



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

Appeal Number: HU/19388/2016

**THE IMMIGRATION ACTS**

**Heard at Newport**

**On 18<sup>th</sup> September 2018**

**Decision & Reasons  
Promulgated**

**On 4<sup>th</sup> October 2018**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**BASSEY EFFIOK THOMAS**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

Respondent

**Representation:**

For the Appellant: Ms S Pearce of Avon & Bristol Law Centre

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nigeria who was born on 19 February 1967. He appeals against a decision of the First-tier Tribunal (Judge G C Solly) which dismissed his appeal on human rights grounds against the respondent's decision dated 25 July 2016 to refuse him indefinite leave to remain ("ILR") based upon ten years' continuous lawful residence under para 276B of the Immigration Rules (HC 395 as amended).
2. Permission to appeal was granted by the First-tier Tribunal (Judge Pooler) on 17 January 2018.

## **The Appellant's Immigration History**

3. The appellant entered the United Kingdom on 21 September 2005 with entry clearance as a student nurse valid until 19 February 2006. That leave expired before the appellant made an application, out of time, on 18 March 2006 for further leave to remain as a student. This application was successful and leave was granted from 20 April 2006 until 30 April 2007.
4. On 2 October 2006, the appellant applied for a "transfer of conditions". This appears to have been treated as an application for further leave and leave was granted to the appellant from 1 November 2006 until 15 March 2010. Although the Secretary of State in her decision letter recognised that this had been done "in error", the Secretary of State acknowledged that the appellant had leave to remain until 15 March 2010.
5. On 8 March 2010, the appellant applied for further leave to remain as a spouse. This application was refused on 18 May 2010 and, it is accepted, the appellant's leave expired two working days later on 20 May 2010.
6. On 12 June 2010, the appellant applied out of time for further leave as a spouse. This was refused on 10 March 2011. Following a request for a reconsideration and a consent order in judicial review proceedings brought by the appellant, the Secretary of State agreed to reconsider the decision. On 28 September 2011, the Secretary of State maintained her refusal to grant the appellant leave as a spouse but also, in a decision served on 29 November 2011, made a decision to remove the appellant. That was appealable and on 13 October 2011, the appellant appealed to the First-tier Tribunal. On 24 November 2011, the First-tier Tribunal (Judge A D Baker) allowed the appellant's appeal on human rights grounds, under Art 8 of the ECHR. Subsequently, and as I understand it as a result of that decision, the Secretary of State granted the appellant discretionary leave from 30 March 2012 until 30 May 2015.
7. On 20 May 2015, the appellant applied, in time, for further leave outside the Rules. The application was refused on 1 September 2015. The appellant appealed on 14 September 2015 but that appeal was withdrawn on 8 March 2016 as a result of a request made on 5 March 2016 to vary the consideration of his earlier application as one now under para 276B of the Rules based upon ten years' continuous lawful residence.
8. It is clear from this chronology, and was common ground between the parties before me, that there are two 'gaps' in the appellant's leave covering the ten-year period between 21 September 2005 and 21 September 2015. Those 'gaps' are between 20 February 2006 and 19 April 2006 and further between 21 May 2010 and 30 March 2012.
9. In his decision dated 25 July 2016, the Secretary of State concluded that each of those periods of time when the appellant did not have leave to remain in the UK broke the period of "continuous lawful residence" as defined in para 276A. Each exceeded 28 days and so could not be

disregarded under para 276B(v). As a consequence, the appellant could not establish “at least ten years’ continuous lawful residence in the United Kingdom” so as to meet the requirements of para 276B.

### **The Long Residence Rule**

10. The ‘long residence’ rule is found in para 276B (with definitions in para 276A) of the Rules. Para 276B provides, inter alia, as follows:

“276B. The requirements to be met by an applicant for indefinite leave to remain on the grounds of lawful residence in the United Kingdom are that:

(i) (a) he has had at least 10 years’ continuous lawful residence in the United Kingdom.

.....”

11. Para 276A defines “lawful residence”, so far as relevant, as meaning:

“residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; ...”

12. Further it defines “continuous residence” as meaning:

“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, ....”

13. Read alone, therefore, the effect of these provisions would be that either period during which the appellant did not have lawful leave would have the effect of preventing him establishing that he had ten years’ lawful continuous residence in the UK.

14. Para 276B, however, contains a provision in sub-para (v) which allows for periods of overstaying to be disregarded.

15. It is necessary to set out two versions of sub-para (v) as it was, at least initially, an issue before me as to which version was applicable to this appeal.

16. The provision in force for applications made before 24 November 2016 provided as follows:

“(v) the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.”

17. HC 667 substituted a new sub-para (v) for applications made on or after 24 November 2016 and is as follows:  
  
    “(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –  
  
        (a) the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or  
  
        (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.”
18. The latter provision was relied upon in the appellant’s grounds of appeal upon which permission was granted, although Judge Pooler in granting permission raised the issue of whether the substituted provision effected by HC 667 was the correct and applicable one to the appeal.
19. Before me, there was some discussion between the representatives and myself as to the applicable provision. Initially, Ms Pearce, who represented the appellant, relied upon the substituted version of sub-para (v). However, on obtaining a copy of HC 667, it became apparent that the implementation provisions brought into effect the substitute version of sub-para (v) only in respect of “applications made on or after 24 November 2016”. Both representatives, on considering the implementation provisions in HC 667, accepted that it was the earlier version of sub-para (v) that applied to this appeal as the appellant’s application for ILR had been made before 24 November 2016, namely (by variation of his application) on 5 March 2016. The parties’ submission, thereafter, focused on the application of the earlier version of sub-para (v) to the judge’s decision and the facts of this appeal.

## **Discussion**

20. As will be clear from that sub-para periods of overstaying of “up to 28 days” between periods of leave will be disregarded as will any additional periods of overstaying “pending the determination of an application” which has been made within that initial 28-day period of overstaying.
21. Applying that to the accepted facts of this appeal, Mr Howells, who represented the Secretary of State, accepted that the judge had been correct to conclude that the first ‘gap’ in the appellant’s leave between 20 February 2006 and 19 April 2006 was correctly disregarded by the judge. He accepted that the judge’s reasoning in para 20 of her determination was correct. There, the judge said this:  
  
    “20. The first gap alleged was between 20 February 2006 and 19 April 2006. The respondent’s immigration history says that on 18 March 2006 the appellant applied further leave to remain as a student. Given that this is the date of application given by the respondent I accept as being accurate. His period of entry clearance had expired on 19 February 2006. The gap between 19 February 2006 and 18 March 2006 is 28

days or less. This period does not break the 10 years period given paragraph 276B(v) of the Immigration Rules.”

22. I agree. 20 February 2006 (when the appellant’s previous leave had expired) to 18 March 2006 (when he next applied for further leave) is a period of less than 28 days and during that initial period of overstaying of 28 days the appellant made an application for further leave. By virtue of sub-para (v), the entire period of overstaying “pending the determination” of that application is disregarded in calculating whether the appellant has established ten years’ continuous lawful residence. He was, of course, granted further leave from 20 April 2006. The effect of sub-para (v) is, as the judge concluded in para 20 of the determination, that the period of 20 February 2006 to 19 April 2006 is disregarded as a period of overstaying when the appellant did not, in fact, have leave to remain.
23. There was, however, a continued dispute between the parties as to whether the judge had reached a correct conclusion in respect of the second ‘gap’ between 21 May 2010 (when the appellant’s leave expired) and 30 March 2012 (when the appellant was next granted discretionary leave).
24. The judge’s reasoning is found at paras 21 – 25 of her determination as follows:
  - “21. The second gap alleged is between 21 May 2010 and 29 March 2012. On 12 June 2010 he applied for leave to remain as the sponsor of a person present and settled in the UK. I find that this gap between 21 May 2010 and 12 June 2010 was less than the 28 days allowed by paragraph 276B(v) of the Immigration Rules.
  22. This application was refused on 2 March 2011 with no right of appeal. A reconsideration was requested (the date of which is not provided to me) and on 28 September 2011 the decision was maintained. A pre-action protocol letter was issued and a judicial review application raised. I am not given the date of either. An appeal on 13 October 2011, heard on 14 November 2011 before Immigration Judge Baker, was allowed on human rights ground on 24 November 2011. The appellant was subsequently granted discretionary leave from 30 March 2012 to 30 May 2015.
  23. I am satisfied his that the appellant had adequate leave from 13 October 2011 to 29 March 2012 as this is a period within which he was appealing.
  24. This therefore leaves the period from 3 March 2011 to 12 October 2011. The appellant’s representative has applied to the respondent’s case records which commence on page 16 of the appellant’s bundle and there is a note (dated on page 17 as 1 March 2011) in which the case handler says that it is proposed to refuse the application. The next note is dated 10 May 2011 and says PAP letter received. I take this to be a pre-action protocol letter.
  25. On 2 March 2011 according to the immigration history the application was refused. The pre-action protocol letter had been received by 10 May 2011 and the gap between the two days is well over 28 days. I accordingly find that this period breaks the 10 year lawful residence.”

25. On behalf of the respondent, Mr Howells accepted that the effect of sub-para (v) was to disregard the period between 21 May 2010 (when his leave expired on 20 May 2010) and 28 September 2011 (when the Secretary of State following the judicial review proceedings reconsidered the appellant's application for further leave made on 12 June 2010 and maintained it so as to refuse him leave). He submitted that, applying the wording of sub-para (v) the appellant had made an application within the initial 28-day period of overstaying (which began on 21 May 2010) and that application was, in effect, "pending" until the Secretary of State's decision on 28 September 2011. Thereafter, it was no longer "pending" even though the appellant had a right of appeal against the separate decision to remove him made at that time. Consequently, there was a break in the appellant's lawful residence in the UK from around 28 September 2011 (bearing in mind the application was not determined until it was served) and 30 March 2012 when, albeit as a result of the intervening appeal, the appellant was granted discretionary leave until 30 May 2015.
26. Ms Pearce submitted that the effect of sub-para (v) was to require that the appellant's overstaying from 31 May 2010 be disregarded until the conclusion of his appeal on 24 November 2011 (or, at least, fourteen days later when no appeal could be brought in time by the respondent). She accepted, however, that from update, namely 8 December 2011 until 29 March 2012 there was a period when the appellant did not have leave to enter or remain and which was not properly disregarded under sub-para (v).
27. In my judgment, Mr Howell's submissions are correct. Sub-para (v) creates two potential periods of time during which an individual is overstaying but which "will be disregarded" in calculating whether he has established a period of ten years' continuous lawful residence. Both periods must occur between periods of leave when the individual has overstayed. The first period is a period of up to 28 days. The second period is a period of an undetermined number of days where during the initial 28-day period of overstaying the individual makes an application for leave. In those circumstances, the period of overstaying which "will be disregarded" is extended "pending the determination" of that application. Once the application is determined, sub-para (v) ceases to have any effect. Of course, if as a result of the determination of the application, the individual is granted further leave from that date then the whole of the period of overstaying "will be disregarded". Where leave is not granted with effect from the date the application is determined (and that was this case) but subsequently leave is granted to the individual from a future date, there will remain a period of overstaying which sub-para (v) does not permit to be "disregarded".
28. It seems to me that the phrase "pending the determination of an application" means what it says. An application is "pending" until it is decided. Once a decision is made, then, the application is no longer "pending". On the facts of this case, Mr Howells accepted that the

application made on 12 June 2010 was “pending” until it was finally determined on 28 September 2011 (or, at least, two days thereafter when it is deemed to be served upon the appellant).

29. Ms Pearce sought to overcome this apparent effect of sub-para (v) by contending that by analogy to s.3C of the Immigration Act 1971 the application should be considered not to be determined – and, therefore, to remain “pending” – until the appeal proceedings brought against the decision of 28 September 2011 were concluded. She submitted that, otherwise, the effect of sub-para (v) would produce an anomalous effect namely that an individual’s overstaying would not be “disregarded”, despite a successful appeal, where an application was determined adversely to him despite a successful appeal. She submitted that, as s.3C of the Immigration Act 1971 continued the leave of an individual until the conclusion of appeal proceedings, so by analogy sub-para (v) should be interpreted to extend the period for which overstaying would be “disregarded” until the end of appeal proceedings.
30. Ms Pearce’s submission is not without some attraction. In the result, however, I do not accept her submission which, in my judgment, simply run contrary to the plain wording of sub-para (v).
31. Section 3C of the Immigration Act deals with the continuation of leave pending a variation decision. It deals with the position where an individual with leave seeks further leave but, before a decision is made by the Secretary of State, the existing grant of leave expires (s.3C(1)). In practical terms, applications for further leave are made relatively close in time to the expiry of existing leave and, if for no reason other than pressure of work, a decision by the Secretary of State is likely to be reached after the existing leave has expired. The underlying purpose of s.3C is to ensure that an individual is not prejudiced by that “practicality” which would leave them in the position of being an overstayer. It, therefore, statutorily extends the individual’s existing leave beyond the point when it would naturally expire. Section 3C(2) extends the leave as follows:

“(2) the leave is extended by virtue of this section during any period when –

- (a) the application for variation is neither decided nor withdrawn,
- (b) an appeal under s.82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
- (c) an appeal under that section against the decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of Section 104 of that Act), or
- (d) an administrative review of the decision on the application for variation –
  - (i) could be brought, or

(ii) is pending”.

32. In summary, an individual’s leave, when an in-time application for a variation of that leave is made, is extended beyond the period when it would otherwise expire to:
  - (i) the date when that application is decided or withdrawn (s.3C(2)(a)); and
  - (ii) during any period when an in-country appeal may be brought against the decision (excluding the possibility of an out of time appeal) (s.3C(2)(b)); and
  - (iii) if such an appeal is brought or such time as that appeal is “pending” which, by virtue of s.104 of the 2002 Act, is until that appeal is “finally determined, withdrawn or abandoned” (s.3C(2)(c))
  - (iv) during any period when an administrative review could be brought or is pending (s.3C(2)(d)).
33. It is, of course, obvious that s.3C is concerned with an entirely different issue to the one raised in this appeal. It is concerned with a person who made an in-time application to vary his leave but upon which a decision is not reached during the currency of his existing leave. The individual has done everything that he can appropriate to obtain further lawful leave. By contrast, the individual who relies upon sub-para (v) of para 276B has not sought further leave within the currency of his existing leave but rather has overstayed and is seeking a ‘condolence’ of a period of overstaying. He has not done all that he can to obtain further and unbroken leave to remain in the UK.
34. The wording of s.3C(2) is, in my judgment, instructive. In effect, Ms Pearce’s submission seeks to read into sub-para (v) what is set out in s.3C(2)(b) and (c) when, in effect, only what is found in s.3C(2)(a) is actually included in sub-para (v). The sequential extension of leave affected by s.3C(2) begins with a period up to which the application is decided. That is, in plain terms, what is said in sub-para (v) of para 276B. Ms Pearce however seeks to include within the latter’s wording of “pending the determination of an application”, a further period when an appeal could be brought against that decision (s.3C(2)(b)) and a further period until such time as the appeal is determined (s.3C(2)(c)). If the interpretation urged upon me by Ms Pearce of sub-para (v) was correct, the further periods of extension set out in s.3C(2)(b) and (c) would have been unnecessary because they would already have been included within the wording in s.3C(2)(a).
35. In my judgment, had the Secretary of State (and Parliament) intended the reach of sub-para (v) of para 276B to extend beyond the “decision” on an application, the wording of sub-para (v) would have been different and would have reflected, in essence, the provisions in s.3C(2)(b) and (c) of the



Immigration Act 1971. In my judgment, the plain wording of sub-para (v) extends the period of overstaying which “will be disregarded” to the point when a decision is made upon an application for further leave (itself made within the initial 28-day period of overstaying) but beyond that the application is no longer “pending”.

36. Of course, it may well be that if an application is successful, the individual will, in any event, be granted leave backdated to an earlier point in time such that there may not be any ‘gap’ in his leave when a retrospective gaze is cast over his immigration history to determine whether he can establish ten years’ continuous lawful residence. In those circumstances, there is no need to rely upon sub-para (v). However, if the grant of further leave is backdated to the date of application or date of decision on that application, reliance upon sub-para (v) will be necessary to establish “continuous lawful residence”.
37. Where, however, the application is unsuccessful but, as in this case, is successfully appealed, sub-para (v) properly interpreted, may well result in an individual overstaying for a period which is not “disregarded” for the purposes of para 276B. That will be so where, as a result of the successful appeal, the individual is granted leave but that is not backdated to the date of the application or the date on which the application – now in retrospect – was wrongly refused. If it is granted only from the date of the successful appeal or some later date, sub-para (v) will not allow the entire period of overstaying to be “disregarded”. That is precisely what happened in this case. As a result of the successful appeal to Judge Baker on 24 November 2011, the appellant was granted discretionary leave only from 30 March 2012. He was not even granted leave from the date on which the appeal was successful. Mr Howells was unable to assist as to why the Secretary of State had only granted discretionary leave from 30 March 2012. As I have already noted, and Ms Pearce accepted in her submissions, even on the basis she put the appellant’s case before me there remained a period of overstaying which could not be “disregarded” from the date of Judge Baker’s decision to 30 March 2012. That period of overstaying inevitably prevents the appellant from establishing the required ten years’ continuous lawful residence under para 276B.
38. Ms Pearce accepted that but invited me to conclude that the judge had, in any event, wrongly applied sub-para (v) and, in doing so, had failed to take into account in assessing the appellant’s claim under Art 8 the correct period which was to be “disregarded” under that provision and that, despite having succeeded in his appeal through no fault of his own, and inexplicably, he had only not been granted leave until 30<sup>th</sup> March 2012. She invited me to set aside the judge’s decision and remit the appeal to the First-tier Tribunal to reconsider the appellant’s claim under Art 8 but in the light of the correct application of sub-para (v) and the inexplicable fact that leave was not granted until 30 March 2012.
39. Although Mr Howells invited me to construe and apply sub-para (v) so that the appellant’s overstaying would only be “disregarded” until 28

September 2011 (plus 2 days for service), he agreed with Ms Pearce that the judge had misapplied sub-para (v) and that had infected her decision in respect of Art 8 outside the Rules. He accepted that whether I accepted his or Ms Pearce's submissions as to the correct period of overstaying to be "disregarded", the judge's decision should be set aside and remitted to the First-tier Tribunal to reach a new decision on Art 8 outside the Rules in the light of my conclusions.

40. I have already set out my reasons for accepting Mr Howell's submissions on the proper interpretation and application of sub-para (v) of para 276B. That period ended following the decision on his application on 28 September 2011 (plus 2 days for service).
41. It is not clear whether Judge Solly applied the correct and applicable version of sub-para (v) or the more recent (and current) version substituted by HC 667. The latter is not identical to the applicable version of sub-para (v). There is more than a suspicion that her attention was directed towards the new version, not least because she was referred to the Secretary of State's guidance on "long residence" dated 3 April 2017 which deals with that new provision and also because her (then) legal representatives clearly took the view in the grounds of appeal to the Upper Tribunal that the case turned upon the application of the version substituted by HC 667. Whether she did or not, the judge's conclusions on the application of sub-para (v) were not in accordance with the proper application of the applicable version of sub-para (v).
42. First, the judge found that the appellant had "adequate leave" from 13 October 2011 to 29 March 2012 "as this is a period within which he was appealing". That is, with respect, wrong. The appellant at no time has had leave, adequate or otherwise, between 21 May 2010 (when his existing leave expired) and 30 March 2012 when he was granted discretionary leave by the respondent. It is not wholly clear why the judge in para 23 concluded that he had leave during the period of the appeal process. She may have had in mind the effect of s.3C of the Immigration Act 1971 but that had no application as the appellant had not made an in-time application before his leave expired on 20 May 2010 to which s.3C could apply. It would, in any event, have only applied to the point of time when the appeal process was concluded, which was fourteen days after the decision of Judge Baker on 24 November 2011, namely 8 December 2011. There would still remain a gap from that date until 30 March 2012.
43. Secondly, it is accepted by Mr Howells that the effect of sub-para (v) required the period of the appellant's overstaying to be "disregarded" up to the point when his application for further leave was finally determined on 28 September 2011 (plus 2 days for service). That was, at least, accepted as a period covered by sub-para (v) by Ms Pearce and, as I have already concluded, the correct application of sub-para (v) on the basis that that was the date after which the application was no longer "pending". By contrast, the judge found that sub-para (v) did not apply to the period from 3 March 2011 to 12 October 2012 being the period from when the

application was initially refused until the appellant lodged his appeal to the First-tier Tribunal against the maintained decision on 28 September 2011 to refuse his application and to make a removal decision. Applying sub-para (v) correctly the judge should have concluded that the period of the appellant's overstaying which had to be "disregarded" was between 21 May 2010 and 28 September 2011 (plus two days for service on the appellant).

44. For these reasons, therefore, the judge erred in law in her application of para 276B, in particular sub-para (v). That led her wrongly to identify the period of overstaying which could be disregarded for the purposes of determining whether the appellant could establish ten years' continuous lawful residence in the UK. Ms Pearce accepted, and I agree, that the appellant could not establish the required ten years' continuous lawful residence so as to succeed in showing he met the requirements of para 276B. Preferring Mr Howells' submissions to those of Ms Pearce, I have concluded that the period that could be disregarded was between 21 May 2010 and 28 September 2011 (plus 2 days for service). Thereafter, however, having successfully appealed against the respondent's refusal of leave, for reasons which have not been discernible before me, the Secretary of State only granted discretionary leave from 30 March 2012 leaving the appellant with a period from 30 September 2011 which, inevitably, broke the required period of ten years' continuous lawful residence. That was, however, as Ms Pearce submitted a matter wholly outside the control of the appellant. Both the period of overstaying and the fact that the appellant was successful on appeal but not (inexplicably) granted leave until later, were relevant in the judge's assessment of the appellant's claim under Art 8 outside the Rules. I accept his submissions that the judge's flawed findings infected her decision in respect of Art 8.

### **Decision**

45. The judge's decision to dismiss the appeal involved the making of an error of law. I set aside the decision.
46. As I was invited by both representatives, I remit the appeal to the First-tier Tribunal (to be heard by a judge other than Judge Solly) to remake the decision under Art 8 in the light of my conclusion as to the application of para 276B(v) to the appellant's immigration history and having regard to the fact that the appellant was only granted discretionary leave, despite his successful appeal, from 30 March 2012.

Signed



A Grubb

Judge of the Upper Tribunal

26 September 2018