Lawful residence in the UK is defined in Rule 276A(b). It is residence which is continuous residence pursuant to (i) existing leave to enter or remain; or (ii) temporary admission within section 11 of the 1971 Act (as

previously in force) or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or (iii) an exemption of immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

15. The definition of lawful residence does not include an exception for short periods of overstaying. This is a separate matter, as is apparent from the wording of paragraph 276B which sets out the requirements for indefinite leave to remain on the ground of long residence in the UK. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the UK are that:

> '(i) (a) he has had at least 10 years' lawful residence in the United Kingdom
>
> ...
>
> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraphs 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –
>
> (a) the further application was made before 24 November 2016 and within 28 days of expiry of leave; or
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.'

16. In short, an applicant for indefinite leave to remain on the ground of long residence has to meet all five of the requirements set out in Rule 276B(i)-(v), and the fact that the applicant satisfies the requirements of (v) does not mean that he satisfies the requirements of (i). They are separate requirements. So the Judge did not err in law in his alternative finding at [20] that, if it was the case that the appellant had continuous lawful leave until 3 April 2017, he had not *"as a matter of fact"* – i.e. under the Rules – accumulated ten years' lawful residence.

Ground 1

17. However, Ground 1 is clearly made out. As the Department had accepted in the decision letter that the appellant was continuously lawfully resident until 3 April 2017, it was reasonable for the appellant's legal representatives not to include in the bundle filed for the hearing documentary evidence to allay the Judge's concerns about whether the position taken by the Department was legally or factually correct. As there was no issue between the parties as to the appellant's status prior to 3 April 2014, the burden of proof did not rest with the appellant to prove continuous lawful residence until 3 April 2017.

18. In addition, the Judge got into a muddle about who was contending for what. Initially he correctly characterised the Secretary of State as advancing the case that the appellant had been continuously lawfully

resident until 3 April 2017. But later on in his reasoning process he wrongly characterised the Secretary of State as contending for the opposite of what had been set out in the decision letter.

19. Accordingly, while the Judge raised a legitimate concern about the appellant's true immigration history based on an alternative narrative given by the appellant's previous solicitors, he did not give adequate reasons for reaching an adverse conclusion on the issue, rather than giving the appellant the benefit of the doubt; and, in any event, he was factually wrong in his conclusion, and he thus made a mistake of fact for which neither the appellant nor his legal advisers are responsible. The mistake of fact was capable of making a material difference to the ultimate outcome of this appeal, and so procedural fairness requires that the decision should be set aside and remade.

The Resumed Hearing in the Upper Tribunal for Remaking

20. The appellant did not file any additional evidence for the resumed hearing. Mr Muquit called the appellant as a witness, and he adopted as his evidence in chief the same witness statement he had previously adopted in the First-tier Tribunal. On the topic of the private life which he had established in the UK, he said: *"I have invested a lot of time, money and effort in making a life for myself in the UK. I therefore would lose all that that I have made for myself in the UK if I am forced to be removed from the UK."*

21. Mr Muquit did not ask any supplementary questions and Ms Everett declined to ask the Appellant any questions in cross-examination. In the course of submissions, I asked the appellant to clarify how he was financially independent. He said that he got funding from his parents in India. He added that he had a cousin here who was a British national, and that his cousin also helped him financially.

Discussion and Findings on Remaking

22. The appellant does not have a viable private life claim under Rule 276ADE(1)(vi) as he does not contend that there would be very significant obstacles to his reintegration into life and society in India, and in any event there is no reason to suppose that he cannot lead an adequate private life on return to India, drawing upon, if necessary, his parents' financial support.

23. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test should be answered in the appellant's favour, with regard to the establishment of private life in the UK. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent.

24. On the issue of proportionality, I must take into account the relevant public interest considerations arising under section 117B of the 2002 Act. It is in the appellant's favour that he speaks good English, as this means

that he is better able to integrate into UK society. It is also in the appellant's favour that he is financially independent, in that he maintains and accommodates himself without recourse to public funds as a result of being entirely financially supported by his family.

25. Nonetheless these considerations are not in themselves sufficient to tip the balance in the appellant's favour in the proportionality assessment. As submitted by Ms Everett, the statute stipulates that little weight should be given to private life which is built up in the UK while a person's status here is precarious.

26. However, the considerations set out in section 117B are not exhaustive, and a rounded proportionality assessment requires the Tribunal to take all relevant factors into account. I acknowledge that the appellant can be characterised as a "near miss" under Rule 276B, since in April 2017 (when his lawful residence ceased) he was only six months short of qualifying for ILR on the grounds of ten years' continuous lawful residence. I am also mindful of the question posed in **Rhuppiah -v- SSHD [2016] EWCA Civ 803** which is whether the applicant has established in the UK a private life of a special and compelling character, such as to override the generalised normative guidance that little weight should be given to private life established by a person at a time when that person's immigration status is precarious.

27. However, I am unable to give an affirmative answer to this question in the case of the appellant. He has not shown that he has established a private life of a special and compelling character. He has also not shown that his – or more probably his parents' – financial investment in him has somehow been wasted. He entered the UK as a student, and hence on the express or implied undertaking that he would return to India once his studies in the UK were completed. Alternatively, he had no legitimate expectation of being able to prolong his stay in the UK unless he could bring himself within another category so as to qualify for further leave to remain. There is no evidence that the appellant failed to complete his course of studies, and hence there is no evidence that his time spent in the UK as a student has been wasted.

28. If the appellant were to be returning to India without having enhanced his employability and life prospects generally through gaining one or more academic qualifications here, he has not shown that there is anyone or anything to blame for this state of affairs apart from himself. However, for the avoidance of doubt, I deduce from the appellant's immigration history that he made progress in his studies in the period 2007 to 2012, and that he is likely to have obtained some academic qualifications in this five year period which will serve him in good stead in India. For if that were not the case, it is unlikely that he would have been granted leave to remain as student on three successive occasions in 2009, 2010 and 2011 respectively, or that he would have had occasion to apply in 2012 for leave to remain as a post-study work migrant.

29. Accordingly, having weighed all the relevant considerations in the balance, I do not consider that the interference consequential upon the refusal decision will be disproportionate to the legitimate public aim sought to be achieved, which is the maintenance of firm and effective immigration controls, and thus the appellant has not made out a case that the decision is unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

30. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed.

Signed Date 28 January 2019

Deputy Upper Tribunal Judge Monson