IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001101
First-tier Tribunal No: HU/56545/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 August 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE HOFFMAN

Between

Prabath Lahiru Dammachari Rodrigo Bastiankoralage
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mrs A Nolan, Senior Presenting Officer

Heard at Field House on 12 August 2024

DECISION AND REASONS

1. The appellant seeks to appeal the decision of First-tier Tribunal Judge Bonavero dated 20 January 2023 dismissing his appeal against the respondent decision of 5 October 2021 to refuse him leave to remain. Permission to appeal was granted by First-tier Tribunal Judge Mills on 14 April 2023.

Background

2. As recognised by Judge Bonavero at para 2 of his decision, the appellant's immigration history is lengthy and complex. In summary, the appellant, who is a citizen of Sri Lanka, entered the UK with leave to enter as a student on 23 September 2009. He made an in-time application to extend that leave which was refused on 27 January 2011. The appellant's attempt to appeal that decision was out-of-time and therefore struck out. Thereafter, the appellant asked the respondent to reconsider her decision of 27 January 2011 which she belatedly did, accepting that a mistake was made. Consequently, the appellant was invited to make a new application for leave to remain which would be treated as having

been made in-time. The appellant made the new application on 15 October 2017 and on 29 November 2017 he was granted further leave to remain as student. The appellant made an in-time application for further leave to remain on 22 August 2018 but this was refused on 13 February 2019. That decision has not been successfully challenged. Following this, on 25 February 2019, the appellant applied for indefinite leave to remain ("ILR") on the basis of 10 years' continuous residence in the UK.

3. In a decision dated 5 October 2021, the respondent refused to grant the appellant ILR. The respondent considered the appellant's circumstances under paragraph 276B of the Immigration Rules but found that the appellant was only able to demonstrate continuous lawful residence between 23 September 2009 (when he entered the UK on a student visa) and 13 February 2019 (when his application for further leave to remain was refused). The appellant therefore fell short of the 10 year requirement by just over seven months. The respondent went on to consider whether the appellant qualified for leave to remain under the family and private life provisions of the Immigration Rules but found that he did not. She also concluded that there were no exceptional circumstances or compassionate factors to his case that would qualify him for a discretionary grant of leave to remain.

4. The appellant exercised his right of appeal to the First-tier Tribunal against the respondent's decision. This was heard by Judge Bonavero on 13 January 2023 who, as explained above, dismissed the appeal. At paragraph 10 of his decision, the judge recorded that the appellant had accepted that he could not qualify for ILR under paragraph 276B of the Immigration Rules following the judgment of the Court of Appeal in R (on the application of Afzal) v Secretary of State for the Home Department [2021] EWCA Civ 1909. At paragraph 11, the judge stated that the appellant's case was argued on the basis that his appeal should succeed on Article 8 ECHR grounds outside of the Immigration Rules. Having considered the evidence before him and the parties' submissions, Judge Bonavero found that the appellant's removal to Sri Lanka would not amount to a disproportionate interference with his right to a private life.

5. The appellant subsequently applied for permission to appeal to the Upper Tribunal on the following grounds:

    a. The appellant had not conceded his case under paragraph 276B of the Immigration Rules and the judge had therefore made a material error of law in failing to consider whether he met that provision.

    b. The judge had failed to take into account the history of delay in his case.

    c. The judge had failed to "access [sic] the appellant's case in a fair manner when deciding if the appellant will face [very] significant obstacles to re-integration to [sic] life in Sri Lanka".

6. On 14 April 2023, First-tier Tribunal Judge Mills granted permission to appeal. Having listened to the opening of the recording of the hearing before Judge Bonavero, Judge Mills was satisfied that the appellant's representative, Mr Richardson, had made only a "conditional concession" on the Afzal point: he had accepted that the First-tier Tribunal was bound to follow the Court of Appeal's judgment; however, given that permission to appeal had been granted by the Supreme Court in that case, Mr Richardson had invited Judge Bonavero to make findings on the issue, to leave open the possibility of future consideration. Judge

Mills said that there was less merit to the other grounds, but he did not limit the grant of permission.

7. On 27 June 2023, Upper Tribunal Judge Kamara stayed the error of law hearing pending judgment of the Supreme Court in Afzal. The appellant's solicitors were required to inform the Upper Tribunal within 14 days of that judgment whether appellant wished to proceed with his appeal.

8. On 28 November 2023, the Supreme Court handed down its judgment in R (on the application of Afzal) v Secretary of State for the Home Department [2023] UKSC 46 upholding the decision of the Court of Appeal. However, the appellant failed to comply with the directions made by Judge Kamara. Consequently, on 21 June 2024, a further order was made by Upper Tribunal Judge Norton-Taylor who noted the wholly unsatisfactory failure by the appellant to respond to the earlier directions. Judge Norton-Taylor lifted the stay and directed the appellant to confirm within seven days of the order being sent out whether or not he wished to pursue his appeal. Again, the appellant failed to comply.

9. The error of law hearing was therefore listed before us at Field House on 12 August 2024 at 10 am. There was no appearance by the appellant or his representatives despite the appellant having been required to attend at 10 am. By the time we turned to this case at 12:45 there had still been no appearance. We therefore considered whether to adjourn the hearing taking into account the principle of fairness: see Nwaigwe (adjournment: fairness) [2014] UKUT 418. We satisfied ourselves that the notice of hearing had been correctly served on both the appellant and his representatives. The notice of hearing informed the parties that the hearing may proceed in their absence and no application for an adjournment had been made. We also took into account the appellant's failure to comply with the directions of both Judge Kamara and Judge Norton-Taylor. Having had regard to the overriding objective to deal with cases fairly and justly, including avoiding delay, and the fact that the case was a straightforward one to decide, we concluded that it would be fair in the circumstances to proceed with the appeal in appellant's absence.

Conclusions – Error of Law

10. We are not satisfied that Judge Bonavero made a material error of law by failing to make any findings on whether the appellant met the requirements of paragraph 276B of the Immigration Rules. That is because the judge was bound by the Court of Appeal's judgment in Afzal such that, on proper interpretation, the appellant had not established 10 years' continuous lawful residence in the UK. The grant of permission recorded as follows:

> "Having listened to the opening of the recording of the hearing in which this issue is discussed it is clear that Mr Richardson, counsel for the appellant, made what he called a 'conditional concession' on this point. Specifically, he stated that he accepted that the Tribunal was bound to follow Afzal and thus find against the appellant on the long residence issue. However, given that permission has been granted by the Supreme Court in that case, the Tribunal was nonetheless invited to consider and make findings on the issue, to leave open the possibility of future consideration."

While Mr Richardson urged the judge to make the findings anyway, because Afzal was under appeal to the Supreme Court, Counsel did concede that, on the law at the date of the hearing, and which the judge applied, the appellant could

not succeed. Moreover, the Supreme Court has since upheld the Court of Appeal's judgment.

11. The appellant has failed to comply with two orders of the Upper Tribunal requiring him to confirm whether he intended to proceed with his appeal in the light of the Supreme Court's judgment. We agree with Judge Norton-Taylor that the appellant's failure to do so is wholly unsatisfactory. But, in any event, as a consequence of the appellant's failure to engage with his appeal, he has not provided the Upper Tribunal with any reasons why he meets the requirements of paragraph 276B. The submissions made at paragraph 3 of the appellant's grounds of appeal do not demonstrate that the appellant meets the 10 years' residence requirement. It is not in dispute that the appellant was able to demonstrate continuous residence between 23 September 2009 and 13 February 2019. While the appellant did submit a further application for leave to remain on 25 February 2019, and therefore within 14 days of the 13 February 2019 decision, and any subsequent period of overstaying would be disregarded in accordance with paragraph 276B(v) and paragraph 39E of the Immigration Rules, he did not have leave at the date of application and the application of 25 February 2019 was in any event refused by the respondent on 31 July 2019 with a right of appeal belatedly being granted on 5 October 2021. While the period during which paragraph 39E applied would be disregarded under paragraph 276B so far as the appellant was present in the UK in breach of immigration laws, none of that time would count towards 10 years' continuous residence for the reasons given by the Supreme Court in Afzal, at paragraphs 67 and 68. Consequently, so far as continuous residence is concerned, the clock remained stopped at 13 February 2019.

12. Turning to the appellant's second ground of appeal, that the judge erred in failing to take into account the administrative delays in the appellant's case, we find that Judge Bonavero took this into account at paragraphs 16 to 18 of his decision and then gave clear reasons at paragraphs 19 to 24 as to why he found that the delay point added little to the appellant's Article 8 ECHR claim. We are satisfied that the findings made by the judge were reasonably and rationally open to him and that he made no error of law.

13. Finally, the appellant argues at paragraph 5 of his grounds that the judge failed to properly assess whether there would be any (very) significant obstacles to him re-establishing his private life in Sri Lanka. The appellant criticises the judge for failing to make findings on his "current affairs with his family and friends in Sri Lanka", take into account evidence of the support he receives from friends in the UK "who the appellant considers his own family", and take into account that he has not been back to Sri Lanka for more than 13 years. However, we find that the judge had regard to the appellant's private life in the UK, including through friendships, at paragraph 14 of his decision but he correctly identified that, in accordance with s.117B of the Nationality, Immigration and Asylum Act 2002, little weight could be attached to that private life because it has been developed at a time when the appellant's immigration status was either precarious or he had no leave at all. Furthermore, at paragraph 15, the judge took into account the appellant's continuing links with his family in Sri Lanka and the fact that the appellant has been absent from the country for a significant length of time. In conclusion, the judge found that there was "nothing in the evidence to suggest that [the appellant] will experience very significant obstacles to his re-integration there". We therefore find that the judge properly considered the evidence before him regarding the appellant's private life and any very significant obstacles to him re-establishing this on return to Sri Lanka. The findings that the judge made

were reasonably and rationally open to him and we therefore find that he made no errors of law in this regard.

Notice of Decision

There is no material error of law in Judge Bonavero's decision.

The appeal is dismissed.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15th August 2024