Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08738/2019

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft teams)	**Decision & Reasons Promulgated**
On 6 July 2021	**On 23 July 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ISMAIL BAIG MIRZA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bunting, instructed by Edward Marshall Solicitors.
For the Respondent: Mr Whitwell, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Burns promulgated on 1 December 2020, which the Judge dismissed the appellant's appeal on human rights grounds.

2. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis it was said to be arguable that the Judge had failed to make findings on an issue before him, referred to as "the

second gap" which was a material issue to be decided on the evidence.

3. The Judge noted the appellant had applied for ILR on the basis of long residence and family and private life, which was refused on 30 April 2019 on the basis the requirements of paragraph 276B and 276ADE of the Immigration Rules were not met, and that there were no exceptional circumstances warranting a grant of leave pursuant to article 8 ECHR.

4. In relation to 276B requiring the appellant to have 10 years continuous lawful residence in the United Kingdom at the relevant date, it was said there were two breaks in the appellant's lawful residence, being from 31 January 2010 to 7 July 2010 as a result of an application made within time having been rejected as not being valid, therefore not conferring the benefit of section 3C leave upon the appellant, and a second gap referred to by the Judge at [28 – 29] in the following terms:

> 28. The Respondent identified a second break in the Appellant's continuous lawful residence as follows *"Following your grant of leave to remain on 7 July 2010, you held lawful leave until 16 June 2013. You did not seek to vary your leave on 14 June 2013, this application was refused and following your unsuccessful appeal. Your appeal rights were exhausted on 7 August 2014. Your next grant of leave was in fact not until 30 March 2015. So it is noted that between the exploration of your leave and your next grant was a period of 234 days."*
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> 29. The Appellant's response to this is as follows *"My application dated 4/9/14 was rejected on 21/2/15.... however I varied this application on 12/2/15 (which means I varied my application, 9 days before my ... application was rejected ... the application dated 4/9/14 was varied once again and leave to remain was granted till 3/5/18. This means I have valid leave from 4/4/14 till 3/5/18.... My further applications after 3/5/18 were varied until my ILR application was refused on 30/4/19."*

5. The Judge at [31] noted the appellant's submission was that the 27-day gap between becoming appeal rights exhausted 7/8/2014 and the application dated 4/9/14 must be disregarded and that the period up to 3/5/18 is covered by 3C leave, which the Judge found it was not necessary to consider in light of the decision about the first gap in the appellant's period of leave.

6. At [33] the Judge writes:

> 33. For the avoidance of doubt, even if I had concluded that the Appellant was correct about the second claimed gap, (which would mean that he did not have the requisite 10 year period as at 26/2/19, but does have it now. At the time of his appeal hearing), I would not have thought it appropriate to allow the appeal on this basis. Indeed, Mr Hussein did not submit that I should. The Appellant's remedy in that case would be to reapply, ensuring that he complies with all the elements of the rules that the application date, a matter which is not within my purview.

7. The error in relation to the second gap noted in the grant of permission was conceded by the Secretary of State in her Rule 24 reply with a suggestion, the matter should be retained within the Upper Tribunal with certain suggested preserved findings.

8. Mr Bunting on behalf of the appellant filed a skeleton argument in which he submits in relation to the second gap:

Submissions

'Second Gap'

1. As is accepted by the respondent, the failure to make a finding on the 'second gap' is a material error of law.

2. It is clear that it is the second gap that would always be the critical one given that without that the appellant would not have been able to accrue ten years lawful residence, irrespective of the conclusion on the first gap.

3. For that reason, it is submitted that it is appropriate to start with that point.

4. It was not in dispute that the appellant had leave from 07 July 2010 until 07 August 2014 when he became appeal rights exhausted. The next grant was on 30 March 2015, with the period of time between the latter two dates being 234 days (excluding 30 March 2015).

5. Since Hoque, there have been two further Upper Tribunal cases of note : Muneeb Asif (Paragraph 276B – disregard – previous overstaying) [2021] UKUT 96 (IAC) and R (Waseem & Others) v SSHD (long residence policy – interpretation) [2021] UKUT 146 (IAC).

6. Both of these were decided after the determination in this case.

7. In Asif, the facts are set out at paras 22-25. In brief, that appellant had valid leave, but an application to vary it was refused. An appeal was lodged, but this was withdrawn on 03 July 2014.

8. A fresh application was made on 25 July 2014 (within 28 days). This was refused but, after litigation, it was granted on 23 November 2015. There was a gap of 507 days between 03 July 2014 and 23 November 2015.

9. The Upper Tribunal held that that appellant fell within the terms of para 276B(1)(v)(a). In those circumstances, the period of overstaying of 507 days was treated as lawful residence.

10. It is submitted that this appellant's case is on fours with the principles of Asif. In those circumstances, irrespective of the first gap, the appellant had accrued 10 years lawful residence on 06 July 2020.

11. If the appellant meets the Immigration Rules then, following TZ (Pakistan) & PG (India) v SSHD [2018] EWCA Civ 1109, the appeal should be allowed on article 8 grounds.

9. On behalf of the Secretary of State Mr Whitwell accepted that in light of the current case law it had been established that the appellant had achieved 10 years continuous lawful residence in the United Kingdom as required by the Immigration Rules. It was also accepted, on that basis, that the weight to be given to the public interest assessment as part of the balancing exercise was substantially reduced and that on the facts the Secretary of State could not sustain an argument that it will be proportionate to remove the appellant from the United Kingdom when there were no other countervailing factors.

10. On that basis I find the First-tier Judge has erred in law in a manner material to the decision to dismiss the appeal. I set that decision aside. I substitute a decision to allow the appeal pursuant to article 8 ECHR.

Decision

11. The Judge materially erred in law. I set the decision aside. I substitute a decision to allow the appeal.

Anonymity.

12. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 7 July 2021