



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

Appeal Number: IA/03540/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke

**Decision and Reasons
Promulgated**

On 22 October 2015

On 26 October 2015

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JEVIN NOOKANAH

Respondent

Representation:

For the appellant: Mr McVeety, Senior Home Office Presenting Officer

For the respondent: Ms Brankovic, Counsel

DECISION AND DIRECTIONS

1. The respondent is a citizen of Mauritius. He originally entered the United Kingdom ('UK') on 21 July 2003 as a student and has remained here continuously since then.
2. The respondent applied for leave to remain pursuant to Paragraph 276B of the Immigration Rules on the basis of his ten years lawful residence. In a decision dated 10 January 2015 the SSHD refused the application. All relevant requirements of paragraph 276B were

considered to have been met save for the fact that the residence was not continuous lawful residence because there was said to be a gap of 119 days.

3. The respondent appealed against this decision to the First-tier Tribunal relying upon two grounds: (1) the respondent met 276B, and in the alternative (2) Article 8 of the ECHR.
4. First-tier Tribunal Judge Somal first of all considered the relevant chronology having heard the respondent give evidence. The relevant chronology can be summarised as follows:

21/7/13 R enters the UK with entry clearance as a student

15/9/03 R makes an in-time application to extend leave to remain as a student

21/9/13 Entry clearance expires

10/3/04 SSHD refuses the application on the basis that it did not include an application form but indicates that R has 28 days to make a further application (in order for it to be treated as in-time)

8/7/04 R resubmits the application (after the relevant 28 day period)

10/3/09 SSHD grants leave as a student. This leave continues to be extended to 2/9/14

1/9/14 R makes in-time application for ILR on the basis of 276B

5. The judge found that the respondent did not reapply within the requisite 28 days but some three months later in July 2004. The judge therefore found there was a break in continuous lawful residence as the respondent applied after the expiry of his initial period of leave, and as such the appeal under the Immigration Rules had to be dismissed. Ms Brankovic clarified that this was not disputed and there has been no cross-appeal against this finding.
6. The judge however found that the SSHD had acted unfairly in delaying between 8 July 2004 and 10 March 2009 and concluded that the decision was not in accordance with the law. The appeal was allowed on this basis only.
7. The SSHD has appealed against the decision with permission. Permission was granted on the basis that "*the reasoning as to why the delay would itself lead to a grant of leave was sparse and unclear.*"
8. At the beginning of the hearing I indicated my preliminary view to the

parties: the judge erred in law in allowing the appeal on the basis that the SSHD had breached its requirement to act in accordance with the common law principle of procedural fairness without conducting any assessment or making any findings regarding Article 8 of the ECHR. Ms Brankovic conceded that the judge failed to address Article 8 and was not entitled to allow the appeal for the reasons provided. Ms Brankovic was correct to do so.

9. The judge was obliged to determine the appeal against the decision not to grant ILR dated 1 September 2014. The judge has provided no reasoning as to why that decision was unfair because of delay on the part of the SSHD many years earlier. That period of delay did not cause the gap in lawful residence, which led to the respondent's inability to meet 276B. The gap in lawful residence was caused by the respondent's own delay in 2004.
10. It follows that the decision allowing the appeal on the basis that the decision is not in accordance with the law must be set aside. That leaves the Article 8 appeal outstanding as the judge did not address this. Both representatives agreed that as the judge had completely failed to engage with and address Article 8 the appropriate course was to remit the appeal to the First-tier Tribunal. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the absence of any Article 8 assessment on the part of the First-tier Tribunal. I agree with the representatives that this is an appropriate case to be remitted to the First-tier Tribunal.

Decision

11. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
12. The appeal shall be remade by the First-tier Tribunal.

Directions

- (1) The appeal shall be remade by the First-tier Tribunal sitting in Nottingham / Stoke (preferably Nottingham) on the first available date. (TE: 1.5hrs).
- (2) 28 days before the hearing date the respondent shall file and serve an indexed and paginated comprehensive bundle of documents. This shall contain a chronology and a statement from the respondent.
- (3) 14 days before the hearing the SSHD shall file and serve a written summary of her position in response to the respondent's evidence.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
22 October 2015