



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

Appeal Number: HU/09420/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 25 October 2019**

**Decision & Reasons Promulgated
On 31 October 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

**BHAVIN BHARATKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Patel, counsel instructed by Hiren Patel Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Eldridge, promulgated on 12 June 2019. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 13 September 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The appellant arrived in the United Kingdom on 24 September 2006 with entry clearance as a student. His leave was extended until 14 April 2009. An in-time application for further leave to remain as a Tier 1 Post-Study migrant was refused and elected not to appeal that decision. His leave expired on 10 June 2009. The appellant was granted leave to remain on 29 September 2009 and his leave was extended until 15 January 2016. He applied in-time for leave to remain on 12 September 2015, but this application was unsuccessful. On 14 January 2015 he applied for indefinite leave to remain as a Tier 1 migrant and on 13 December 2016 the appellant varied that application to one for indefinite leave to remain on the basis of 10 years long residence.
4. The Secretary of State refused the appellant's long residence application on 15 August 2017. It was said that the appellant made false representations in previous applications submitted in 2010 and 2012 with regard to his earnings, which did not correspond with checks made with HMRC. The appellant's explanation for the discrepancy was rejected and his application was refused under paragraph 322(2), 322(5), 276B(ii) and (iii) of the Rules. It was further noted that there was a gap in the appellant's legal residence of 110 days when he was without leave and he could not meet the requirements of paragraph 276B (i)(a) and (v). The respondent noted that the appellant did not rely on family life or raise any exceptional circumstances or compassionate factors.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, it was argued on the appellant's behalf that he submitted an application to the Secretary of State in 2009 but that his previous lawyer had not preserved the records. The judge rejected that claim and found that it was likely that any further application was made on 21 August 2009, when the appellant's leave had already expired. The judge found there to be no exceptional circumstances. As the period of overstaying was in excess of 28 days, the judge found that the appeal could not succeed under paragraph 276B of the Rules. The judge considered paragraph 322(5) of the Rules and with reference to *Balajigari v SSHD* [2019] EWCA Civ 673, concluded that the Secretary of State was not entitled to rely on the general grounds for refusal because the issue of dishonesty regarding which the respondent was minded to refuse the application, had not been put to the appellant prior to a decision being made.

The grounds of appeal

6. The following criticisms of the decision were made;

- There was a failure to consider that the appellant qualified for ILR under paragraph 245CD due to his 5 years lawful residence as a Tier 1 General Migrant.
 - There had been no findings in relation to dishonesty
 - Failure to take account of historical injustice
 - failure to take account of the evidence that the appellant applied for further leave in 2009 within the 28 days grace period
 - the judge had made a mistake of fact as to the length of lawful residence and the operation of section 3C of the 1971 Act.
7. Permission to appeal was granted on the basis that the decision of the First-tier Tribunal contained no finding in relation to dishonesty. The remaining grounds were not considered.
8. The respondent's Rule 24 response, received on 8 October 2019, opposed the appeal. The Secretary of State stated that it was correct that the judge erred in failing to deal with the issue of dishonesty but inferred that it was immaterial because there were clear findings to the effect that the appellant's lawful residency was broken in 2009.

The hearing

9. Mr Patel relied on the grounds and Mr Tarlow concurred with the Rule 24 response.
10. Mr Patel argued that the judge erred in failing to make findings on the dishonesty allegation. That failure was relevant to the remaining grounds. He referred me to an administrative court decision, namely *R (oao) Godwin Chaparadza v SSHD* [2017] EWHC 1209 (Admin) in relation to the appellant's variation of his application under paragraph 245CD in order to rely on paragraph 276B of the Rules. He argued that the variation application supplemented rather than supplanted the earlier application and the First-tier Tribunal should have taken the earlier application into account. Mr Patel added that the appellant now met the residence requirements of the 10-year Rule, regardless of the previous break in residence and thus the only issue outstanding was that of dishonesty.
11. At the end of the hearing, I accepted that the First-tier Tribunal made a material error of law in failing to determine the general grounds of refusal. I therefore set aside the decision in its entirety.

Decision on error of law

12. The First-tier Tribunal judge avoided making a decision as to whether the appellant deceived either the respondent or HMRC as to his previous earnings. Instead, he criticised the respondent for failing to inform the appellant that the Secretary of State was minded to refuse his application for this reason. The judge considered that there was no need to decide the dishonesty issue because in his view the appellant could not meet the

requirements of the Rules in any event as there had been a break in his claimed 10-year residence. At this point, I refer to the helpful reported decision handed up by Mr Patel, *SD (para 320. Findings desirable) Pakistan* [2009] UKAIT 00021, the headnote of which states as follows;

“In view of the influence that a decision under para 320 may have on subsequent applications by an appellant, it is desirable that the Tribunal should give its view on issues arising under that paragraph, even if they are not material to the determination, provided that there has been sufficient evidence to enable it to do so.”

13. The case of *SD* has clear application in this case, notwithstanding the differing general grounds' paragraphs in issue. The appellant submitted a substantial quantity of evidence regarding the dishonesty allegation and was cross-examined extensively, according to the judge's record of proceedings. There was, therefore, no good reason not to decide the dishonesty matter. The grounds rightly argue that such a finding is required in order to determine whether the appellant's application under paragraph 245CD met the requirements of the Rules based on 5 years' continuous residence as a Tier 1 migrant. Furthermore, at the time of the hearing, the appellant had resided in the United Kingdom for well over 9 years following the apparent break in his previous residence which occurred between 27 May 2009 and 29 September 2009. Therefore, a decision was required on the dishonesty issue in relation to any future consideration of the appellant's compliance with paragraph 276B of the Rules.
14. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of his appeal at the First-tier Tribunal and it would be unfair to deprive him of such consideration.

Decision

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

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 2 hours by any judge except First-tier Tribunal Judge Eldridge.

Signed

Date: 30 October 2019

Upper Tribunal Judge Kamara