

THE IMMIGRATION ACTS

Heard at Field House
On 7 July 2016

Decision & Reasons Promulgated
On 26 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

S SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

STEPHEN MWANZA
(NO ANONYMITY DIRECTION MADE)

Appellant

Respondent

Representation

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr Canter, Counsel

DECISION AND REASONS

Background

1. The respondent is a citizen of Zambia born on 8 December 1983 who entered the UK on 26 June 2002 with entry clearance as a student. He was subsequently granted leave to remain on numerous occasions.
2. On 18 July 2013 he applied for indefinite leave to remain on the basis of ten years continuous lawful residence under Paragraph 276B of the Immigration Rules. On 8 March 2014 the Secretary of State refused his application. One of the Secretary of State's reasons for so doing was that the respondent had been without valid leave between 31 October 2005 and 2 March 2006 such that the continuity requirement under Paragraph 276B was not satisfied.

3. The respondent appealed and his appeal was heard by First-tier Tribunal ("FtT") Judge Oakley. In a decision promulgated on 23 December 2014 Judge Oakley allowed the appeal. The decision does not make any reference to the issue of whether the respondent was without leave between 31 October 2005 and 2 March 2006. The decision addresses a separate issue, which is whether the respondent had lawful leave to remain under Section 3C of the Immigration Act 1971 when he made his application for indefinite leave to remain, and concludes that he did.
4. The Secretary of State appealed to the Upper Tribunal, where the appeal was heard by Deputy Upper Tribunal Judge McClure. Judge McClure identified that the sole issue before him was whether Judge Oakley had considered the period 31 October 2005 - 2 March 2006. It was raised before Judge McClure, by Counsel for the respondent, that the Secretary of State had conceded that the respondent had valid leave in the period of 31 October 2005 - 2 March 2006. Judge McClure noted that Judge Oakley had not referred to there being a concession in either the decision or his notes of evidence. He then stated at paragraph [11]:

"If a concession was made then I am not going to go behind that concession but that is a matter to be clarified by Judge Oakley. Judge Oakley can confirm whether such a concession was made. If the concession was made then there is no ground upon which Judge Oakley's decision can be challenged further."
5. On 11 January 2016 the appeal came before Judge Oakley again. It is clear from his decision that he did not personally recollect whether a concession had been made. However, following consideration of the circumstances he concluded, at paragraph [19], that he was satisfied a concession had been made. On that basis, he allowed the appeal.
6. The Secretary of State now appeals the decision of Judge Oakley, which was promulgated on 13 January 2016.

Grounds of appeal

7. The grounds of appeal argue that Judge Oakley erred because, in finding a concession had been made, he relied exclusively on the respondent's and the respondent's counsel's recollections and did not take into account the submissions of the Presenting Officer. The grounds also argue that, even if a concession had been made, it could not be relied upon as the Secretary of State cannot concede as a matter of law that the respondent had lawful leave during a period in which he did not.

Submissions

8. Mr Tufan acknowledged that no challenge was being made as to whether the respondent had leave since 2013 and that this issue had now been resolved in the respondent's favour.
9. With respect to the period at issue (31 October 2005 - 2 March 2006), Mr Tufan argued that it simply made no sense for the Presenting Officer to make a concession as to concede this point was to effectively concede the appeal. He also contended that Judge Oakley's reasoning, as to why he found there had been a concession notwithstanding his failure to record it, was unclear and deficient.
10. Mr Canter argued that Judge Oakley carried out the task required of him, which was to answer the

specific question of whether a concession had been made. He considered the evidence available to him, including the record of the Presenting Officer, and gave a reasoned decision. In respect of the Secretary of State's argument that this issue could not, as a matter of law, be conceded, Mr Canter argued that it was a matter for the Secretary of State to decide whether to concede this point and that, once the concession had been made, it was entirely proper for the Judge to accept it.

Consideration

11. There is no contemporaneous evidence to show the claimed concession was made. No reference to there being a concession is made in Judge Oakley's decision promulgated on 23 December 2014 or in his notes from the proceedings. Nor is it mentioned in the record/minutes of the Presenting Officer. In the absence of any such record it is difficult to accept that a concession was made, particularly as such a concession would fatally undermine what otherwise would appear, on its face, to have been a strong case for the Secretary of State.
12. However, it is not for me to decide whether, on the balance of probabilities, there was a concession but rather to determine if Judge Oakley, in his second decision (which was promulgated on 13 January 2016) made a material error of law in finding there had been a concession. Judge Oakley, as the judge before whom the concession was said to have been made, was particularly well placed to assess whether a concession had in fact been made. It is no doubt for this reason that the Upper Tribunal remitted the appeal to him rather than a different judge.
13. Having reviewed afresh the evidence that was before Judge Oakley, I am satisfied that he took into account all of the material evidence and submissions that were before him, including that of the Presenting Officer, and that having so done it was open to him, for the reasons he gave, including in particular his consideration of his "normal practice", to conclude that a concession had been made about the period 31 October 2005 - 2 March 2006.
14. The concession was not as to what the law required but rather it concerned whether the respondent had a gap in lawful leave at a particular time. The concession, therefore, was about a factual circumstance rather than the requirements of the law and as such it was a concession the Secretary of State was able to make. Accordingly, I find that the grounds of appeal fail to establish that Judge Oakley made a material error of law and his decision promulgated on 13 January 2016 shall stand.
15. I note, in the alternative, that were I to have found there to have been an error of law I would have proceeded to remake the decision on the basis that the duration requirement of Paragraph 276B(i)(a) has been satisfied even if the respondent did not have lawful leave between 31 October 2005 and 2 March 2006. This is because it is accepted by both parties that he has had lawful leave since 2 March 2006 and the requisite ten year period has now passed since that date.

Decision

- A. The appeal is dismissed.

- B. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
- C. No anonymity direction is made.

Signed

Deputy Upper Tribunal Judge Sheridan

Dated: 25 July 2016