Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18009/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 7 April 2017	**On 31 May 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TEJINDER SINGH
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Mills, (Senior Home Office Presenting Officer)
For the Respondent: Mr Hoare (Solicitor)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (Judge Samimi hereinafter "the judge") made after a hearing of 15 July 2016, to allow the claimant's appeal against a decision of the Secretary of State made on 7 May 2015, refusing to vary leave to enter or remain and deciding to remove him from the UK.

2. There is something of a history to all of this. The claimant, who is a national of India and who was born on 25 April 1981, entered the UK on 16 January 2005 having obtained entry clearance as a student. He was given valid

leave, on that basis, until 28 February 2006, such leave being extended until 30 April 2007 and then to 30 November 2007. Prior to the expiry of the latter grant he had met and commenced a relationship with a Polish national one Dorota Druzko and, indeed, there is evidence indicating that the two had married on 14 September 2007. In reliance upon that relationship the claimant applied on 29 November 2007 for an EEA Residence Card. That was granted, although seemingly not until 4 March 2009, with an expiry date of 4 March 2014. On 3 March 2014 the claimant sought a Permanent Residence Card but, on 25 April 2014, his application was refused. He appealed against that decision, but on 21 January 2015, he withdrew his appeal. On 26 January 2015 he applied for indefinite leave to remain on the basis of long residence in the United Kingdom. It appears that the Secretary of State treated that as a human rights claim rather than simply as an application under the Immigration Rules because in a letter of 4 May 2015 an officer acting on the Secretary of State's behalf told him "your human rights claim has therefore been refused". That was in a covering letter attached to a decision of 28 April 2015 refusing leave to remain. That decision was, shortly after, overset by the decision of 7 May 2015 referred to above. The claimant appealed and it appears his appeal has been treated as being against both of those decisions. In December 2015, whilst the appeal was pending, he says that his marriage broke down and that his wife left him and left the UK. His appeal, as noted, succeeded. The judge's decision was promulgated on 26 July 2016.

3. The judge, in a short written decision, set out the relevant immigration history. It was said that the appeal had been brought under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. The Secretary of State's position as to matters up to the hearing was summarised in this way;

"4. The Respondent has considered the Appellant's application in a letter dated 28.4.2015. this in summary provides that having regard to the Appellant's immigration history, given that the Appellant had withdrawn his EEA Appeal on 23.1.2015, he would not have had a S.3C (Immigration Act 1971), and accordingly, he had been without lawful leave from 25.4.2014, amounting to a period of approximately nine months (277 days), and hence breaking the Appellant's period of continuous residence. Consequently, the Appellant has been found to complete a continuous lawful period of approximately nine years and three months to the date of the respondent's decision."

4. So, in short, the Secretary of State's position was that the claimant had failed to clock up ten years continuous lawful residence under paragraph 276A of the Immigration Rules.

5. The judge though decided, on the basis of published Home Office policy, that if a person was exercising treaty rights in the United Kingdom then the period in which he or she was so doing would on discretionary grounds be counted as lawful residence under paragraph 276A. The judge quoted from

what he termed "the Respondent's Guidance on Long Residence – version 13.0". He thus concluded;

> "8. I find that the Appellant clearly had been exercising treaty rights as a family member of an EEA National until the time of his application, and the periods of break that formed the basis of the respondent's refusal do not disqualify him as he was exercising EEA right to reside throughout the disputed period, and that right had not b [sic] curtailed or cancelled by virtue of Regulations 19 or 20 of the EEA Regulations. I find that the Appellant had been exercising treaty rights as the family member of an EEA national in accordance with Regulation 15 of the EEA Regulations throughout the relevant period. I therefore find that the Appellant has satisfied the requirements of Long Residence Rules in accordance with Paragraph 276B of the Immigration Rules."

6. The Secretary of State applied for permission to appeal contending, in a nutshell, that the claimant had not had a right of appeal such that there had been no valid appeal before the judge; that the judge had had no proper basis to "assume" that the claimant had been exercising treaty rights at any point beyond the date on which his original residence had been issued; that the judge had wrongly proceeded on the basis that EEA Residence rights and leave to remain were interchangeable concepts and that the judge had misconstrued the policy guidance which he had had regard to.

7. Permission having been granted there was a hearing before me to address the question of whether or not the judge had erred in law and if so, what should flow from that. Representation was as stated above and I received helpful submissions from each representative.

8. I have concluded that, whilst it was brief and might have benefitted from fuller reasoning, the judge's decision did not involve the making of an error of law. I explain why below.

9. It had never been argued before the judge that there was no valid appeal. I accept that in principle, however, such a fundamental point can be properly raised for the first time in grounds of appeal to the Upper Tribunal.

10. The Secretary of State though, in the grounds, makes reference to the amendments to what are referred to as the "new provisions" and which now appear at section 82(1) of the Nationality, Immigration and Asylum Act 2002. It is accepted in the grounds that those new appeal provisions had applied from 6 April 2015. The Secretary of State argues that the relevant decision was not the refusal of a protection or human rights claim or a challenge to a revocation of a protection claim so that, therefore, it was not appealable under section 82(1) as amended. However, as noted above, the application had been characterised by the Secretary of State himself as being a human rights claim. I am satisfied, therefore, that the decision under appeal was a refusal of a human rights claim in addition to a refusal of a claim under the Immigration rules and that, therefore, there was a valid appeal before the judge.

11. As to the judge simply assuming that the claimant had been exercising treaty rights during the relevant periods on the basis of his relationship with a Polish national, it is apparent that documentary evidence had been provided for the purposes of the appeal, addressing her exercise of treaty rights as a qualified person within the meaning of the EEA Regulations. What the judge had to say about all of this was exceptionally brief but I have concluded that in the face of such evidence being offered and in the face of there not having been any specific challenge to the status of her as a qualified person or him as a person exercising treaty rights (and there is nothing in the judge's decision to suggest that there was any such dispute despite the presence of a Presenting Officer) the judge's approach was permissible. Further, I do not accept that the judge treated an EEA residence rights and the concept of leave to remain as being interchangeable. What he did was simply apply the relevant policy. I cannot seem that he misconstrued the policy and it has not been properly explained how he might have done.

12. In the circumstances, therefore, I have concluded that none of the grounds relied upon by the Secretary of State have been made out. Accordingly, the judge's decision shall stand.

Decision

The decision of the First-tier Tribunal did not involve an error of law. That decision shall, therefore, stand.

No anonymity direction is made.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated 26 May 2017

To the Secretary of State: Fee award

I make no fee award.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated 26 May 2017