



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

Appeal Number: HU/18481/2016
Extempore judgement

THE IMMIGRATION ACTS

**Heard at Field House
On 2 October 2017**

**Decision & Reasons
Promulgated
On 9 October 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**PATRICK NEWTON GNANAPRAGASAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Home Office Presenting Officer

For the Respondent: Mr R Solomon, Counsel instructed by Shanthy & Co
Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Sri Lanka and his date of birth is 21 April 1986. He came here on 15 February 2006 having been granted leave to enter as a student and he remained here lawfully until 19 June 2015. The Appellant made an application for a residence card as an extended family member under the 2006 EEA Regulations on 18 June 2015, before the expiry of his leave on 19 June 2015. This application was refused by the

Secretary of State on 14 August 2015. He made an application under the long residence Rules on 27 January 2016 and this was refused by the Secretary of State on 14 July 2016. The Appellant appealed against this decision and his appeal was allowed by Judge of the First-tier Tribunal Cockrill, in a decision that was promulgated on 20 January 2017, following a hearing on 12 January 2017 (not 2016 which is a typographical error). Permission was granted to the Secretary of State by Judge of the First-tier Tribunal Page on 31 July 2017.

2. The Secretary of State in the Reasons for Refusal Letter referred to the obtaining of a fraudulent document but this was not pursued at the hearing. It was agreed by Mr Solomon at the hearing before the First-Tier Tribunal, that there was no right of appeal in relation to the EEA point following Sala [2016] UKUT 411. It was also agreed at the hearing by both representatives that this Appellant did not have leave under section 3C of the 1971 Act following his application under the 2006 EEA Regulations (see AS (Ghana) [2016] EWCA Civ 133).
3. The appeal was pursued on Article 8 grounds, and the argument for the Appellant, was that the Secretary of State failed to apply the relevant policy (identified as “The guidance long residence version 13.0 published for the Home Office staff on 8 May 2015”):

“This page tells you about circumstances that break lawful residence for long residence applications and when you can use discretion for short breaks in lawful residence:

Time spent outside the UK:

Gap(s) in lawful residence:

You may grant the application if an applicant:

- Has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days, and
- Meets all the other requirements for lawful residence.

The 28 day period of overstaying is calculated from the latest of the:

- End of the last period of leave to enter or remain granted.
- End of any extension of leave under sections 3C or 3D of the Immigration Act 1971.
- The point that a migrant is deemed to have received a written notice of invalidity, in line with paragraph 34C or 34CA of the Immigration Rules, in relation to an in-time application for further leave to remain.

Periods of overstaying:

When refusing an application on the grounds it was made by an applicant who has overstayed by more than 28 days, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

- Serious illness which meant the applicant or their representative was not able to submit the application in time - this must be supported by appropriate medical documentation.
- Travel or postal delays which meant the applicant or their representative was not able to submit the application in time.
- Inability to provide necessary documents - this would only apply in exceptional or unavoidable circumstances beyond the applicant's control. For example:
 - o It is the fault of the Home Office because it lost or delayed returning travel documents.
 - o There is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood. The applicant must send evidence of the date of loss and the date replacement documents were sought.

Any decision to exercise discretion and not refuse the application on these grounds must be authorised by a senior caseworker at senior executive officer (SEO) grade or above.

When granting leave in these circumstances, the applicant must be granted leave outside the rules for the same duration and conditions that would have applied had they been granted leave under the rules.

Time spent outside the UK:

A person who is outside the UK will not be in breach of the Immigration Rules.

You can overlook a period of unlawful residence if the applicant leaves the UK after their valid leave has expired and:

- Applies for entry clearance within 28 days of their original leave expiring.
- Returns to the UK with valid leave within 6 months of their original departure.

Examples of gaps in lawful residence:

The examples below show some instances when it may or may not be appropriate to grant the application. This is not a complete list and you must judge each application on the information it contains and discuss this with a senior caseworker.

Example 1:

An applicant has a single gap in their lawful residence due to submitting an application."

4. At the hearing before the First-tier Tribunal Mr Solomon referred to a “lacuna” in the legislation because the Appellant had in fact made an in-time application under the 2006 EEA Regulations, but does not have the benefit of 3C leave. The judge made findings at paragraphs 38 through to 45 which are relevant:

- “38. The situation is that the Respondent does have a policy to deal with those who have broken the continuity of their residence and, in this particular case, suffice it to say that the Respondent has simply not addressed her own public policy in any shape or form.
39. What was incumbent upon the Respondent, pursuant to her policy, was to consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying. The simple answer to that is that the Appellant really did not appreciate that he was getting himself into this difficulty and that is why he did not make the application to regularise his position, he was simply awaiting the outcome of the 2006 Regulations application.
40. What we have here, therefore, is not a case where someone has been absent from this country for an appreciable length of time and then has to explain and justify that period of absence. It is not a question of ill health, or anything of that nature, intervening. As Mr. Solomon rightly indicated, in my judgment, it is a lacuna in the law in the sense that a layman would naturally expect that if they had made this Residence Card application that that would not jeopardise the whole issue of the calculation of time for the purposes of showing ten year’s continuous lawful residence. What the policy encourages the decision-maker to do is to apply discretion to count time spent in this country as lawful residence for an EE or EEA national, or their family members exercising their Treaty rights to reside in the UK.
41. It is my overall assessment, having regard to all the circumstances presented to me, that if I was to step into the shoes of the Secretary of State then I would exercise discretion in the Appellant’s favour, given all that I have read about and heard.
42. Further, or in the alternative, the way in which this failure, as I see it, to apply the policy to the Appellant’s situation can be dealt with is that it features as a factor in an analysis of the Appellant’s private life outside the context of the Immigration Rules. Prior to turning to that area, though, it seems to me that I need to look at whether or not the Appellant can meet the requirements of the Rules and the only relevant part, as I see it, is paragraph 276ADE(vi). Can it rightly be said that there would be very significant obstacles to his integration to Sri Lanka? Although the Appellant has been here for a very long time, that specific test, it seems to me, is not met by the Appellant. The

fact that he has formed ties here, and feels very much settled in the United Kingdom, is not the point. He has not presented any argument and material to show that there really would be significant obstacles to his integration to Sri Lanka, let alone very significant obstacles. As I see it, on the facts presented by this Appellant, he does not succeed under the Rules.

43. There is no further threshold set and, looking at the matter overall, it does seem to me that there are compelling circumstances whereby I can look at his position in far more detail outside the Rules. It allows me to take what I term a more global assessment of the Appellant's situation. Clearly, I am going to be following the five-stage approach set out weighed in **Razgar [2004] UKHL**. There is here a private life that has been developed, albeit that the Appellant did not have any expectation that he would be able to stay on in this country. It is clear he has developed a number of ties and associations over the very long time that he has been here, since 2006. I think it is very much to be noted that he has been here lawfully right up to 2015.
44. Looking, therefore, at the several steps under **Razgar**, there would be an interference with that right to respect for private life and of sufficient gravity such as to engage Article 8. The third question is a particularly interesting and critical one in the particular circumstances of this case. It seems to me that the lawfulness of the decision has been brought into question by the failure of the Respondent to give proper consideration to her stated policy and guidance in relation to long residence applications where applicants have overstayed. If I am right in that analysis so far, then the matter could end there because the decision could then rightly be said not to be in accordance with the law but, for the purposes of this appeal, I think it is helpful to go on and look at the fourth and fifth questions and, conflating those, the real issue is proportionality. I can, though, in looking at proportionality, take full and proper account, as I do, of what seems to be an undesirable prejudice caused to the Appellant by the particular sequence of events in his case. It seems to me that that is something that can be rightly placed in the scales, the fact that he did not realise that he was jeopardising the calculation of the ten year period by his 2006 Regulations application. He has not fallen far short of showing compliance, in any event, with paragraph 276B.
45. In looking also at public interest, I am of course mindful of the statutory provisions of Section 117B to the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014, Section 19. The Appellant does speak English. He has not been a burden on the state. He has been supported by relatives; he has got the capacity to gain work, once he is permitted to do so lawfully. He has taken perfectly proper steps to try to regularise his stay in this country over the

years. Whilst it might be said that his position has technically been precarious, I think it is also right to record that as the months and years have gone on the Appellant had considered that he was more and more settled in this country, in practice, and had really thought that he had been able to show ten year's continuous lawful residence here. Looked at overall, therefore, the Section 117B factors can be brought in aid of the Appellant. The reality of the situation is that the Appellant has been in this country now for practically eleven years and, with the one exception when he went back for his father's funeral, he has made this country his home, with all that that entails. I have devoted some time to this issue of the Appellant being treated as an overstayer. It seems to me that there is some injustice that is likely to be caused to the Appellant if a strict view is taken of that break in the calculation of time. There was policy and guidance issued by the Respondent and it was incumbent upon the Respondent to apply that guidance. I am afraid she did not apply it. Discretion could have been, and indeed in my judgment ought to have been, exercised in the Appellant's favour, given the overall circumstances and that is a factor which I give weight to in looking at this final question of proportionality of the interference. My overall conclusion, therefore, in the light of all the material presented, is that the decision would be a disproportionate one."

5. The Secretary of State's grounds of appeal argue that the judge erred in allowing the appeal under Article 8 because the judge failed to have regard to the exceptional circumstances test. It is also argued that the Appellant's circumstances do not fall within the policy and therefore there has been no breach by the Secretary of State. It is further argued that the judge relied on an erroneous finding that there was a failure to apply the policy and that there was a lacuna in the law in respect of EEA nationals wishing to apply for indefinite leave to remain.
6. I heard extensive submissions from Mr Solomon and Ms Ahmad addressed me in respect of the grounds.

Error of Law

7. The judge erred in concluding that the Secretary of State should have applied the guidance. The guidance refers to gaps in lawful residence and under this discreet heading indicates that leave may be granted if an applicant has short gaps in lawful residence, no more than 28 calendar days, and meets all the other requirements for lawful residence. It is clear that this part of the guidance does not apply to the Appellant. Mr Solomon referred me to the paragraph under the heading 'periods of overstaying' and his submission was that the "exceptional circumstances" which are referred to in this paragraph, are the exceptional circumstances that the judge referred to in the decision.

8. On a proper reading of the guidance, it covers situations where a person who has accrued ten years' lawful continuous residence then overstays and fails to apply within the first 28 days of overstaying. It refers to the failure to submit an application in a timely fashion and it does not apply to a situation where a person, like the Appellant, has not in fact accrued ten years' lawful continuous residence under the Rules. The policy does not apply and therefore it was not incumbent on the Secretary of State to apply it. The judge in concluding that the Secretary of State failed to apply the policy and attaching significant weight to this in the Article 8 proportionality assessment material erred.

Notice of Decision

9. I set aside the decision. I agreed with the parties that there would need to be a *de novo* hearing and remitted the matter to the First-tier Tribunal for a re-hearing.
10. The judge made a finding in relation to paragraph 276ADE and there has been no counter challenge to this. The First-tier Tribunal will re-hear the matter afresh. There may be no change in the position and no good reason to go behind the finding, but that will ultimately be a decision for the judge who will consider the appeal under Article 8 at the date of the hearing.

No anonymity direction is made.

Signed Joanna McWilliam

Date 6 October 2017

Upper Tribunal Judge McWilliam