



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

Appeal Numbers: IA/51539/2013
IA/51544/2013

THE IMMIGRATION ACTS

**Heard at Manchester Upper Tribunal
On 21 January 2015**

**Decision & Reasons
Promulgated
On 5 February 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**AA (FIRST APPELLANT)
KY (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Schwenk instructed by Legal Rights Partnership
For the Respondent: Ms Johnstone, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, AA and KY, are citizens of Pakistan. The first appellant applied for leave to remain in the United Kingdom on the basis of his relationship with the second appellant KY who, in turn, has applied to

remain on the basis of her relationship with her children. I shall hereafter refer to the first appellant as “the appellant”.

2. The appellants had appealed to the First-tier Tribunal (Judge M Davies) which, in a determination promulgated on 14 August 2014, dismissed the appeals. The appellants now appeal, with permission, to the Upper Tribunal.
3. The first issue in the appeal concerns an alleged procedural irregularity. In his determination [6] Judge Davies recorded “Mr Brown [Counsel for the appellants] indicated he would be pursuing only the Article 6 and 8 matters. He also indicated that the appellant [KY] rights under Article 6 also form part of her private life under Article 8”. In the same paragraph, the judge recorded that Mr Dillon [the Home Office Presenting Officer] had argued that the appellant [AA] was not entitled to permanent residence because he had not completed ten years of lawful residence in the United Kingdom; it was accepted by both parties that the appellant had changed employers without notifying the Home Office, thereby not complying with the terms of his work permit.
4. The grounds (supported by a witness statement from Mr Brown) assert that the judge had inaccurately recorded what had happened at the hearing. Mr Brown claims that he had not abandoned the long residence (paragraph 276B) claim before the First-tier Tribunal. He did not accept that the appellant had failed to complete 10 years’ “lawful residence” within the meaning of the Immigration Rules simply because he had changed his employer without notifying the Home Office.
5. I was concerned that the Tribunal file had not been returned to Judge Davies for his comments. However, I was greatly assisted by the fact that Judge Davies had kept a typed Record of Proceedings of the hearing on 5 August 2014. This records Mr Brown as having pursued the issue of paragraph 276B (“*Mr B: [appellant] did not terminate leave so here lawfully*”) Immediately following this, the judge has written: “*INDICATE THAT AS DID NOT SEEK PERMISSION TO CHANGE EMPLOYMENT WAS HERE UNLAWFULLY SO CAN SATISFY TEN YEAR CONTINUOUS RESIDENCE RULE*”. It is clear that “can” is a misprint for “cannot”. It is also clear that the passage in block capitals records what Judge Davies himself said (or rather indicated); they are not the words of Mr Brown. Following that “indication” the record then states that “Article 6 issues still pursued. Article 8”; not surprisingly in the light of the indication from the judge, Mr Brown did not press the matter of long residence. However, there is nothing in the Record of Proceedings which indicates that Mr Brown withdrew the appellant’s appeal under paragraph 276B.
6. I have no doubt whatever that Judge Davies has inadvertently made a genuine mistake as regards the long residence issue when he came to write up his determination. The only consequence of the misunderstanding is that Mr Brown should have been given the opportunity to make full submissions regarding paragraph 276B and the

issue should have been determined by Judge Davies. Moreover, the judge's error would, in turn, only justify the setting aside of the determination if the long residence issue had any merit. Mr Schwenk, who appeared for the appellant before the Upper Tribunal, argued that it did. Paragraph 276B (requirements for indefinite leave to remain on the grounds of long residence in the United Kingdom) provides as follows:

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

- (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom.
- (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
 - (a) age; and
 - (b) strength of connections in the United Kingdom; and
 - (c) personal history, including character, conduct, associations and employment record; and
 - (d) domestic circumstances; and
 - (e) compassionate circumstances; and
 - (f) any representations received on the person's behalf; and
- (iii) the applicant does not fall for refusal under the general grounds for refusal
- (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
- (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".

7. It is not disputed that the appellant has been in the United Kingdom continuously for 10 years. The question is whether he has been "lawfully resident" here. Lawful residence is defined at paragraph 276A(b) as "residence which is continuous residence pursuant to existing leave to enter or remain or temporary admission (within Section 11 of the 1971 Act where leave to enter or remain is subsequently granted) or an exemption from immigration control where an exemption ceases to apply if it is

immediately followed by a grant of leave to enter or remain.” In the case of the appellant, the question is whether he has been “lawfully resident” in the sense that he has been continuously resident in the UK pursuant to existing leave to remain. In *NM (No retrospective cancellation of leave) Zimbabwe* [2007] UKAIT 00002, the Upper Tribunal found that there was no power under the Immigration Acts to cancel leave retrospectively, even if it had been obtained by deception. Leave which has been granted may be curtailed but only with prospective effect. The present appeal does not involve any attempt by the respondent to curtail or cancel leave retrospectively. However, it is clear from *NM* that leave to remain will be valid and therefore lawful until such time as it is cancelled or curtailed. Continuous residence in the United Kingdom subject leave to remain which has not been cancelled or curtailed, therefore, falls within the definition of “lawful residence” in paragraph 276A. The appellant may have breached one of the conditions of his work permit such that the respondent might have grounds to curtail his leave but she might do so only with prospective effect. On the face of the evidence, therefore, this appellant complies with paragraph 276A(i)(a) because he has had “at least ten years’ continuous lawful residence in the United Kingdom.” The reason given by Judge Davies for indicating that that aspect of the appeal could not succeed was wrong in law. For that reason, I set aside his determination. I allow the appeal of the appellant on the basis that the decision was not in accordance with the law. I can go no further than that because there is nothing in the refusal letter to indicate that the respondent has ever considered how the appellant should be assessed by reference to remainder of paragraph 276B, in particular the factors appearing at 276B(ii) I return the matter to the Secretary of State to consider the appellant’s claim under paragraph 276B. I have set aside the determination in respect of the appeals of both appellants given that the outcome of the appellant’s claim for indefinite leave to remain on the basis of long residence may, in turn, have a material influence upon the appeal of his wife.

NOTICE OF DECISION

The determination of the First-tier Tribunal promulgated 14 August 2014 is set aside. The appeals are allowed on the basis that the decisions of the respondent were not in accordance with the law. The first appellant’s claim for indefinite leave to remain in the United Kingdom on the basis of long residence is returned to the Secretary of State for further consideration.

Signed

Date 2 February 2015

Upper Tribunal Judge Clive Lane