



IAC-BH-PMP-V1

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

Appeal Number: IA/44287/2014

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke  
On 23<sup>rd</sup> November 2015**

**Decision & Reasons Promulgated  
On 8<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GARRATT**

**Between**

**KEVINDRA APPANAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Shah, Legal Representative of Law Association  
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the sake of consistency and to avoid confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.

**Background**

2. On 20<sup>th</sup> October 2015 Judge of the First-tier Tribunal N Osborne gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Narayan who allowed the appeal against the decision of the respondent taken on 16<sup>th</sup> October 2014, to refuse leave to remain on the grounds of ten years' long residence applying the provisions of paragraph 276B(i)(a) of the Immigration Rules.

3. Judge Osborne noted that, in accordance with the grounds of application, there were two issues. First, that the appellant had no leave to remain from 17<sup>th</sup> April 2012 (when an application for leave to remain as a Tier 4 (General) Student Migrant had been refused) to 6<sup>th</sup> November 2012 when the appellant was again granted leave as a student until 30<sup>th</sup> January 2014. Second, it was argued that the judge had miscalculated the period of 28 days' grace given by paragraph 276B(v) of the Rules.

### **Submissions**

4. Ms Johnstone relied upon the grounds as summarised in the grant of permission. In detail these argue that paragraph 276A(b) of the Rules define "lawful residence" as including residence "pursuant to existing leave to enter or remain". Whilst provision is made for leave to be statutorily extended pending the outcome of an application lodged before leave expires there is no such provision for an application made after leave expires. Thus the entire period from the expiry of previous leave (extended by Section 3C of the 1971 Act) until the date on which new leave was granted falls outside the definition of "lawful residence". The application for leave on the basis of long residence made on 1<sup>st</sup> June 2012 had no effect in terms of the appellant having no leave at the time of that application.
5. The second point made in the grounds argues that the wording of the concession in paragraph 276B(v) requires that an applicant *must not be* in the UK in breach of immigration laws and applies the present tense and does not mean *must not have been*. Thus, the respondent argues that only a current period of less than 28 days is to be disregarded. The combined effect of the two grounds is said to mean that the First-tier Judge miscalculated the relevant periods of time without leave in 2012 and then wrongly applied its conclusions to paragraph 276B(v).
6. Ms Johnstone added to the grounds by indicating that the appellant's skeleton argument (to which I refer later) now stated that the relevant date for calculation of the 28 day period from the decision of 20<sup>th</sup> April 2012 was 25<sup>th</sup> April 2012 which was not the date put to the judge. She maintained that the appellant had no leave from the date of decision on 20<sup>th</sup> April 2012 to the grant of further leave as a student on 6<sup>th</sup> November 2012. She also argued that, if the appellant had not appealed within ten days of 20<sup>th</sup> April 2012, the 28 day period of grace granted by Section 3C(2)(b) of the Immigration Act 1971 would not apply as this related to an extension of time in relation to *the bringing of an appeal* when the appellant had not, in fact, appealed that decision. Further, she confirmed it was the respondent's view that, in any event, the gap between 20<sup>th</sup> April and the application on 1<sup>st</sup> June was more than 28 days and the appellant was not entitled to add another ten days for an appeal that he did not bring.
7. Mr Shah commenced his submissions on the basis that, at the hearing before the First-tier Judge, the Home Office representative had accepted the relevant date as 25<sup>th</sup> April 2012 although, I as indicated to him, there was no indication that this was so. Indeed, paragraph 21 of the decision shows that Mr Shah put to the judge at the time that 25<sup>th</sup> April 2012 was a bank holiday when it was not (such holiday being on 23<sup>rd</sup> April 2012). At paragraph 22 the judge records that the Home Office Presenting Officer at the time, Mrs Boden, accepted "the arithmetic" only if Mr Shah's argument in respect of Section 3C was correct. Mr Shah continued to rely upon his grounds the relevant part of which I quote as follows:

### “Submissions

1. The appellant submits his application was in time and he did not overstay the designated time limits set by the Immigration Rules.
2. The appellant submits on 31/01/2012 to 20/04/2012 his leave was pending under 3C leave of the Immigration Act 1971.
3. The appellant submits the decision on the 31/01/2012 application was made by the SSHD on 20/04/2012 and not 17/04/2012 this is confirmed by the Case Record sheet in the Outcome action section.
4. The appellant submits the decision was received by him on 25/04/2015.
5. The appellant wishes to rely on Immigration Rules Paragraph 276B(v) and The Asylum and Immigration Tribunal (Procedure) Rules 2005, the following calculation of the dates and times are as followed;

The appellant Lodged an application on 31/01/2012 the appellant did not receive a reply back from the Home Office until 25/04/2012.

<u>Application sent to Home Office -</u>	<u>31/01/2012</u>
To	<b>(Appellant has not overstayed Rule 3C Immigration Act 1971)</b>
<u>Decision served on the appellant -</u>	<u>25/04/2012</u>
<u>10 day Limit to lodge appeal -</u>	<u>26/04/2012</u>
To	<b>(The Asylum and Immigration Tribunal (Procedure) Rules 2005 Rule 7)</b>
<u>Last day to Lodge appeal -</u>	<u>09/05/2012</u>

On 07/05/2012 there was a public Holiday namely Bank Holiday Monday, therefore one day will need to be added from the 10 Day limit therefore making 10/05/2012 the last day for the appellant to lodge his appeal, the appellant submits he was under no duty to lodge an appeal as *Immigration Act 1971 section 3C(2)(b) states an appeal under section 81(1) of the Nationality Act, 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).* The appellant wishes to rely on the word could be brought, the appellant is under no duty to appeal the said decision and there is no immigration rule that can scrutinize the appellant for his decision.

<u>28 days overstayed allowed -</u>	<u>10/05/2012</u>
To	<b>(Paragraph 276B(V) of the Immigration rules)</b>
<u>Last day Before the 28 day Rule -</u>	<u>06/06/2012</u>

6. The Appellant on 01/06/2012 decided to submit a Tier 3 (General) Student Visa, well before 06/06/2012 being the last day of his lawful leave under Paragraph 276B(v) of the Immigration rules. The submission of this

application was accepted by the Home Office which is shown on the Case record sheet on the Outcome Action.”

### **Conclusions**

8. I have reached the conclusion that the decision of the First-tier Judge does not show an error on a point of law for the reasons which follow.
9. The judge conducts a careful analysis of the law and the Immigration Rules from paragraph 27 onwards.
10. It was accepted that the decision relating to the application for an extension of student leave submitted by the appellant on 31<sup>st</sup> January 2012 was refused on 20<sup>th</sup> April 2012 (the date on the letter of refusal). Although the judge does not deal with the submission about the date of receipt of that decision (which is stated, erroneously, in the skeleton to have been 25<sup>th</sup> April 2015) that makes no difference to the overall calculation made by the judge.
11. I infer that the date in the skeleton should be 25<sup>th</sup> April 2012 and is simply a clerical error. But, as I have said, that makes no difference to the overall calculation which eliminates any period of overstaying. That is because, as detailed in the skeleton, the appellant had a period of ten working days (calculated within Rule 7 of the Asylum and Immigration Tribunal (Procedure) Rules 2005) in which he could have brought his appeal. That period is not to be regarded as overstaying by virtue of Section 3C(2) of the Immigration Act 1971 and runs to, at least, 3<sup>rd</sup> of May 2012 applying the Procedure Rules.
12. Then, applying the 28 day period of grace allowed by paragraph 276B(v) of the Rules takes the period to 1<sup>st</sup> June 2012 when the appellant’s subsequent application was made. For the avoidance of doubt, however, I should point out that the decision which is dated 20<sup>th</sup> April 2012 cannot have reached the appellant through the post until at least the following day. By operation of Rule 7(1)(a) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (which was applicable at the time) time to appeal runs when the appellant is served with the notice of decision. So, the operative date adding the 28 day concession under 276B(v) was, at least, 2 June 2012, the day after the appellant made his application for leave which was approved. Any failure by the judge to deal with the claimed date of receipt of the relevant decision on 25 April 2012 is not material as the extension granted by Section 3C (after applying the Procedure Rules for service) would still mean that the appellant was entitled to take the benefit of the 28 day period of grace in paragraph 276B(v) of the Immigration Rules applicable at that time which would take him past the date of application on 1 June 2012.
13. In reaching the above conclusions I should make it clear that I regard the words “could be brought” in Section 3C(2)(b) of the 1971 Act as not requiring an appeal to, actually, be brought. That is because of the ordinary meaning of the words “could be”. The words do not imply a requirement to bring the appeal only that it can be brought.

14. Thus, the judge was entitled to reach the conclusion that the refusal decision of the respondent of 20<sup>th</sup> April 2012 was wrong and that the appellant is entitled to leave on the basis of ten years' lawful residence.

### **Notice of Decision**

The decision of the First-tier Tribunal does not show an error on a point of law and shall stand.

### **Anonymity**

Anonymity was not requested before the First-tier Tribunal nor the Upper Tribunal nor do I consider it appropriate in this appeal.

Signed

Date

Deputy Upper Tribunal Judge Garratt