Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06829/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 4 January 2019	**On 18 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

MOIZ SAIFUDEEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jafferji
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Moiz Saifudeen, was born on 29 May 1965 and is a male citizen of Sri Lanka. By a decision dated 16 May 2018, the Secretary of State refused the appellant international protection. The appellant appealed to the First-tier Tribunal (Judge S L Farmer) which, in a decision promulgated on 10 July 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. First, the appellant challenges the decision of the First-tier Tribunal Judge on the basis of the judge's failure properly to consider the historic injustice which the appellant claims to

have suffered on account of the failure of the Secretary of State to have regard to the operation of paragraph 395C of the Immigration Rules:

> 'Before a decision to remove under Section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, including:
>
> (i) age;
>
> (ii) length of residence in the United Kingdom;
>
> (iii) strength of connections with the United Kingdom;
>
> (iv) personal history including character, conduct and employment record;
>
> (v) domestic circumstances;
>
> (vi) previous criminal record and the nature of any offence for which the person has been convicted;
>
> (vii) compassionate circumstances;
>
> (viii) any representations received on the person's behalf.
>
> In the case of family members the factors listed in paragraphs 365 to 368 must also be taken into account'

3. The chronology is briefly as follows. The appellant entered the United Kingdom in December 2001 on a visit visa. He overstayed. He was encountered working illegally and served with a Form IS151A on 6 October 2008. He made a human rights application on 2 December 2008 which was rejected by the Secretary of State on 10 February 2009. He made a further human rights application on 17 April 2009 which was refused by a notice dated 15 May 2009. A further application made by the appellant on 26 June 2009 was also rejected with no right of appeal. The appellant made yet another application on human rights grounds on 24 April 2015 which was refused on 14 May 2015. On 6 January 2018, the appellant was advised that his removal to Sri Lanka was imminent. On 16 January 2018 he made further submissions but these were rejected and the decision certified. Finally, on 26 March 2018, the appellant claimed asylum. Notwithstanding his earlier human rights applications, this was the first occasion upon which the appellant had claimed international protection. By a decision dated 16 May 2018, the Secretary of State refused the asylum application which is the subject of the appeal now before the Tribunal.

4. The appellant relies on the former paragraph 395C of HC 395 (as amended) which is no longer in force. On 13 February 2012, paragraph 395C was replaced by a new paragraph 395B.

5. The appellant argues that the Secretary of State's decision of 23 March 2011 was flawed. The decision erroneously stated that the appellant should leave the United Kingdom; an enforcement decision had in fact already been made. As a result of the Secretary of State's error, no

consideration was then given to the operation of paragraph 395C. In turn, the appellant would have benefitted from a revised policy of the Secretary of State (August 2009) to treat a residence albeit illegal of six-eight years as significant. By the relevant date in 2011, the appellant had been living in the United Kingdom for more than nine years. The appellant argues that there was a "good chance" that a consideration by the Secretary of State at paragraph 395C would have led to a grant of leave to remain. As it was, the appellant's submissions on this point were ignored by the Secretary of State.

6. Judge Farmer's decision deals first with the appellant's claim to be at real risk in Sri Lanka on account of his associations with the LTTE. Judge Roundly rejected that claim and credibility of the appellant's account. Her findings have not been challenged on appeal to the Upper Tribunal. I am told that paragraph 395C was raised before the judge but she makes no mention of it in her decision. She does deal with the question of delay at [52].

7. Whilst I accept that written representations were made in respect of paragraph 395C by the appellant's representatives (I have copies of their letters) I do not find that the issue was specifically raised with Judge Farmer. The judge at [21] has given a detailed summary of the submissions made by both representatives. Further, the grounds of appeal to the First-tier Tribunal make no specific reference to paragraph 395C. The appellant was represented before the First-tier Tribunal by Mr Burrett. He submitted to the judge that there were "exceptional circumstances that warrant looking outside the Rules". He referred to the "fact of delay in this case where the appellant has been denied a right of appeal in his human rights decisions since his application was made in 2008". That would appear to be a reference to the certification of previous claims by the appellant. The judge then recorded that Mr Burrett

> "… states the fact that [the appellant] has been in the UK for seventeen to eighteen years (in fact sixteen and a half years) together with the other factors means that when balancing the public interest considerations and looking at proportionality it is not proportionate to remove the appellant, especially as to say for his immigration status he has no illegal conduct. The delay is so significant in this case so as to be exceptional."

8. First, I find that it is not surprising that the judge has not dealt with paragraph 395C and the arguments previously made by the appellant since these matters were not raised directly with her by the appellant's representative. Significantly, the claimed historic injustice was not raised in the grounds of appeal to the First-tier Tribunal. Secondly, even if I am wrong and the judge should have dealt with paragraph 395C, I do not find that she has fallen into legal error. The appellant complains that the Secretary of State did not consider paragraph 395C before making the decision to remove him. Arguably, therefore, the Secretary of State's decision to remove was not lawful and the appellant had available to him the remedy of judicial review which significantly he took no steps to utilise.

Moreover, neither paragraph 395C nor the respondent's policy (I have not been provided with a copy) would appear to have guaranteed a decision in favour of the appellant. Indeed, Mr Jafferji, who appeared before me in the Upper Tribunal, accepted that the operation of paragraph 395C was not a "trump card" for the appellant; was merely a factor that should have been taken into account in the Article 8 analysis. Judge Farmer's analysis of Article 8 appears at [42] *et seq.* The judge has properly considered whether the appellant could bring himself within the provisions of paragraph 276ADE and concluded that he could not do so. He has thereafter carried out a consideration of Article 8 outside the Immigration Rules by reference to *Razgar [2004] UKHL 27.* Her analysis of Article 8 is thorough and carefully structured. She has applied to various statutory provisions of Section 117B of the 2002 Act (as amended). She has specifically looked at the question of delay [51-52]. She was aware also that the appellant complied with the reporting restrictions imposed on him. Notwithstanding the delay and other factors in the appellant's favour, the judge's finding that the appellant had not "produced evidence of longstanding friendships or ties to the community" is plainly available to her on the evidence. She has given cogent reasons for finding that, notwithstanding his long residence, the appellant should not be granted leave under Article 8 ECHR outside the Rules. Further, as I have indicated above, I am not satisfied that the question of paragraph 395C was ever raised before Judge Farmer.

9. I have considered whether, had Judge Farmer expressly considered the relevance of any submissions regarding paragraph 395C in the assessment of proportionality, whether this made a material difference to her decision. I have concluded that it would not have done so. Paragraph 395C together with the Home Office policy in force at the time would not have guaranteed the appellant grant of leave to remain. The appellant had every opportunity to challenge the failure of the Secretary of State to consider paragraph 395C by judicial review. He chose not to do so. I am not satisfied that submissions in respect of the paragraph 395C issue would have made any difference to the outcome of the judge's analysis of Article 8 outside the Rules. With regard to the question of delay (which is the subject of the second ground of appeal) I have dealt with this above. I am satisfied that Judge Farmer has considered the question of delay and has reached an outcome available to her on the evidence.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 2 March 2019

Upper Tribunal Judge Lane

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

Signed Date 2 March 2019

Upper Tribunal Judge Lane