



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

Appeal Number: IA/46673/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 10<sup>th</sup> December 2015**

**Promulgated**

**On 4<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR RAJEEV SOLOMON BROWNE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms S Akinbolu (Counsel)

For the Respondent: Ms A Holmes (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Hodgkinson, promulgated on 5<sup>th</sup> June 2015, following a hearing at Hatton Cross on 20<sup>th</sup> May 2015. In the determination, the judge dismissed the appeal of Rajeev Solomon Browne, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of India, who was born on 10<sup>th</sup> March 1974. He appealed against the decision of the Respondent dated 31<sup>st</sup> October 2014, refusing his application to remain in the UK on the basis of his Article 8 human rights. The Appellant's human rights claim is based upon the rights of his wife, Monali, his daughter, P, and his second daughter, A.

## **The Appellant's Claim**

3. The nub of the Appellant's claim is that he graduated from Bombay University, and then worked on a cruise ship as a mini bar supervisor, before coming to the UK as a visitor in 2003. He then worked on a working holidaymaker's visa at the Crown Plaza Hotel from July 2004 until May 2005 and then worked for the transport of London in a clerical capacity, before returning to India in February 2006 (see paragraph 16). The Appellant was in India during the currency of his working holidaymaker visa, and he then applied for entry clearance as a student (see paragraph 17), which was then refused, but the Appellant then successfully appealed, and that appeal was heard in the UK and the Appellant succeeded in the appeal. He remained in the UK as a student until 31<sup>st</sup> August 2008 (see paragraph 17).
4. On 17<sup>th</sup> November 2011, he applied to extend his student visa but he inadvertently omitted to apply for his wife and for P, and the application was refused on 24<sup>th</sup> January 2012, on the sole basis that he did not satisfy all the components of the relevant English language test. Nevertheless, the Appellant appealed and when he did so his appeal was heard by First-tier Tribunal Judge Kamara, who on 9<sup>th</sup> July 2012, allowed the appeal, so that the Appellant had Section 3C "continuing leave" to remain in this country.
5. This being so, the Appellant claimed that he now had ten years' lawful residence following his successful appeal in July 2012. He claims that he, his wife, and P had established private and family life, and subsequently on 7<sup>th</sup> October 2014, his wife gave birth to a second child, to P. He claims he has never overstayed in the United Kingdom and he has not ever breached the Immigration Rules. He has not committed any criminal offences (see paragraph 20).

## **The Judge's Findings**

6. The judge held that,

"The relevant period of the Appellant's leave having commenced on 25<sup>th</sup> February 2004, and I have concluded that his Section 3C leave ended in July 2012, it is clear that the Appellant's period of lawful leave was little less than eight and a half years, rather than the ten years claimed by him ..." (See paragraph 44),

So that the Appellant had to show that he could avail himself of paragraph 276B of the Immigration Rules, which he could not. The reason why the judge held that “the Appellant only had Section 3C leave until the end of July 2012, was that, there was no attempt by the Appellant to appeal that particular immigration decision.” (See paragraph 43).

7. The judge went on to hold that P had been in the UK for seven and a half years (see paragraph 48); and that she was integrated into the education system in this country (see paragraph 53); and that she would be a stranger in India now (see paragraph 54); and that the best interests of the children was to remain in the UK.
8. However, the Respondent’s decision was a proportionate one, as there had not been ever an expectation on the part of the Appellant to remain in the UK, and that his presence in this country had become a precarious one (see paragraph 62), such that the public interest required is returned.

### **Grounds of Application**

9. The grounds of application state that Judge Hodgkinson erred in his understanding of the findings made by Judge Kamara in her determination on 9<sup>th</sup> July 2012. This was a case where there two separate determinations. The earlier one was by Judge Kamara, and the one that was currently being appealed was by Judge Hodgkinson. There had additionally been two separate immigration decisions. The first refusing to vary leave and the second to remove the Appellant by way of directions. Judge Hodgkinson concluded that Judge Kamara had dismissed the appeal against the first immigration decision, but had allowed the appeal against the second on the basis that the Home Office had no power in law to make a removal decision, at the same time as refusing to vary leave.
10. The grounds stated that Judge Kamara had in fact found that both immigration decisions are legally flawed and that therefore the appeal against refusal to vary was allowed to the limited extent that the application to vary remained pending before the Home Office. Given that this was so, the Appellant would have been entitled to the continued benefit of Section 3C(2A) of the 1971 Act and Judge Hodgkinson should have considered paragraph 276B of the Immigration Rules because by that time the appeal would have clocked up a period of residence by the Appellant of having lawfully been in this country exceeding ten years.
11. Judge Kamara’s determination had said (at paragraph 38) that both immigration decisions were incorporated into a single notice, which was defective because there was merely a passing reference to Section 55 of the BCIA 2007 about the wellbeing of the Appellant’s children. Judge Hodgkinson recorded this argument at paragraph 40 of his decision. However, he did not give a reason for rejecting it.
12. On 26<sup>th</sup> August 2015, permission to appeal was granted on the basis that, although there can be no disagreement for Judge Hodgkinson’s determination, and his legal analysis regarding Section 36C of the 1971 Act in general, and although it cannot be gainsaid that Judge Kamara was

dealing with appeals against two separate immigration decisions, nevertheless at paragraph 10 of her determination, Judge Kamara had recorded that the Grounds of Appeal included an argument that the decision was contrary to the law. It is arguable that she had found the variation decision to be unlawful because relevant factors had not been considered. Judge Hodgkinson did not engage with this part of the Appellant's appeal and his failure to deal with this appeal was an arguable error of law.

13. If Judge Kamara had allowed the earlier appeal because both immigration decisions were unlawful, then it was arguable that the Appellant still had Section 3C leave at the date of the appeal in 2014 because his application to vary leave would have remained outstanding. On this rather protracted basis, the judge allowed the appeal on 26<sup>th</sup> August 2015.
14. On 2<sup>nd</sup> September 2015, a Rule 24 response was entered to the effect that Judge Kamara was mindful that she was dealing with two separate immigration decisions, and at paragraphs 14, 18, and 24 of the determination of 9<sup>th</sup> July 2012, the Appellant's appeal under the Immigration Rules and Article 8 was dismissed. The appeal was allowed to a limited extent that Section 47 alone was unlawful (see **Adamally [2012] UKUT 414**).

### **Submissions**

15. In the submissions before me, Ms Akinbolu, appearing on behalf of the Appellant, submitted that if one looks at the determination of Judge Kamara, promulgated on 9<sup>th</sup> July 2012, she had intimated that the Appellant had come to the UK only as a student in 2007 (see paragraph 22). However, Judge Hodgkinson, in his latest appeal, had now confirmed that the Appellant had been in the UK since 2004. There was a gap here in 2006. During this time the Appellant had returned back to India in order to make a new application. But the effect of all of this was that, since the relevant date was 2004, the Appellant had clocked up ten years of lawful residence.
16. Secondly, Judge Kamara may well have been wrong in splitting up the two decisions by the Secretary of State, when she recorded that,
 

“The Respondent's decision to refuse to vary leave in this case included a further decision to remove the Appellant from the United Kingdom by way of directions under Section 47 of the 2006 Act. Both decisions were incorporated in a single notice. Other than a passing reference to Section 55 of the Borders Act, no paragraph 395C removal factors were addressed when the variation decision was taken. Consequently, I find that the Respondent's decision was not in accordance with the law, owing to the findings in **Ahmadi**.” (See paragraph 38).
17. The judge had then gone on to allow the appeal, “to the limited extent that the Respondent reconsider her take account of **Ahmadi**” (see paragraph 40). If at that stage the Respondent Secretary of State had

appealed that decision, the Appellant would not have had a leg to stand upon.

18. However, that decision was never appealed. The Appellant's leave continued and it continued lawfully. In short, the Appellant now stood to be a beneficiary of the ten year lawful residence rule. This appeal should be allowed simply on that basis.
19. For her part, Ms Holmes submitted that Judge Kamara had undertaken a Section 395C assessment and had been unimpressed by this and so there was nothing further to consider. She had recorded that,

"I have attached a considerable amount of weight to the Appellant's admirable charitable work. I have no doubt that he carries out his work with terminally ill patients and others as a demonstration of his faith. There were many heartfelt testimonies among the letters of support before me which obviously add to the strength of the Appellant's case ....." (Paragraph 32).
20. Judge Kamara, however, did not allow the appeal on this basis. She only allowed it to the limited extent that **Ahmadi** had not been properly taken into account.

### **Error of Law and Re-Making the Decision**

21. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
22. This is a case where the Appellant entered the UK on 18<sup>th</sup> March 2004 on a working holidaymaker's visa, which was valid until 25<sup>th</sup> February 2006. He returned to India before the expiry of that valid leave. He then applied from India again to re-enter as a student on 10<sup>th</sup> January 2006. Although that application was initially refused, he succeeded in his quest following an appeal, and entry clearance was issued to him and he re-entered the UK on 22<sup>nd</sup> February 2007. Since then the Appellant has had successive periods of leave as a student until 10<sup>th</sup> November 2011. Before the expiry of his latest period of leave, the Appellant applied for further leave to remain as a student on 7<sup>th</sup> November 2011. The application was refused because the Appellant's English language credentials were not up to the mark. He appealed.
23. When he appealed, judge Kamara dismissed the appeal under the European Convention of Human Rights under Article 8, but held that the decision was not in accordance with the law because both the Section 47 decision and the decision to refuse had been conflated under a single notice. The Appellant's appeal was allowed. The application was remitted back to the Respondent Secretary of State for a lawful decision to be undertaken. When no further decision was undertaken, the Appellant's solicitors on 7<sup>th</sup> March 2014 submitted an application under the long residence Rule (under paragraph 276B, and that application was refused

on 31<sup>st</sup> October 2014. The Appellant appealed against that decision, and Judge Hodgkinson on 3<sup>rd</sup> June 2014 dismissed the Appellant's appeal. The Appellant sought permission to appeal, which on 26<sup>th</sup> August 2014, was granted by Judge McCarthy. The Appellant has now been in the UK for ten years lawfully resident. This is plainly the case. The appeal must be allowed on that basis. I so do.

24. I have therefore remade the decision on the basis of the findings of the previous judge's, the evidence before them, and the submissions that I have heard today, and I allow this appeal for the reasons that I have given above.

### **Notice of Decision**

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

26. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

18<sup>th</sup> December 2015