Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/44834/2013
IA/44835/2013
IA/44836/2013
IA/44838/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th June 2014	**On 1st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR MUHAMMAD AKHTAR HOUSSEIN BHEEKHOO
MRS ADEELAH ISMET ATCHIA
JAZIB MUHAMMAD HOUSEIN BHEEKHOO
ALEENA HOUSSEIN BHEEKHOO

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Turner QC instructed by Raj Law Solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of Mauritius whose appeals were dismissed by First-tier Tribunal Judge Shamash in a determination promulgated on 15th April 2014.

2. The judge found that the Appellants did not meet the requirements of Appendix FM and the first Appellant did not meet the long residence requirement under paragraph 276B-C of the Immigration Rules. The judge also considered Article 8 outside the Rules and dismissed the appeal on all grounds.

3. Grounds of application were lodged stating that the judge had erred in finding that the first Appellant (hereinafter referred to as the Appellant) did not meet the long residence requirement because the Appellant did not meet the ten year requirement at the date of application. The judge had fallen into error because the relevant date was not the date of application but rather the date of decision. The date of decision was October 2013 and the Appellant had been in the United Kingdom lawfully for ten years as at that date and as such met the terms of the Immigration Rules. Further documents were said to be attached to the grounds (in fact they were not) and it was said that the decision turned on whether or not the Appellant had acquired ten years' lawful residence here. It was submitted that as at the date of decision the Appellant had and that the judge by considering that the relevant date was the date of application had fallen into error.

4. The Respondent opposed the Appellant's appeal and lodged a Rule 24 notice stating that the Respondent maintained that the Appellant entered in 2004 and therefore did not have at the date of the hearing ten years' residence. As such any error was not material.

5. Before me Mr Turner relied on his grounds and also produced the letter from the Home Office said to be attached to the Grounds dated 11th February 2010 confirming that the Appellant entered the UK as a student in September 2013. The refusal in this case was dated 8th October 2013 and accordingly the Appellant had been here for ten years. It was a stateable argument that the crucial date was the date of hearing and not the date of decision but nothing turned on that and applying the date of decision the decision of the judge should be set aside as she had fallen into material error of law in determining the matter as at the date of application. If I was not prepared to allow the appeal outright then the judge had nevertheless made a material error of law in failing to record the length of time the Appellant had been in the United Kingdom and the matter should be remitted to the First-tier Tribunal. If that was the outcome then that would permit further documentation to be lodged on behalf of the Appellant which was not available to the First-tier Tribunal Judge.

6. For the Home Office Ms Kenny agreed that the crucial date was the date of decision. It did appear that the Appellant was granted leave to enter the United Kingdom as a student on 13th September 2003 as that was what was stated in the letter from the UK Border Agency dated 11th February 2010. However there was no error in law by the judge who found that the first Appellant had not discharged the burden of establishing when he first entered the United Kingdom and there was no evidence of the periods when he was out of the country or of his status in 2003.

7. I reserved my decision.

Discussion

8. Given that Ms Kenny agreed that the critical date was the date of decision (see **Odelola v SSHD [2009] HKHL 25**) it is plain enough that the First-tier Tribunal Judge erred in law in concluding that the Appellant failed under the Rules because at the date of application he had not met the ten year Rule.

9. The judge had the benefit of hearing oral evidence from the Appellant who adopted his statement. That statement says he first arrived in the United Kingdom in September 2003 and was granted leave to enter as a student. He was granted further leave in August 2004. The judge did record in the immigration history at paragraph 4 that he appears to have re-entered the United Kingdom on 13th September 2003 and it was "not clear" whether he left the UK in April 2004 before then. The judge noted that he "appears to have re-entered" the United Kingdom on 13th/14th May 2004 but it was unclear from the photocopy of the passport when he left.

10. Ms Kenny was obliged to accept that, contrary to the Rule 24 notice, the Appellant *was* granted leave to enter the United Kingdom as a student on 13th September 2003. Given that date and the fact that the date of decision was 8th October 2013 then it could be said that the Appellant had been here for "at least ten years' continuous lawful residence in the United Kingdom" as required by paragraph 276B of the Rules.

11. Unfortunately the position is simply not that clear. The witness statement of the Appellant does not say whether or not he did leave the United Kingdom in April 2004 or before then. The statement is also silent on whether he did re-enter the United Kingdom on 13th/14th May 2004 as the judge noted in paragraph 4 of her determination. The judge made no findings in that regard. Perhaps surprisingly neither representative of either party saw fit to ask the Appellant any questions about whether he did leave the country in 2004 or before then. It follows that a critical factual issue remains unclear.

12. As indicated above Mr Turner said that if the matter was remitted to the First-tier Tribunal he would have further documents to lodge; Ms Kenny said she was probably in the same position. Whilst it is unfortunate that a re-hearing appears to be required in this case I cannot see an alternative

as a further fact-finding exercise is necessary and this is best carried out by the First-tier Tribunal.

13. As such the determination of the First-tier Tribunal is set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of judicial fact-finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Decision

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

15. I set aside the decision.

16. I remit the case to the First-tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald