**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/29887/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On August 31, 2017** | **On September 8, 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR RAAYIN AHMED MINANUR RAHMAN**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Jafar, Counsel, instructed by Liyon Legal Limited
For the Respondent: Mr Armstrong, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I do not make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The appellant is a Sri Lankan national. The appellant entered this country on September 13, 2004 with entry clearance as a student until January 31, 2009. On

January 21, 2009 he applied to extend his stay as a Tier 1 Highly Skilled (Post Study) Migrant but this application was refused on March 18, 2009. His appeal rights were exhausted on July 6, 2009 and he left the United Kingdom on July 30, 2009.

3. He then applied for entry clearance as a Tier 4 (General) Student on August 17, 2009 and this was successful. He re-entered the United Kingdom on October 10, 2009 and his leave to remain as a Tier 4 (General) student was extended on March 7, 2011, April 16, 2012 and finally on November 19, 2013 his leave was extended until March 14, 2015.

4. On March 5, 2015 he applied to remain under paragraph 276B HC 395 on the basis he had been living here lawfully for ten years. The respondent refused his application on the basis he had left the country on July 30, 2009 and did not apply to return until August 17, 2009. This broke the continuity of his lawful residence.

5. The appellant lodged grounds of appeal on September 1, 2015 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Swinnerton (hereinafter called "the Judge") on October 21, 2016 and in a decision promulgated on November 18, 2016 the Judge refused his appeal.

6. The appellant appealed this decision on December 1, 2016. Permission to appeal was initially refused by Judge of the First-tier Tribunal Grant-Hutchinson on May 19, 2017 but when those grounds were renewed to the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge McWilliams on July 13, 2017.

7. The respondent lodged a Rule 24 response dated August 1, 2017 in which she opposed all grounds of appeal.

8. The matter came before me on the above date. The appellant was present and represented as set out above.

**Submissions**

9. Mr Jafar adopted his grounds of appeal and submitted that the Judge had erred by failing to give any weight to what happened in 2009. The appellant had been wrongly refused leave to remain as student as evidenced by the Court in the case of Secretary of State for the Home Department v Pankina [2010] EWCA Civ 719. Like in that case the appellant's application had been refused because the respondent wrongly stated he was required to have held his funds (£700) for three months. The ten-year lawful residence period had only been broken because the respondent refused his application and the appellant left the United Kingdom and applied for entry clearance. This was a historic injustice that should have been corrected. The Judge erred because he attached no weight to this issue when considering proportionality.

10. Mr Armstrong relied on the Rule 24 response and submitted the fact remained his continuous lawful residence was broken and whichever Mr Jafar argued the case the

appellant could not have succeeded under the Immigration Rules. The Judge considered the relevant matters and reached a decision open to him on the facts presented.

**FINDINGS**

11. Permission to appeal was granted by Upper Tribunal Judge McWilliams. She found it arguable that the circumstances of the events in 2009 were a material consideration in the proportionality assessment.

12. Mr Jafar sought to persuade me that the respondent should never have refused the appellant's current application because she had acted unfairly in 2009 when refusing his application for Tier 1 status. However, I reminded Mr Jafar that the Judge had only been concerned with a human rights appeal and in any event the circumstances clearly demonstrated there had been a break in his lawful residence and even if the Judge had been empowered to consider an appeal under the Immigration Rules the facts remained that there was a break in his lawful residence and his application under paragraph 276B HC 395 was bound to fail.

13. However, this was a human rights appeal and it was necessary therefore for the Judge to consider all the evidence for the purposes of a proportionality assessment. The Judge's assessment of the evidence can be found between paragraphs [21] and [28] of his decision.

14. During the hearing I raised with Mr Armstrong whether he felt the Judge had given any weight to the events of 2009 in that assessment. He agreed with me:

    (a) Paragraphs [21] to [23] set out the paperwork and the appellant's family circumstances.

    (b) Paragraph [24] set out that he left the United Kingdom and his continuous residence had been broken.

    (c) Paragraphs [25] to [28] dealt with the current situation.

    (d) The Judge did not attach any weight to the events of 2009.

15. Given the above facts I indicated to the representatives that I was satisfied there was a clear error in law for the reason given by Upper Tribunal McWilliams. I asked the representatives if they were content for me to remake this matter in the Upper Tribunal without the need for any further submissions and both representatives agreed that this was a matter that could be concluded without any further evidence or submissions.

16. The relevant factors I have considered are:

    (a) The appellant is now 33 years of age and with the exception of 254 days he had lived continuously in the United Kingdom since September 13, 2004. He spent 21 years living in Sri Lanka prior to coming to the United Kingdom in 2004.

(b) The appellant has lawfully obtained undergraduate degrees and a Master's degree in the United Kingdom.

(c) The appellant and his wife, an Egyptian national, married in Sri Lanka and have a daughter. His daughter and wife went to live in Egypt in August 2014 and they have lived there since. The appellant last saw his wife and child in November 2014 when he visited them.

(d) The appellant's sister and brother-in-law live in the United Kingdom. The appellant is a godfather to their children.

(e) The appellant's application as a Tier 1 (Post study) migrant failed because the Judge found he had not held sufficient funds in his account for three months. The basis for this finding, which upheld the respondent's refusal letter, was subsequently found to be legally flawed by the Court in Pankina. The appellant never appealed his decision.

(f) The appellant left the United Kingdom and applied to re-enter as a Tier 4 migrant in August 2009 and was granted permission to enter in October 2009.

(g) The appellant's parents and three siblings live in Sri Lanka. His father has a business there.

17. The respondent originally considered this application under paragraph 276ADE(vi) HC 395 because he had spent less than 20 years in this country. In order to have succeeded under that Rule the appellant would have had to demonstrate there were very significant obstacles to his integration into Sri Lanka. The appellant's own immigration history demonstrates his ties to Sri Lanka. He returned there for 26 days in September 2010, for 24 days in November 2011, for 17 days in October 2012, for 9 days in January 2013 and in 2014. His parents and siblings continue to live there. He has studied here with a view to returning to Sri Lanka better qualified for work and I am satisfied the respondent was entitled to find there were no very significant obstacles to his integration into Sri Lanka. There was also no claim under Appendix FM of the Immigration Rules because the appellant's wife and child reside in Egypt- his wife is Egyptian.

18. I am invited to consider the appeal under article 8 ECHR. Mr Armstrong submitted there had to be exceptional reasons for me to consider the appeal under human rights but having considered the background and all the circumstances I accept the length of time he has spent here is a reason to consider his claim on human rights grounds.

19. The correct approach to an article 8 claim is set out in Razgar [2004] UKHL 00027. The appellant has studied and worked here for over 12 years and I accept he has established a private law and requiring him to leave would interfere with the life he has created here. Such a refusal is in accordance with the law because he failed to meet the Immigration Rules and it was for reasons set out in article 8(2) ECHR. The issue is one of proportionality.

20. In Strbac v SSHD 2005 EWCA Civ 848 the Court of Appeal said that discrimination in respect of accommodation or employment cannot normally engage Article 8. This Article confers no right to a home or a job and Article 14 does not confer a free-standing right to be protected from discrimination.

21. Whilst a long period of employment can give rise to a valid private claim I am satisfied that the appellant has not established a work record in this country. He would have been allowed part-time work as a student and rightly or wrongly he never worked as a Tier 1 migrant.

22. In MG (2005) UKIAT 00113 the Tribunal suggested that it must be asked in any event whether that interference (removal from the United Kingdom) will "have consequences of such gravity" as actually to engage Article 8 at all.

23. The appellant came here to study and he studied between 2004 and 2015. In that time he passed his exams and obtained a degree at Brunel University in aerospace engineering in 2008 and a Master of Science at the same university in Advanced Mechanical Engineering in 2012. His status throughout this period is deemed under section 117B of the 2002 Act as precarious because his status was never settled.

24. When he came to this country in 2004 it would have been his intention to return to Sri Lanka after he gained his qualifications and whilst I accept he has always been here lawfully the fact remains he would have been aware that his visa gave him no entitlement to remain here.

25. The fact he speaks English is a neutral factor. I was provided with some evidence of his private life outside of his studies. The letters of support confirm he is well thought of by extended family and friends.

26. He is a Sri Lankan national and has lived the majority of his life in Sri Lanka. His parents and sisters continue to live there and he clearly has close contacts with them and extended family as evidenced by his regular trips to Sri Lanka. He is a 33-year-old male with a degree and a Masters in engineering.

27. I do not overlook his immigration history and in particular the fact that but for what happened in 2009 he may have been entitled to indefinite leave to remain under paragraph 276B HC 395. Mr Jafar invited me to attach significant weight to this immigration history and what he describes as a historical injustice. As I indicated above the respondent was entitled to refuse that application and the main reason I am considering his appeal outside of the Rules is his length of time in this country. It is therefore a factor I have given weight to when assessing whether it would be proportionate to require him to leave this country.

28. His wife and child have never lived here for any period of time. His wife has been refused entry clearance as a family visitor already and in her statement expresses a view that she would be unable to live in Sri Lanka. However, when they married she

and the appellant would have been fully aware that he had no right to remain here and their married lives, when they married, would ultimately be in either Sri Lanka or Egypt.

29. I have balanced all the above factors and having done so I find that it would not be disproportionate to refuse the appellant's appeal on human rights grounds.

**DECISION**

30. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

31. I have re-made the decision and I dismiss the appellant's appeal on human rights grounds.

Signed Date 07.09.2017

Deputy Upper Tribunal Judge Alis

**FEE AWARD**
**TO THE RESPONDENT**

No fee award is made because I have dismissed the appeal.

Signed Date 07.09.2017

Deputy Upper Tribunal Judge Alis