



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/14235/2014  
IA/52188/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15<sup>th</sup> February 2016

Decision & Reasons Promulgated  
On 27<sup>th</sup> April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS DONNA AGBEMABIESE  
MR JERRY AGBEMABIESE

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Bazini, Counsel; Pennington Manches Solicitors  
For the Claimant: Mr L Tarlow, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellants appeal against the decision of First-tier Tribunal Judge O'Garro, dismissing the Appellants' appeals against the Respondent's decisions of 22 November 2013 refusing them indefinite leave to remain, and challenging removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The First-tier Tribunal promulgated its decision dismissing the Appellant's appeal against that decision on 28 July 2014. Subsequently, that decision was appealed to the First-tier Tribunal and the Upper Tribunal. Both the First-tier Tribunal and Upper Tribunal refused permission to appeal. The Appellant then brought a judicial review of the Upper Tribunal's refusal to grant permission to appeal pursuant to Civil Procedure Rule 54.7A (commonly known as a "Cart" judicial review, so popularly named after the Supreme Court authority of *Cart v The Upper Tribunal* [2011] UKSC 28). That judicial review came before Simler, J and was unsuccessful; however, that may or may not have been because a draft consent order agreeing the settlement of that claim which was not placed before the Administrative Court. Matters moved on and the appeal came before Richards, LJ at the Court of Appeal, Civil Division, whom granted permission to apply for judicial review on the papers sealed on 27 July 2015; and remitted the matter to the Administrative Court whereby the parties could either proceed with the claim.
3. Ultimately, the parties entered into a form of consent whereby the decision of the Upper Tribunal refusing the claimants' applications for permission to appeal was set aside. Thereafter the original grounds along with the skeleton argument lodged on behalf of the claimants' and referred to by Richards, LJ were placed before the Vice President of the Upper Tribunal, Judge Ockelton, whom in light of those materials and the arguments raised on the appellants' behalf extended time and granted permission to appeal by way of a decision dated 3 November 2015.
4. The key grounds of appeal may be summarised as follows:
  - (i) It is arguable that the judge erred in considering paragraph 276A in determining the issue of whether the Appellants had two breaks in their continuous residence for the requisite 10-year period matters no relevant to the issue, particularly as it was never suggested by the Respondent that the Appellant and his British wife are not in a genuine and subsisting relationship and as they are now expecting their first child; and
  - (ii) It is arguable that the judge erred in considering the Appellant's Article 8 rights.
5. The Appellants relied upon the skeleton argument before the Court of Appeal as well as the grounds seeking permission to appeal from the Upper Tribunal. The Appellants also produced through their counsel copies of the following items which were read by all parties before submissions began:
  - (i) Paragraphs 29-34 of the Immigration Rules,
  - (ii) Annex A of the Home Office's Highly Skilled Migrant Programme (HSMP): Guidance for Applicants Version 2.0 valid from 07.11.06,
  - (iii) *Kaur (Entry Clearance - date of application) India* [2013] UKUT 381,

- (iv) *Anufrijeva, R (on the application of) v Secretary of State for the Home Department & Anor* [2003] UKHL 36,
- (v) *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33,
- (vi) Long Residence and Private Life Guidance v11.0 valid from 11.11.13, and
- (vii) Tier 1 (General) Policy Guidance valid from 06.04.10.

6. The Respondent filed a Rule 24 Reply dated 30 December 2015 which stated that the gaps in the appellants' lawful leave were considered by the First-tier Tribunal and were properly reasoned and not vitiated by error of law; and there was furthermore no error in her decision pursuant to Article 8.
7. I was addressed at great length by counsel for the Appellants. In reply, Mr Tarlow sought only to rely upon the Rule 24 Reply and made no further submissions or rebuttal in respect of any of the points made by Mr Bazini.

#### **Error of Law**

8. At the close of submissions, I indicated that I did find an error of law and would remake the Appellants' appeals allowing them with full reasons to follow. My reasons for so finding are as follows.
9. The sole live issue raised under paragraph 276A of the Immigration Rules by the Respondent related to whether the Appellants had continuous lawful leave for a continuous 10-year period. In this regard, the Respondent had raised two periods in the first Appellant's stay. The first Appellant arrived in the UK on 21 September 2001 and it was asserted that the first break in her leave was (i) from 12 April 2007 to 26 March 2008, and (ii) 1 May 2010 to 26 July 2010. It was asserted by Mr Bazini for the Appellants that the second Appellant had produced evidence of living in the UK for 10 years prior to 1 May 2010, but that the judge failed to address this. I did not receive submissions from the Respondent on this point, but it matters not in view of the outcome. The two alleged gaps in the Appellants' leave were duly noted by the judge in her decision at §48 and she was well aware of them.
10. In relation to the first alleged gap, the Appellants made an in-time application to extend their stay in the UK on 26 February 2007. There were insufficient funds to cover the application fee and as such the Respondent deemed the application invalid/withdrawn on 11 April 2007. On that date, the Respondent wrote to the first Appellant and informed her that her application was invalid and returned her documentation to her.

11. As an aside, I queried with Mr Bazini whether this application extended the first Appellant's section 3C leave under the Immigration Act 1971. Mr Bazini stated that it did not matter given that the rejection of their application was never served upon them and consequently, there was no notice of any decision and given that the Respondent had a policy in place at the time which allowed applicants 28 days to resubmit their applications even had the decisions been delivered (which they were not) which would allow the applications to be treated as in time. This is identical to the summary made by the judge at §54 of her decision. It is clear that the judge disagreed with this submission for reasons she gives at §§55-61 of her decision.
12. Dealing with each of those in turn, Mr Bazini submitted that the judge's reliance on *Kaur (Entry Clearance – date of application) India* [2013] UKUT 381 at §56 was a material error as *Kaur* discusses paragraph 30 of the Immigration Rules, which was not in issue at all because it concerns applications for entry clearance as opposed to leave to remain. Having studied the rule, it is clear that Mr Bazini is right that the rule has nothing to do with in-country applications at all and was wholly irrelevant to this issue. It was also stated that *Kaur* was not raised at the hearing at all but given my view on the irrelevance of paragraph 30 and *Kaur*, I did not need to consider this submission.
13. I was further asked to examine paragraphs 31, and 34C(a) of the Rules in relation to the notice of decision. Paragraph 34C(a) does indeed make clear that notice of an invalid application, such as for non-payment of a fee as occurred here, will be given in writing and deemed to be received on the date it is given. It is not in dispute here that the notice of invalidity was never given contemporaneously and indeed was served many years later. Therefore, as there was no notice of invalidity given to the first Appellant in relation to her invalid application, there cannot have been any abridgement of the first Appellant's section 3C leave. This is ironically supported by the decision in *Ved* which the judge referred to. Notice of invalidity is not an immigration decision but notice must be given nonetheless of the decision for it to have any effect. At any rate, the judge accepted that the documentation was sent to an incorrect address (§58) and consequently, it is clear that notice was not given and the application was not invalid until notice was sent which occurred years later and after the invalidity in the application was inadvertently cured anyhow.
14. Mr Bazini submitted openly that the rules governing notice in paragraph 34C(a) did not exist at the time but there was an unwritten informal policy which has now been transposed into the Rules alongside a policy which the Appellants meet also. To this extent, I was referred to the Long Residence guidance at page 20 which makes clear that one can overstay by 28 days after notice of invalidity has been given and notwithstanding that, any applicant who does not fall within that 28 day period can show evidence of exceptional circumstances which prevented them applying earlier. It was submitted that it is implicit from the guidance that one's leave is not treated as broken otherwise the guidance would make no sense and there would be no point in

having that guidance. I see the force in that common sense approach and purposive interpretation of the Rules and guidance alongside one another.

15. I find that the guidance and Rules support the conclusion that against these modern materials, the first Appellant would not have suffered any break in her leave, and given that there was no previous policy on this point but an unwritten informal practice, it would be unfair to not give the Appellant the benefit of that unwritten practice, particularly in light of the fact that the practice has now been documented and incorporated into the Rules and guidance.
16. Furthermore, this approach accords with the House of Lords' judgment in *Anufrijeva, R (on the application of) v Secretary of State for the Home Department & Anor* [2003] UKHL 36 at [26] onwards wherein it is stated as follows:

Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: *Raymond v Honey* [1983] 1 AC 1, 10G per Lord Wilberforce; *R v Secretary of State for the Home Department, Ex p Leech*, [1994] QB 198, 209D; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.
17. In relation to §§59-61 of the judge's decision concerning her understanding of the HSMP document of 4 December 2007 and the scheme, Mr Bazini relied upon the Home Office's HSMP Guidance for Applicants Version 2.0 valid from 07.11.06, which contains a footnote at Annex A see footnote which makes clear that the Appellant would not need the approval to succeed in her application for further leave but this was a formality to be completed before applying. At any rate, in my view, with respect, this point has no bearing or materiality upon the gap in question as notice was not given and so this issue is not relevant at all.
18. Therefore, I find in relation to the first gap that the judge materially erred in law given that the Respondent had failed to give notice of invalidity to the first Appellant and so the Appellant cannot be in default due to lack of notice and even so would have had 28 days permissible overstaying which would have cured any difficulty that may have arisen had notice been given. Given that the judge accepted that notice was not served, she was wrong to detour from that view for the reasons given above, and I find that the remaining documentary evidence, such as the letter from the Appellants' solicitors to PermitsUK of 28 February 2008 (page 398-399 of Appellant's Bundle 2 of 2) makes clear that the application should be treated as in-time and establishes there was a 28-day policy which applied at the time which was never enforced either.

19. Consequently, the first alleged gap of 12 April 2007 to 26 March 2008 falls away given that notice was never served and the application was made in time (on 26 February 2007, whereas leave expired a few days later) and either the appellants had section 3C leave *or* the guidance was not enforced and should have been (although the rules were not in force then, but exist now and demonstrate how such matters should be considered).
20. In relation to the second alleged gap, §62 onwards of the determination reveals that the applications were submitted on 27 March 2010 (the date that the Appellants' visas expired), but these applications were rejected on 8 April 2010; however the Appellants reapplied on 12 April 2010, well within the 28 period of overstaying, but were refused with no right of appeal on 30 April 2010 on the basis that documents stated in the guidance (not the Rules) were not submitted. On 6 July 2010, a subsequent application was made and was granted on 27 July 2010.
21. The judge's decision at §§66-68 shows that she accepted the decision was unlawful and a nullity given the Supreme Court's decision in *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33 concerning compliance with the guidance not laid before Parliament, as opposed to Immigration Rules which are.
22. At §70, the judge rejects evidence of self-employment, however these findings are irrelevant as the judge had already accepted that the refusal of 30 April 2010 was unlawful (see §68). Furthermore, I find that the judge's findings at §70 themselves breach the decision in *Alvi* because the items that were complained of as missing were listed in the guidance, not the Rules, and so the judge falls into the same error she noted in the decision of 30 April 2010 (see Appellant's bundle at pp. 440, 460-461 of Bundle 2 and paragraphs 119 to 124).
23. Consequently, the re-application of 12 April 2010, within the 28-day period, was a lawful application and the decision refusing it on 30 April 2010 was a nullity, and consequently, there was no decision upon that application until it was varied on 6 July 2010 which was anyhow granted on 27 July 2010. As a result, the second alleged gap of 1 May 2010 to 26 July 2010 falls away.
24. Given my analysis and findings above as to the correct interpretation of the law, Rules and jurisprudence, the First-tier Tribunal committed errors of law such that the decision should be set aside in respect of those errors. In light of the above findings, the assessment of Article 8 is also clearly unsafe as the factual basis of the Appellants' immigration history and the culpability for the delays perpetrated would have a bearing upon the weight given to the public interest in their removal (see *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387 at [56]).

## Remaking the Decision

25. The standard of proof is to the civil standard and that of the balance of probability. I have considered all the evidence in the appeal, including the appellant's and respondent's bundles. I heard submissions from both parties which are set out in full in my record of proceedings.
26. Paragraph 276A of the Immigration Rules as at 22 November 2013 is stated in the following terms:
- Long residence in the United Kingdom
- 276A. For the purposes of paragraphs 276B to 276D and 276ADE and 399A.
- (a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:
- (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
  - (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
  - (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
  - (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
  - (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.
- (b) "lawful residence" means 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 where leave to enter or remain is subsequently granted; or
  - (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.
- (c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.
27. In remaking the decision, I adopt the findings above of my own views upon the alleged gaps in continuous residence of (i) from 12 April 2007 to 26 March 2008, and

(ii) 1 May 2010 to 26 July 2010, noted by the Respondent as the sole points in issue under paragraph 276A. Consequently, in light of those findings and my detailed analysis, I find that there were no gaps in the Appellants' leave as alleged.

28. The Respondent's Long Residence guidance also makes clear that 28-days overstaying does not break continuity of residence and small gaps are negligible and may be overlooked in the exercise of discretion.
29. Underlying these submissions is the reassurance that the Respondent's guidance also makes clear that when considering delays in submitting applications, any administrative errors by the Home Office can constitute exceptional circumstances (according to the 3<sup>rd</sup> bullet-point of the guidance). This can be said of the delay in both gaps in my view. The invalidity notice was served to an incorrect address by the Home Office and was not served until well after the event; and in the second instance, the decision was unlawful against the decision in Alvi and was not replaced until a grant of leave on 27 July 2010. Consequently, even if I am wrong in my findings concerning the Appellants submissions, in my view, the administrative errors made by the Home Office remove any culpability from the Appellants for the gaps in their residence which are exceptional circumstances in the guidance, and otherwise in my view, which would not and should not break their continuity of 10-years' leave.
30. In conclusion, I find that the Appellants have resided for a 10-year continuous period in the UK and qualify for indefinite leave to remain pursuant to paragraph 276A of the Immigration Rules.
31. I therefore, do not propose to deal with Article 8 as the appeals have succeeded on the above basis under paragraph 276A.
32. For the above reasons I set aside the judge's decision and remake the decision allowing the appeal under the immigration rules.

### **Decision**

33. The appeal to the Upper Tribunal is allowed.
34. The decision of the First-tier Tribunal is set aside.
35. I remake the appeals allowing them under the Immigration Rules.



**Anonymity**

36. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so at present.

**Fee Award**

37. The First-tier Tribunal did not consider making a fee award as the appeal was dismissed on all grounds. In light of this Tribunal's decision, it is appropriate for a fee award to be made against the Respondent for the Appellant's appeals in the sums paid by them.

Signed

Date

Deputy Upper Tribunal Judge Saini