



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10647/2016

THE IMMIGRATION ACTS

Heard at The Rolls Building, London
On 8 February 2018

Decision & Reasons Promulgated
On 6 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAJASATHAN PARAMANATHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: Ms Bond, instructed by SJS Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant Kajasathan Paramanathan was born on 4 May 1987 and is a male citizen of Sri Lanka. His immigration history is somewhat complex:

<u>Date</u>	<u>Chronology</u>
4 May 1987	Appellant born.
19 April 2002	Appellant arrives in the United Kingdom and applies for asylum at port. The appellant granted temporary admission.
3 October 2003	Appellant granted discretionary leave to remain until 2 October 2004.
30 September 2004	Appellant applies for further leave to remain.
1 December 2004	Application refused with right of appeal.
11 April 2005	Appeal dismissed on asylum grounds but allowed under Article 8 ECHR. Appellant granted a further period of discretionary leave to remain from 19 May 2005 to 19 May 2008.
4 March 2005	Appellant's brother-in-law (a German citizen) applies for an EEA residence card for his family including the appellant as another family member (OFM).
1 August 2005	Appellant's brother-in-law issued with a permit but appellant's application refused on the grounds that there was insufficient evidence that the appellant had been in his brother's family in another EEA country before arriving in the United Kingdom.
25 January 2006	Appellant applies for transfer of conditions and an extension of discretionary leave.
7 April 2006	Appellant successfully appealed against the refusal of a residence card. However, decision not implemented until December 2010.
12 May 2008	Appellant applies for further discretionary leave.
21 December 2010	Whilst the appellant's application was pending the appellant is issued with an EEA residence card valid until 21 December 2015.
14 March 2011	The appellant applied for further discretionary leave but his application is refused.

16 May 2011	The appellant's appeal against the refusal for further leave to remain is dismissed.
1 June 2011	Appellant's appeal rights (application for further leave to remain) exhausted.
17 May 2013	The appellant's brother-in-law deported from the United Kingdom to Germany.
27 October 2015	Appellant applies for indefinite leave to remain based on ten years' lawful residence (paragraph 276B of HC 395 (as amended)).
29 September 2017	Hearing before First-tier Tribunal Judge Oliver. Secretary of State not represented.
15 November 2017	Judge Oliver allows the appeal on Article 8 ECHR grounds.
21 December 2017	Judge J M Holmes grants permission to appeal to the Upper Tribunal.
8 February 2018	Hearing before Upper Tribunal.

2. The Secretary of State submits that the judge failed to resolve the conflict between the respondent and the appellant as to whether or not the appellant continued to be a dependent of an EEA national exercising treaty rights before his brother was deported from the United Kingdom in 2013. The Secretary of State relies on his published 'Modern Guidance; Long Residence:

Time spent in the UK with a right to reside under EEA regulations

This page tells you how to consider a long residence application when a person has spent time in the UK with a right to reside under the European Economic Area (EEA) regulations.

Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:

- the spouse, civil partner or other family member of a European Union (EU) national
- an EEA national exercising their treaty rights to live in the UK but have not qualified for permanent residence
- former family members who have retained a right of residence

During the time spent in the UK under the provisions of the EEA regulations, the individuals are not subject to immigration control, and would not be required to have leave to enter or leave to remain. See EEA Nationals guidance for further information.

However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK.

Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules. *[emphasis as it appears in grounds of appeal to Upper Tribunal]*

This does not affect the rights of family members of EEA nationals to permanent residence in the UK, where they qualify for it after a period of 5 years residence in the UK - Regulation 15 of the Immigration (European Economic Area) Regulations 2006. More information can be found on the GOV.UK website – apply for a UK residence card.

If an applicant was in the UK with a right to reside under European Economic Area (EEA) regulations, continuous residence is not broken if they leave the UK and are then re-admitted under the EEA regulations.

When granting a Long Residence application in which a person has relied on a period of leave in the UK exercising treaty rights as an EEA national or their family member, any grant of leave must be made outside the Immigration Rules

The Secretary of State asserts that the judge conflated the validity of a period required for the issue of a residence card (five years) with a grant of leave to remain. The respondent argues that the judge failed to understand that a residence card is merely a documentary recognition of an entitlement already possessed by an EEA national who is exercising Treaty Rights. The Secretary of State asserts that the appellant had failed to show before the First-tier Tribunal that either he was dependent upon his brother or that the brother was exercising treaty rights throughout the relevant period and that “given the removal of the brother in 2013 this clearly casts doubt as to whether they were actually exercising treaty rights at that time. The FTTJ gives no consideration to this point”.

3. Granting permission, Judge Holmes wrote:

The grounds are arguable. This is a very brief decision that arguably fails to engage with the evidence before the judge or to resolve the relevant disputed issues of fact arguably, in addition, the judge misdirected himself as to the effect of a residence card; it is not a grant of leave but merely an act that confirms the respondent was satisfied at the date of issue that the requirements of the EEA Regulations were met. Moreover there are no findings upon whether Article 8 is engaged by the decision under the appeal or the nature of the claim that is to be balanced against the public interest. Thus arguably the judge had failed to make any of the relevant necessary findings that would permit him to allow this Article 8 appeal.

4. At the date of the hearing before the Upper Tribunal, the appellant had an outstanding information request which had been submitted to the Home Office. I invited the representatives of both parties to make further written submissions following the hearing and after the information request had been determined. On 2 March 2018, Ms Brocklesby-Weller who appeared before the Secretary of State emailed me as follows:

Put shortly, the SSHD relies on those submissions made orally at the hearing on 8 February and does not propose to make any new points. For brevity those submissions already advanced will not be rehearsed in full again.

In October 2005, Mr Paramanathan was refused a residence permit under Regulation 10 of the 2000 Regulations as the dependant of his German brother in law who had arrived in 2005, three years after Mr Paramanathan. The basis of the refusal was that the EEA national had after Mr Paramanathan and that there was no evidence of past dependency. I accept Ms Bond's assertion that the first basis of refusal was subsequently identified as wrong in law, however previous dependency was still required. Mr Paramanathan succeeded at the AIT, and the SSHD did not challenge the decision- though she perhaps ought to have on the issue of dependency. Irrespective, the SSHD unfortunately delayed in implementing the appeal which was not undertaken until December 2010 and under the 2006 Regulations. In that period the EEA sponsor, on whom Mr Paramanathan was dependant had been imprisoned in June 2010 for a number of years and therefore dependency ceased. Ms Bond for Mr Paramanathan asserts that the requisite five years had been completed prior to the period of imprisonment.

As asserted at the hearing, under the 2006 EEA Regulations at least Mr Paramanathan did not have status. Regulation 7(3) provided that a "documented EFM" was only residing as a family member while he continued to meet Regulation 8(2) and had a valid document. A similar provision existed under the 2000 Regulations - Regulation 10(1) and (2) also refers to issuing "where appropriate". It is therefore submitted that Mr Paramanathan did not benefit from the mandatory discretion operated by the SSHD in the long residence policy.

The SSHD submits that satisfying factual dependency is simply not enough. To take another approach would be to treat EFM's and direct family members equally, contrary to the terms of the Regulations and the Directive.

It is acknowledged that the current issue before the Tribunal is just one of a material error of law. It is submitted that the decision of Judge Oliver is entirely void of reasoning and does not identify the basis in which 10 years lawful residence is accumulated, but for an assertion that it has- see paragraph 7. Nor, is it clear when the Judge considered this period had been completed. The Judge does not formally adopt the reasons articulated in Ms Bond's skeleton argument and in any event, and as alluded above, there are still material issues to be determined by the Tribunal where full argument can be heard. Any error at paragraph 7 of the Judge's decision infects the conclusion at paragraph 8 where it is noted that the public interest is defeated.

5. The appellant's solicitors emailed me to say that the appellant continued to rely upon the skeleton argument and Rule 24 Notice drafted by Counsel, Ms Bond.
6. Judge Oliver, in his decision promulgated on 15 November 2017, sets out briefly a chronology of the appellant's applications. He recorded the evidence which he received from the number of witnesses who attended on behalf of the appellant. The

witnesses were not cross-examined because the respondent was not represented at the hearing. At [7] Judge Oliver wrote:

[The appellant's] application was made under paragraph 276B of the Immigration Rules not under the Immigration (European Economic Area) Regulations 2006. This is an application that can be made any time following completion of ten years of continuous lawful residence and can conclude periods extended by leave under Section 3C of the Immigration Act 1971. When he arrived in the United Kingdom and claimed asylum, he was given temporary admission and this began his period of residence. Although this was refused, the hearing of his appeal did not take place until 2005 and, although this was decided against him, he was given a second period of discretionary leave to 2008. His appeal against refusal to extend this leave extended his period of lawful residence to 2011. That was, as the respondent argued, the end of his period of leave. **But by then he had been granted residence under the Regulations**, which counts as lawful residence, at least until his brother-in-law was removed in 2013. Accordingly, he accumulated ten years' continuous lawful residence during the currency of that period of residency.

Since the appellant meets the Rules the public interest in the maintenance of fair but firm immigration falls away. Refusal is an interference with the extensive private life which is built up in his fifteen years in the United Kingdom which his extended family members gave unchallenged evidence at the hearing. In these circumstances refusal of the application is disproportionate to the public interest. [my emphasis]

7. I find that the judge has erred in law. As Judge Holmes observed, the judge has incorrectly confused the issuing of a residence card under the 2006 EEA Regulations as synonymous with a grant of leave to remain ("*but by then he had been granted residence under the Regulations ...*"). In effect, the judge has found that the appellant meets the requirements of paragraph 276B of the Immigration Rules, having provided "unchallenged evidence" of an "extensive private life" and has consequently concluded that any public interest in his removal is outweighed by the need to protect his private life in this country. The brevity of the analysis is not necessarily fatal to the decision. If the judge is correct in what he says regarding paragraph 276B and if a more detailed analysis of the relevant circumstances would have led to exactly the same result, then any error is unlikely to be material. That, in short, is what Ms Bond, who appeared for the appellant before both Tribunals, has argued. Ms Brocklesby-Weller's submission, that Judge Oliver's decision is "entirely void of reasoning," is not, on Ms Bond's submission, in itself sufficient to render the judge's decision unsafe.
8. The first question which the Upper Tribunal needs to address is whether the appellant meets the requirements of paragraph 276B. Paragraph 276B provides as follows:

276B. 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.
- (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
 - (a) age; and

- (b) strength of connections in the United Kingdom; and
- (c) personal history, including character, conduct, associations and employment record; and
- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and
- (iii) the applicant does not fall for refusal under the general grounds for refusal.
- (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
- (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where
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(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

9. The appellant claims that he had completed 10 years of lawful residence by May 2012 comprising periods of temporary admission, Section 3C leave, discretionary leave to remain and periods spent as the holder of a residence card as the family member of an EEA national. The Secretary of State does not dispute the legality of the various periods of leave save for that in respect of the residence card. Paragraph 276A contains definitions of "continuous" and "lawful" residence:

276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).

(a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:

(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital

or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.

10. Paragraph 276A(b)(iii) provides that a period of time spent in the United Kingdom whilst exempt from immigration control falls within the definition of "continuous residence". I refer to the long residence guidance of the Secretary of State which I have set out above at [2]. The guidance is unequivocal: "during time spent in the UK under the provisions of the EEA Regulations, the individuals are not subject to immigration control and would not be required to have leave to enter or remain". It must follow that the appellant was exempt from immigration control during the period when he held a residence card as another family member. I agree with Ms Bond that time spent whilst in possession of the residence card counted towards the period of long residence under paragraph 276. I also agree with Ms Bond, therefore, that the appellant had accumulated 10 years' lawful residence by May 2012. I disagree with Ms Brocklesby-Weller that it was necessary for the judge to go behind the issue of the residence card to the appellant to examine whether or not the appellant's brother-in-law had been exercising treaty rights. That argument had been advanced in the refusal letter which asserted that, notwithstanding the issue of the residence card to the appellant, he had in fact been living on his own and not dependent upon his brother-in-law. The letter also asserts that the appellant had failed to prove that his brother-in-law had been exercising treaty rights throughout the necessary period of 10 years. I do not find that argument attractive. I am reminded that the appellant successfully appealed against the refusal of the issue of a residence card in 2006 and that the Secretary of State did not seek to challenge that decision. The decision allowing the appeal had not been acted upon by the Secretary of State until December 2010. The Secretary of State herself did not challenge either the appellant's claim that he was a dependent on his brother-in-law or that the brother-in-law himself was exercising treaty rights. I consider that Judge Oliver was right not to examine again the circumstances of the appellant or his brother in law which lay behind that grant of a residence card to the appellant.
11. It was the Secretary of State's decision not to be represented at the hearing before Judge Oliver. The judge heard evidence from a number of witnesses testifying as to the depth and extent of the appellant's private life in the United Kingdom. The Secretary of State

did not take up the opportunity to cross-examine those witnesses. The judge was entitled to find that they had given truthful evidence. He was also entitled to conclude that, after 15 years living in the United Kingdom, the appellant had acquired a substantial private life here. The judge could certainly have gone into greater detail to support his finding but I accept that it would have been strange if the appellant had not acquired a private life whilst living continuously in this country for such a period. In addition, the judge correctly found that the appellant satisfied paragraph 276B. Accordingly, it was open to him to conclude that, given that the appellant met the requirements of the Immigration Rules, any argument that it would be in the public interest to remove the appellant had been significantly diminished. The judge did err by conflating the issuing of a residence card with the grant of leave to remain. However, for the reasons I have given, he reached an outcome in the appeal which was available to him on the evidence and he did so, in particular, having correctly found that the appellant met the requirements of long residence as set out in paragraph 276B. In the circumstances, I see no reason for the Upper Tribunal to interfere with his conclusions.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed

Date 29 MAY 2018

Upper Tribunal Judge Lane