



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09499/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 January 2019

Decision and Reasons Promulgated
On 7 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

PIRATHAP THILAGENDRAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Georget (counsel for Biruntha Solicitors)

For the Respondent: Mr S Walker (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Pirathap Thilagendran, a citizen of Sri Lanka born 27 February 1993, against the decision of the First-tier Tribunal of 17 October 2018 dismissing his appeal, itself brought against the Respondent's refusal of his human rights claim of 5 April 2018.

2. The Appellant arrived in the UK on 27 October 2007. He was granted DLR as a minor, until 27 August 2010. On 14 August 2010 he applied for further leave. The Respondent had recorded that that application was refused on 6 December 2010, though the Appellant disputed having received lawful notice of that decision. He applied on 15 August 2017 for leave to remain on private and family life grounds. The Respondent refused that application because he did not accept that the Appellant would face very significant obstacles to integration or unjustifiably harsh consequences to relocation to Sri Lanka, bearing in mind he was a young man in good health with significant experience of life in Sri Lanka.
3. The First-tier Tribunal set out the evidence it had considered. It accepted the Appellant's account of not having been served with the December 2010 refusal of his application, given the cogent evidence (from the Respondent's own computer check, from a foster carer and from a social services Pathway Plan), to such effect. Accordingly his application of August 2010 had never been determined, and as it had been made in timely fashion, section 3C of the Immigration Act 1971 operated such as to confer him with leave thereafter, so giving him a basis to vary that application via his August 2017 application, meaning that he had been present with leave until the conclusion of any appeal against the latter application's refusal.
4. By now the Appellant had begun a relationship with Miss Sriskandarajah, which had endured for 5 months at the date of the hearing. The Tribunal accepted this was a genuine relationship, though did not consider it could be described as "strong" given its relative brevity.
5. The Tribunal noted that the Appellant had not satisfied the "life in the UK" requirements found in Appendix KOLL, though accepted that as his English was excellent there was little doubt that he would be able to pass that aspect of the test. He had resided in the UK for a significant period, including three years as a child, though given he had lived the rest of his childhood in Sri Lanka, that was a neutral factor. His assertion that he did not speak Tamil was not credible, given that his solicitors had requested a Tamil interpreter, the skeleton argument had referred to him speaking Tamil, and he had referred to Tamil being his first language at the outset of the hearing.
6. Although his application had been outstanding for a significant period, which needed to be considered having regard to the principles established in *EB (Kosovo)*, the Appellant had acquiesced in the delay in some degree, by not having sought to progress it between 2012 and 2017, albeit that he had raised the matter with the Respondent in 2011 and 2012; he had been present in the UK lawfully throughout the application's consideration, and whilst he had suffered some disadvantage and detriment as he had been unable to finish college, this all carried less weight than otherwise, albeit that the delay was excessive and unreasonable and amounted to a compassionate circumstance. The further 8 month period taken to consider his varied was not in itself excessive.

7. Overall the First-tier Tribunal concluded that the Appellant had not established that the adverse consequences of the delay were so weighty to mean his application should have been allowed given his limited UK connections, bearing in mind his personal history and domestic circumstances. He thus did not satisfy the requirements of Rule 276B. Nor did he meet the requirements of Rule 276ADE as he could not show very significant obstacles to integration in Sri Lanka, given he spoke the language, had lived there for a significant period, understood the culture, had family support available, could work, and was in good health.
8. The First-tier Tribunal could see no space for Article 8 to operate outside the Rules, there being no discernible “gap” between the issues covered by the Rules and otherwise.
9. However, in any event, it was not accepted he had established family life in the UK with his aunt, uncle and cousins, and his family life with his partner was limited given their relationship was of short duration and they did not cohabit, and had been developed whilst his leave was precarious. There were no insurmountable obstacles to its pursuit abroad if the couple so wished: his partner had Sri Lankan heritage, they would both have the benefit of his family there to support them, and she could reasonably be expected to break her studies if she wished to travel abroad with him for a limited period whilst he sought entry clearance to return. There were no *Chikwamba* considerations absent children and given that there were other public interest factors in the Respondent’s favour.
10. Pursuant to *Rhuppiah* at Court of Appeal level, his mere lack of recourse to public funds did not show financial independence, his English language facility was in his favour, and his presence in the UK had been consistently precarious; he had been brought to the UK for no valid reason, which was a neutral factor, but had thereafter been complicit in at least part of the delay in resolving his case. In conclusion, the immigration decision was disruptive but overall, practical, feasible and proportionate.
11. Permission to appeal was granted by the First-tier Tribunal on 13 November 2018 because it was arguable that the Judge had misevaluated the public interest as identified by Rule 276B. This arguably impacted on the assessment of the Article 8 claim in so far as the Appellant’s application might have met the requirements of the Immigration Rules, a relevant consideration as discussed in *TZ (Pakistan)*.
12. Before me Mr Georget relied on the grounds of appeal, emphasising that the failure to properly identify the policy objective of the Rule which had been largely satisfied on this application. Indeed, given that Rule 276A1 permitted the grant of an extension of leave to an individual who satisfied the requirements of the Rule save for the Life in the UK test, there had been no inhibition to the grant of the Appellant's application, once the allegation of overstaying was resolved against the Respondent.

13. Mr Walker accepted that there was no real answer to the Appellant's case on this score: there was no doubt that the Secretary of State would have taken a different approach to the appeal had it been appreciated there had been no lawful service of the historic decision, such that the Appellant had in fact qualified under the long lawful residence Rule. However, he pointed out that there were potential pending criminal proceedings against the Appellant, which might in time pose an obstacle to the Appellant satisfying the good character requirements of the route, subject to their final resolution. Mr Georget replied that the appropriate course of action would be to recognise that there was presently no black mark against the Appellant's character, but for the Respondent to review this at the time of considering the application, putting it on hold if necessary.

Findings and reasons

14. Having regard to the submissions of the representatives, I accept that there was a material error of law in this case. Sir Ernest Ryder in *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35 stated:

“The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. ... That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

15. Accordingly it is always important for the First-tier Tribunal to make an accurate assessment of the extent to which an immigration application would meet the requirements of the Rules. In this appeal, the consequence of the Judge's acceptance that the Respondent had not served the December 2010 refusal upon the Appellant until April 2018 was that the Appellant, who had lived in the UK lawfully since his receipt of DLR over a decade earlier, was that he was clearly a candidate who might satisfy the terms of immigration rule 276B. That Rule provides:

“Long residence in the United Kingdom

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

...

(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;

...

Requirements for an extension of stay on the ground of long residence in the United Kingdom

276A1. The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v).

...

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) ...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 – (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.”

16. Thus it can be seen that, as Mr Georget noted in his submissions, an applicant can be granted an *extension* of leave to remain where they meet certain requirements within the long residence route, albeit that they do not meet every one of the criteria for settlement. I note that the “general refusal” reasons are also disappplied on the extension route. This, however, does not mean that there is no *good character* requirement on an extension application: because “*character*” is separately addressed within Rule 276B(ii)(c). One assumes that the rationale behind excluding the general refusal reasons from the extension route is to allow scope for limited leave to be granted to an individual who falls foul of one of the time-

limited criminality provisions, so that they may “serve out” the relevant period of time before applying for settlement.

17. Mr Walker did not suggest that there were any reasons rendering the grant of leave to the Appellant undesirable by reference to his age, UK connections, personal history, or domestic and compassionate circumstances. Indeed all those factors count in his favour. He has been lawfully resident in the UK for over a decade, including his late teenage years and during early adulthood, he has connections with his foster parents and has friendships here, and he has studied here. Save for the matter I address at the end of my decision, there is no overt reason in his character or conduct to contra-indicate the grant of leave as appropriate.
18. The First-tier Tribunal erred in law in failing to consider the relevance of the Appellant's satisfaction of the requirements of the long residence route. Plainly his lengthy residence and UK connections constituted strong private life ties with this country, and so satisfaction of the Rules was highly relevant to the assessment of proportionality. Indeed, per Sir Ernest Ryder in *TZ*, this can be a *decisive* rather than a merely *material* consideration: “where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be *positively determinative* of that person's article 8 appeal.”
19. I accordingly find there was a material error of law in the First-tier Tribunal's assessment of proportionality.
20. As invited by the parties, I proceed to determine the appeal finally. This is a straightforward exercise, given that, for the reasons just stated, there is presently no factor that counts against the grant of leave to the Appellant, having regard to the considerations identified in the Immigration Rules. All the factors that I have set out above point in favour of a grant of leave, which in the circumstances of this case is decisive of the appeal, as explained in *TZ*.
21. For completeness I should have regard to those matters of proportionality which statute demands are examined on appeal, via section 117B of the Nationality Immigration and Asylum Act 2002. I accept that the Appellant is proficient in the English language, is financially independent (as he receives £400 monthly from a source other than public funds, which thus qualifies him as such, see *Rhuppiah* [2018] UKSC 58), and, whilst his position is precarious given he lacks indefinite leave to remain, his situation is effectively condoned by the Immigration Rules, which countenance the grant of leave to someone in his precise position.
22. I conclude that the Appellant's satisfaction of the Immigration Rules means that his appeal on human rights grounds succeeds; the immigration decision to the contrary is a disproportionate one.

23. As Mr Walker noted, the Secretary of State is entitled to consider criminality when determining an immigration application, and information has come to light since the First-tier Tribunal hearing indicating that there is the possibility of proceedings being brought against the Appellant for some alleged wrong-doing. However, no charges have so far been brought against him. It seems to me that the Respondent would be entitled to review the situation at the time this application falls to be considered, and might wish to put the application on hold pending resolution of this issue, in order to see whether the Appellant's character continues to qualify him for the immigration route in question.
24. I accordingly allow the appeal.

Decision

The appeal is allowed as the decision against which it was brought was contrary to the Human Rights Convention.

Signed

Date 28 January 2019

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes