



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

Appeal Number: HU/02751/2016
HU/02755/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 13 December 2017**

**Decision &
Promulgated
On 24 January 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

**MR MIAH MOHAMMED ENEATH KABIR
MRS SHARABAN TAHURA BENTEE AKBER
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Karim, of Counsel instructed by Thamina Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permissions against a decision of Judge of the First-tier Tribunal Samimi who in a determination promulgated on 12 May 2017 dismissed their appeals against a decision of the Secretary of State refusing them leave to remain on human grounds.

2. The appellants argued that the judge had not dealt with a primary argument in their case which was that they qualified for leave to remain under the ten year lawful residence provisions of paragraph 276C and 276B(i)(a) which reads:-

“He has had at least 10 years’ continuous lawful residence in the United Kingdom.”

3. It appears that at the hearing it was accepted by the appellants’ representative that they had not completed ten years’ lawful residence at the time of application. The judge noted:-

“At the hearing before me, Mr Chowdhury has accepted that the appellant does not meet the ten year lawful residence test and cannot succeed on that basis.”

The judge went on to consider the criteria necessary to qualify for leave to remain on human rights grounds under the Rules and outside the Rules. She concluded having taken into account the relevant case law and the provisions of Sections 117A- 17D of the 2002 Act that the appellants did not qualify for leave under the provisions of Article 8 either within or outside the Rules.

4. The appellants appealed referring to the appellants’ history here and their various applications for leave to remain and appeals following refusal, stating that the judge had erred because consideration had not been given to a Section 120 Notice which argued that they were entitled to leave to remain under the long residence provisions as they had had ten years’ lawful residence. It was argued that had the notice been considered the requirements of paragraph 276B of the Immigration Rules would have meant that the appellants should have been granted indefinite leave to remain. It was argued that the appellants had arrived on 12 October 2006 and had 3C leave until 19 June 2017 and had then made a leave to remain application within 28 days of the expiry of that 3C leave and that application was therefore continuing until the determination of this appeal. Reference was made to an unreported determination of the Tribunal which indicated the way in which the 28 day period might be calculated.
5. At the hearing of the appeal before me Mr Bramble on behalf of the Secretary of State relied on a Rule 24 Notice which stated that there had been no need for the judge to consider the guidance on long residence as it had been conceded at the hearing that that could not apply to these appellants. Mr Karim stated that there was no evidence that that concession had been made but there is no affidavit from Counsel who appeared before the First-tier Tribunal Judge indicating that he had not made that concession. Be that as it may the issue of whether or not the judge should have allowed the appeal under the ten year provisions was considered by me after submissions from both Mr Bramble and Mr Karim. Mr Bramble pointed out that since the refusal of this application an application for leave to remain under the ten year provisions had been

made and refused. It appears that Mr Karim had only been made aware of that just before the hearing.

6. It is relevant to set out the appellant's history here. Mr Kabir entered Britain as a student on 12 October 2006, thereafter applying for leave to remain in that capacity. He was granted leave to remain as a student until 21 June 2011. He then received further leave to remain for post-study work until 14 March 2013. On that date he had applied for further leave to remain as a Tier 1 (Entrepreneur). That application had been refused on 7 May 2013 with a right of appeal. He exercised that right but the appeal was dismissed in November 2013. Permission to appeal to the Upper Tribunal was granted but the appeal was dismissed on 14th March 2014. On 29 June 2015 an application for permission to appeal to the Court of Appeal was refused and the appellant became appeal rights exhausted on 19 June 2015.
7. On 15 July the principal appellant applied for further leave to remain on the basis of his family and private life rights. That had been refused on 25 November 2015 having been certified as clearly unfounded. The application was reconsidered and on 19 January 2016 a decision to refuse was again made but a right of appeal was granted. That right of appeal led to the appeal which is now before me.
8. On 19 November 2016 the appellant had applied for indefinite leave to remain on the basis of long residence and that was refused in the letter of refusal dated 19 July 2017. It is of note that the provisions of paragraph 276B of the Immigration Rules were relied on by the Secretary of State when refusing the application. The letter set out those Rules as follows:-

“ Under paragraph 276B of the Immigration Rules, the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

...

(v) The applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

With regard to paragraph 276B(i)(a), you have not accrued ten years' lawful residence in the United Kingdom. As outlined in your

immigration history above you entered the United Kingdom on 12 October 2006. Your lawful leave expired on 19 June 2017. You have therefore accrued approximately eight years eight months as lawful residence in the United Kingdom.”

9. It was argued before me by Mr Karim that not only was the Section 120 Notice material but that before the date of hearing the appellant had completed ten years’ lawful residence. It was argued the judge had erred in law by not engaging with this. It is clear that that was not argued before the judge and it was not a matter that was , on the face of it, obvious. As I have stated above, I do not consider that there is any error of law in the judge not considering a matter which was not argued before him.
10. In any event Mr Karim argued that the central issue in this case was the period between 19 June 2015 when the appellant became appeal rights exhausted on the first application and his making the application on 15 July 2015, the refusal of which is what is appealed before me. He stated that although the Secretary of State was stating that the appellant’s leave to remain came to an end in June 2015 it was unlawful for the Secretary of State to place weight on the period of less than 28 days after the appellants become appeal rights exhausted and before the principal appellant made the further application. He argued that the appellant’s leave under Section 3C had continued until he became appeal rights exhausted and therefore the lawful residence had continued until the hearing of the appeal. It was Mr Bramble’s contention that the leave to remain had ended when the appellant became appeal rights exhausted and that the 28 day provisions did not apply to a period after an appellant had become appeal rights exhausted and before they made the further application. It was, in effect, not possible to restart the clock.
11. Mr Karim countered that argument that it was for the First-tier Judge not only to consider that application but that he should have regarded that period in accordance with the terms of the Rules.
12. He argued that the 28 day period - the period between the appellant becoming appeal rights exhausted and making the further application - would have been disregarded had the appellant been granted further leave and therefore the appellant was in a “chicken and egg” situation in that he would have been entitled to indefinite leave to remain had the appeal been successful.

Discussion

13. It is necessary to look at Rule 276B which I have set out above and in particular to sub-paragraph (v) which states that an applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less would be disregarded.

14. I have considered the terms of the Long Residence Guidance published on 8 May 2017, document V13.0. What it states at page 28 of 54 is this:-

“If an applicant submits an out of time application, they will have a gap in continuous lawful residence, from the date their leave expires until the date they are next granted leave, regardless of how long it takes for the decision to be made.

For an example of this, see example 5 and related link: examples of continuous lawful residence. The exception to this is where the application is out of time for 28 days or less, but you exercise discretion and count the residence as continuing.

Both 3C and 3D leave count as existing leave to enter or remain in the United Kingdom therefore is lawful residence for the purpose of the ten year long residence Rule.

A person cannot make a fresh application for leave while they had 3C or 3D leave pending the outcome of a decision on their outstanding application. This means that someone who reaches the ten year threshold during this leave cannot apply for indefinite leave. This could occur in the following two situations: the applicant completes ten years' continuous lawful residence while awaiting a decision on an application for further leave. If the application that has generated the 3C leave has not yet been decided, the applicant can vary the grounds of that application to include a request for leave on the basis of long residence. If a long residence application would attract a higher fee than the initial application, the applicant may pay the balance before the varied application can be considered. For more information see related links:

- 05.0 – Section 3C of the Immigration Act 1971 (as amended)
- Specified application form.

The applicant completes ten years continuous lawful residence while awaiting a decision of an appeal. The person may complete ten years of continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under Section 3C and 3D it is not possible to submit a new application while the appeal is outstanding. However the applicant can submit further grounds to be considered at appeal. If the applicant has an outstanding appeal against a decision to refuse leave to remain or indefinite leave to remain, and submits an application for long residence he must void the long residence application and refund the fee.”

15. The reality is that the Section 120 Notice which was submitted by the appellant, on which Mr Karim relied was dated 30 December 2016. It was therefore dated after the appellant had become appeal rights exhausted

but pending the further appeal which is the subject of the appeal before me. The 26 day period between the appellant becoming appeal rights exhausted in June 2015 and the appellant making the further application was not in my view a period which is covered by the 28 day period to which reference is made in Rule 276B(v) and therefore it falls to be disregarded. Such a period would in my view be a period between two periods of lawful leave. The appellant did not have lawful leave to remain after he became appeal rights exhausted. He cannot therefore claim that he benefits from the ten year provisions.

16. I therefore consider that although I am of the view that the judge is correct not to deal with the issue raised in the Section 120 Notice which related to ten years' lawful residence as that had been conceded before her that even if she were wrong not to consider that point it is not a material error of law because the appellant could not have succeeded on that basis in any event.
17. I therefore find that there is no material error of law in the determination of the First-tier Judge and I therefore find that her decision shall stand and this appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed



Date: 18 January 2018

Deputy Upper Tribunal Judge McGeachy