



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

Appeal Number: IA/30431/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 27 July 2017**

**Decision & Reasons Promulgated
On 01 August 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

ZUBAIR BIN MUSLIMA PEERBOCUS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. R. Solomon of counsel, instructed by Aschfords Solicitors
For the Respondent: Ms K. Pal, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 19 January 1980, is a national of Mauritius. On 13 May 2014, he applied for indefinite leave to remain on the basis of long residence. The Respondent refused this application and also a further one made on the same basis on 2 July

2014. He appealed and his appeal was allowed by First-tier Tribunal Judge Verity in a decision promulgated on 20 May 2015, on the basis that the Respondent had failed to consider her own policy on long residence. As a consequence, the Respondent re-considered his application but made a further decision to refuse his application on 1 September 2015. She also made a supplemental decision on 11 October 2016. The Appellant appealed and his appeal came before First-tier Tribunal Judge Miller, who dismissed the appeal in a decision promulgated on 5 December 2016.

3. The Appellant appealed and permission to appeal was granted by First-tier Tribunal Judge Astle on 14 June 2017, on the basis that First-tier Tribunal Judge Miller appeared to have failed to address his claim that he had made an in-time application for further leave to remain in 2012 and had also failed to address other issues raised in the Appellant's counsel's skeleton argument.

ERROR OF LAW HEARING

6. I heard oral submissions from both counsel and the Home Office Presenting Officer and I have referred to the content of their submissions, where relevant, below.

DECISION

7. The Applicant needed to show that he had had a ten-year period of lawful residence in the United Kingdom in order to qualify for indefinite leave to remain under Paragraph 276 of the Immigration Rules. Paragraph 276B of the Immigration Rules states that:

“(a) “continuous residence” means residence in the UK 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 UK 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”

8. It was initially the Respondent's case that he had two periods of overstaying which broke the continuity of his leave. In relation to the former, the Appellant first entered the United Kingdom in February 2004 and was here with leave until 25 April 2006. He then overstayed for one day before returning to Mauritius on 26 April 2006. He re-entered the United

Kingdom on 26 May 2006 with leave to remain as a visitor until 25 November 2006. Therefore, he did not fall within the requirements of paragraph 276B, as he had no leave to remain when he left the United Kingdom.

9. However, the Home Office Guidance for its own staff on *Long Residence Version 13.0*, published on 8 May 2015, states that:

“You can overlook a period of unlawful residence if the applicant leaves the UK after their valid leave has expired and:

- Applies for entry clearance within 28 days of their original leave expiring
- Returns to the UK with valid leave within 6 months of their original departure”.

10. The Applicant applied to enter the United Kingdom and was granted leave to enter as a visitor just after the permissible 28 day period but the Guidance also states that:

“When refusing an application on the ground it was made by an applicant who has overstayed by more than 28 days, you must consider any evidence of exceptional circumstances which prevented that applicant from applying within the first 28 days of overstaying”.

11. It was the Appellant’s case that he had to withdraw his application for further leave and return to Mauritius as his father had died and there was evidence before First-tier Tribunal Judge Miller to confirm the date of the Appellant’s father’s death. Therefore, at paragraph 21 of his decision First-tier Tribunal Judge Miller stated that:

“Having considered the matter, it does seem to me that the circumstances were exceptional, and the length of time that he spent in Mauritius was not unreasonable. Accordingly, I find that there was no interruption in his lawful residence in 2006, such as to interfere with his accrual of continuous lawful residence”.

12. However, it is also the Respondent’s case that the Appellant has had no leave to remain in the United Kingdom since 18 June 2013, when his application as his wife’s dependent was refused. In response, counsel for the Appellant referred to the order made by Upper Tribunal Judge Kebede on 13 February 2014, which noted that the Applicant’s wife had brought a

claim for judicial review, which challenged the decision by the Respondent to refuse to grant them an in-country right of appeal. I did not have a copy of this judicial review application and, therefore, was not able to assess its relevance.

13. However, it is clear that, in the Appellant's counsel's skeleton argument for the hearing before First-tier Tribunal Judge Miller, it was submitted that there was an exceptional circumstance which could have attracted further discretion under the Guidance. This was that the earlier in-time application for leave made by the Appellant's wife on 30 January 2012 should have attracted an in-country right of appeal. Counsel submitted that the reason that this application attracted a right of appeal was that it had erroneously been refused on the basis that the appropriate application fee had not been paid. Counsel for the Appellant referred me to a copy of the Appellant's bank statement, which showed that there was £3,370.47 in his bank account at the time of the application, which would have been more than enough to pay for the application.
14. He also relied on the case of *Basnet (validity of application – respondent) Nepal* [2012] UKUT 113, where it was held that “if the respondent asserts that an application was not accompanied by a fee, and so was not valid, the Respondent has the onus of proof”. He submitted that if an in-country appeal had been granted that would have attracted Section 3C leave, which would have lasted until he had completed the necessary ten year continuous period of lawful leave to become entitled to indefinite leave to remain. Without sight of further evidence it was not possible to decide whether this was the case but the Home Office Presenting Officer accepted that the application on 30 January 2012 had been refused for non-payment of a fee.
15. But the issue before me is the failure by First-tier Tribunal Judge Miller to address this argument in his decision and, in particular, in paragraph 22, and, therefore, a failure to apply part of the policy on indefinite leave which relates to evidence of exceptional circumstances. It was not sufficient for the First-tier Tribunal Judge to merely refer in general to the skeleton argument in paragraph 13 of the decision.
16. The Appellant also relied on his rights under Article 8 of the European Convention on Human Rights. The Home Office Presenting Officer submitted that First-tier Tribunal Judge Miller had given full consideration to the Appellant's private and family life rights in paragraphs 25

– 27 of his decision. It is correct that in paragraph 26 of the decision the First-tier Tribunal Judge stated that he had had regard to Section 55 of the Borders, Citizenship and Immigration Act 2009 but he did not remind himself that a child’s best interests should be a primary consideration or give any detailed consideration to these interests.

17. Furthermore, in paragraph 28 of the decision the First-tier Tribunal Judge that “there would appear to be little purpose in having Rules enabling a person to acquire permanent residence if the same were to be granted when the Rules are not met”. This statement fails to take into account the Guidance provided by the Respondent and undermines any proportionality decision in relation to the Appellant’s entitlement to leave to remain outside the Immigration Rules.

DECISION

- (1) The Appellant’s appeal is allowed.
- (2) The decision by First-tier Tribunal Judge Miller is set aside, apart from his findings in paragraph 21 of the decision, which was not challenged by the Respondent.
- (3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Miller.

DIRECTIONS

1. It is directed that the Appellant do disclose a copy of the claim form for JR/3160/2013 and any documents attached to it; along with a copy of the Respondent’s acknowledgment of service and summary grounds of defence to the Home Office Presenting Officer’s Unit and the First-tier Tribunal sitting at Taylor House within 14 days of notice being given of the *de novo* hearing.

Nadine Finch

Signed

Date 27 July 2017

Upper Tribunal Judge Finch