



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

Appeal Number: HU/06840/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 January 2019**

**Decision & Reasons  
Promulgated  
On 14 March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**SHOWKET BILLAH DIP  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Otchie of Counsel instructed by Shah Jalal Solicitors  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Judge Swaney promulgated on 4 July 2018 in which the Appellant's appeal against a decision of the Respondent dated 24 May 2017 refusing indefinite leave to remain in the United Kingdom was dismissed.
2. I am grateful to both representatives for the helpful discussion that it has been possible to have this morning in respect of the issues in the appeal.
3. At the core of the Appellant's application for indefinite leave to remain was an assertion that he qualified under the Immigration Rules pursuant to

paragraph 276B for indefinite leave to remain on the basis of ten years continuous lawful residence in the United Kingdom. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 24 May 2017. In particular, the Respondent did not accept that the Appellant had demonstrated the required period of continuous lawful residence. A particular issue arose as to the circumstances surrounding applications made in 2015. The Respondent considered that there had been a hiatus between the expiry of the Appellant's leave pursuant to a decision dated 22 October 2015 (served on 24 October 2015) and a subsequent application made on 24 May 2016.

4. On appeal Judge Swaney accepted the Appellant's evidence in relation to the making of the application that followed the decision of 22 October 2015. Judge Swaney accepted that the Appellant had in fact made an application for leave to remain on 7 November 2015 - just within fourteen days of the earlier decision. Nonetheless Judge Swaney, after consideration of various provisions, reached the conclusion that the Appellant had still broken his continuity of residence, and found he had not had any leave to remain since the expiry of his earlier leave in October 2015.
5. Before me it is common ground that the First-tier Tribunal Judge cited the wrong Immigration Rule. Paragraph 276B(v) was amended with effect from 24 November 2016. The version of subparagraph (v) that was applicable from that date is the version considered by Judge Swaney. It is clear that the amendment was such that it was to apply to applications made on or after that date. Necessarily, therefore, an earlier version of the Rules applied at the time of the Appellant's application of 7 November 2015. In that regard subparagraph (v) of 276B was in these terms:

*“(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”.*

6. It is the final stanza in that sub-paragraph which would appear to avail the Appellant: the period of overstaying pending the determination of his application made on 7 November 2015 is to be disregarded in the sense that the Appellant is not be treated as having been present in the UK in breach of immigration laws. His application of 7 November 2015 was indeed made within 28 days of the expiry of his earlier leave, and thereafter up until the date of the Respondent's decision he remained pending the determination of the application. It was during that

timeframe that ten years from his initial entry to the United Kingdom was reached. On this basis. Mr Tufan does not seek to resist the challenge to the First-tier Tribunal Judge's decision, and indeed on the same basis now acknowledges that the Appellant can take the benefit of paragraph 276B.

7. This is an Article 8 appeal. Absent any particular circumstances, proportionality is generally considered to be encompassed by the Rule. There being no particular adverse features, the fact that the Appellant satisfies the Rules is sufficient for the Tribunal to conclude that it would be disproportionate for him to be expected to leave the United Kingdom in consequence of the Respondent's decision.

### **Notice of Decision**

8. The decision of the First-tier Tribunal is set aside for error of law.
9. I re-make the decision in the appeal. The appeal is allowed on human rights grounds pursuant to Article 8 of the ECHR.
10. No anonymity direction is sought or made.

Signed:

Date: 11 March 2019

**Deputy Upper Tribunal Judge I A Lewis**

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

I have allowed the appeal and in all of the circumstances make a whole fee award

Signed:

Date: 11 March 2019

**Deputy Upper Tribunal Judge I A Lewis**  
(*qua* Judge of the First-tier Tribunal)