



IAC-BFD- MD

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/23257/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On 16th July 2015**

**Decision & Reasons Promulgated
On 30th July 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

**MR AJITH WIJESINGHE WIJESINGHE HETTIACHCHI MUDALIGE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, of Counsel instructed by Jein Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant Mr Ajith Wijesinghe Wijeshinghe Hettiachchi Mudalige is a citizen of Sri Lanka. He appeals with permission to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Behan) which in a decision promulgated on 23rd January 2015 dismissed his appeal against the Respondent's refusal to grant him indefinite leave to remain on account of his having completed ten years lawful residence in the UK.

2. The grant of permission neatly encapsulates the central issues in this appeal and the relevant parts for the purpose of this hearing are set out below.

“The background facts are not disputed. It was accepted that the Appellant had lived in the United Kingdom since 2003. His right to live in the United Kingdom was on the basis of his student status, an application which the Appellant made in 2009 for further leave to remain as a student was rejected as invalid because, he had failed to complete mandatory parts of the application form. When the Appellant eventually received the notice of invalidity he corrected the mistake and he was granted further leave to remain as a student.

He made his application for indefinite leave to remain under the provisions of paragraph 276B in 2014 after his educational Sponsor’s licence had been revoked and the Appellant’s leave was curtailed but, he submitted his application before his period of leave (as curtailed) had ended. The Secretary of State’s representative refused the application on the basis that the events of 2009 had caused the Appellant to remain in the United Kingdom for more than 28 days as an overstayer.

The issue in the appeal centres upon the point at which the Appellant became an overstayer. Within the decision the judge found at paragraph 32 of the decision that the Appellant was not covered by Section 3C leave because he did not make a valid application to vary his leave before his student visa expired on 30th June. The Secretary of State’s representative calculated that there was a period of 261 days between the Appellant’s leave expiring and the grant of leave on 19th October 2010.”

The UT Hearing/Error of Law

3. Following discussions between the two representatives – Ms Jegarajah for the Appellant and Mr Walker for the Respondent, it was accepted by Mr Walker that the First-tier Tribunal’s decision could not stand and should be set aside. He agreed that the appeal should be allowed and the matter remitted to the respondent for further consideration. Unsurprisingly Miss Jegarajah agreed with this course.
4. The following factors were agreed:
 - The Appellant did not receive the 2009 refusal notice, sent by the Respondent, to treat his application as valid.
 - Nevertheless the Appellant made a re-submitted application for leave to remain out of time, and this application was granted with the Appellant having been granted leave to remain until 3rd October 2011.
 - The Respondent treated the 2009 application as a valid application after it had been corrected by the submission of the re-submitted application. This was the logical inference shown by the Respondent’s notice of 2nd August 2009 whereby the notice contains the following line “*Arrangements would be made for any fee to be repaid*”. In the Appellant’s case no fee was returned – leading to the inference that the application was thereby being treated as a valid one.

5. Added to this contained in the Respondent's own Reasons for Refusal letter dated 3rd May 2014, under the heading **Immigration History (Bullet point 5)** there is an incorrect reference to the Appellant's application for leave to remain as being "rejected", when in fact it should properly have referred to it being a decision on "validity".
6. These factors mean that the First-tier Tribunal Judge was led into error and such error was material. Mr Walker accepted therefore the decision of the FtT could not stand. I agree and set aside the decision of the FtT.
7. Both representatives were further in agreement that the appropriate course in this matter is for the appeal to be allowed to the extent that it is remitted to the Secretary of State for further consideration in accordance with this decision.

Decision

8. Appeal allowed to the extent that the matter is remitted to the Respondent for further consideration of her decision of 13th May 2014 to refuse to vary the Appellant's leave to remain in the United Kingdom.

No anonymity direction is made

Signature

Dated

Judge of the Upper Tribunal