



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

Appeal Number: HU/11606/2016

THE IMMIGRATION ACTS

**Heard at Birmingham
On 8 March 2019**

**Decision & Reasons Promulgated
On 5 April 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR ANANDA MENDON

(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

No appearance

For the Respondent:

Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 17 November 2017, following a hearing of 31 October 2017, and which it sent to the parties on 31 November 2017. The tribunal decided to dismiss the claimant's appeal against the decision made by the Secretary of State on 17 April 2016 to refuse to grant him indefinite leave to remain in the United Kingdom (UK).
2. By way of background, the claimant is a national of India and was born on 4 March 1978. He entered the UK on 1 June 2003 having successfully obtained entry clearance from abroad. He did so for the purposes of work permit employment. He obtained an initial extension of leave until 15 November 2004 and then further extensions, given on the same basis, to take him up to 26 September 2011. However, on 13 July 2009 he was informed that the grant of leave until 26 September 2011 was being curtailed so that it would expire on 11 September 2009. On 12 September 2009, one day after the expiry of his curtailed leave, he applied for further leave but on 12 November 2009 that application was refused. He next sought leave on 15 December 2011 (over two years later) and that application was granted, leave being extended until 1 January 2015. He secured a further extension as a Tier 2 Migrant to take him up to 16 January 2018. But on 3 November 2015 he had made a human rights application for indefinite leave to remain in the UK on the basis of long residence. It was that application which had led to the decision of 17 April 2016 and then to the appeal to the tribunal and now this appeal to the Upper Tribunal.
3. The claimant was legally represented before the tribunal at the hearing of 31 October 2017. The Secretary of State was also represented. The claimant gave oral evidence. Essentially, his argument before the tribunal was that although there were gaps in his period of lawful residence which meant that technically he could not fulfil the 10-year long residence requirement contained within paragraph 276B of the Immigration Rules, the Home Office operated a policy whereby, if there were gaps in lawful residence not the fault of an applicant and if exceptional circumstances applied, the existence of the gaps could be waived on discretionary grounds. As to the circumstances which had led to the gap, the claimant explained to the tribunal, as he had previously done in writing, that there had been difficulties with his former employer in 2009, that the former employer had lost a pre-existing sponsor licence which had led to the curtailment of leave, that after some four months the company for which the claimant had worked had been taken over by new management but that the new entity did not have an appropriate sponsorship licence and that, therefore, he had had to leave that employment and find new employment. His having done so it was that new employment which formed the subject of his application for leave in December of 2011. So, the basis of his argument as to exercise of the discretionary policy was that the gap in his lawful residence had not been his fault but rather, had been attributable to circumstances beyond his control. There was also another issue which had to be dealt with at the appeal concerning an allegation that the claimant had submitted as a Knowledge Life Pass Notification Letter which was not genuine or which did not relate to him. But I need not say anything further about that because the tribunal resolved that matter in the claimant's favour and there has been no subsequent challenge to that part of its decision.
4. As to the question of discretion, though, the tribunal ensured that it had a copy of the policy before it (see paragraph 3 of the written reasons of 17 November 2017). It noted that the appeal before it was proceeding on human rights grounds under section 82(1)(b) and section

84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (see paragraph 22 of the written reasons). It said of the policy:

“35. The Home Office policy gives guidance to decision makers that they must consider evidence of exceptional circumstances that prevented the applicant from applying within the first twenty-eight days of overstaying. The threshold for what constitutes exceptional circumstances was high. Examples are given of unexpected or unforeseeable causes of delays. These are simply examples; they are not exclusive (as evidenced by the use of the phrase “for example”). One example given is “inability to provide necessary documents” in exceptional or unavoidable circumstances beyond the applicant’s control. This is similar to the present case, in that the Appellant was unable to provide an employer’s sponsor licence but the reason for this was beyond his control. The previous employer’s sponsor licence had been withdrawn and he was, I accept, making efforts to find a new employer, who had a valid sponsor licence”.

5. The tribunal then went on to consider whether the claimant, in his particular circumstances, could benefit from or fall within the terms of the policy such that his appeal should succeed on human rights grounds. It did not expressly say so at this point in its written reasons but no doubt it had in mind Article 8 of the European Convention on Human Rights (ECHR). It said this:

“36. In my view, in this case there are exceptional circumstances, namely the actions of the previous employer which led to his sponsorship licence being removed.

37. I accept that he and others reported the issue with the employer to the police. He was no longer legally able to work for the previous employer once the latter’s sponsorship licence had been revoked and had to find new employment, which he did. Although he sought work, clearly the date on which he began new employment depended on the availability of work and the offer of employment; any delay in finding a new job was not primarily of his making.

38. However, balanced against this is the fact that the Appellant did not make a further application for leave to remain for over two years (on 15.12.11). Whilst some of that delay may, as I have said above, be reasonably attributable to the issue with the previous employer, the Appellant had not satisfactorily explained why it took him so long to make a fresh application.

39. For the above reasons the refusal was not disproportionate”.

6. So, the appeal was dismissed but permission to appeal to the Upper Tribunal was both sought and obtained. The two grounds of appeal, as I understand them, were to the effect that the tribunal had erred in failing to appreciate that the gap of over two years was attributable to “the licence issue” or, if it was not wholly so attributable, through failing to explain what proportion of the gap was not so attributable (ground 1) and through failing to conduct a proper holistic Article 8 assessment (ground 2). A Judge of the First-tier Tribunal saw reason to grant permission essentially on what had been said in ground 1. Permission having been granted the matter was listed for an oral hearing before the Upper Tribunal (before me) so that consideration could be given as to whether or not the tribunal had erred in law and if so, what should flow from that.

7. It is apparent from the Upper Tribunal’s file that although the claimant had representation before the tribunal and at the point when permission to appeal to the Upper Tribunal was sought, he is no longer represented. He did not attend the hearing before me and nobody attended on his behalf. But on 7 March 2019 he sent an email to the Upper Tribunal asking that the appeal be postponed and re-listed on a different date. As to why he wanted a

postponement he said, “I am not feeling that well and I am unable to find a suitable Solicitor to represent my case”. It is perhaps worth noting that this case had previously been listed for hearing on 18 January 2019 and had been postponed on that occasion because the claimant had indicated he was unwell then too. On that occasion it appears that he provided a letter from a GP though there was no such letter provided in relation to the current postponement request. In the circumstances Mr Mills invited me to proceed in the absence of the claimant. Bearing in mind principles of fairness and natural justice and the content of rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I decided to do so. That is because the claimant did not supply medical evidence to support his claim to be unwell; because his assertion that he was “not feeling that well” fell short, on the face of it, of an assertion that he was unable to attend a hearing; because there had been a previous postponement; because I did not feel confident that if I were to adjourn the situation regarding attendance would necessarily be any different at a reconvened hearing; because with respect to representation if the claimant had not been able to obtain alternative representation in readiness for this hearing there could be no certainty that he would be able to for a re-convened hearing; because his grounds of appeal to the Upper Tribunal had been professionally drafted in any event and it was not apparent that his presence would add anything to that: and because taking an overall view I was satisfied I could justly decide the error of law issue at least, without an adjournment. I took the view that if I did decide there had been an error of law so as to justify the setting aside of the tribunal’s decision, I could if I felt it necessary, direct a further hearing on a different date when evidence could be given. But there was no good reason not to deal with the error of law issue itself.

8. Mr Mills argued that the grounds were unmeritorious. As to the discretionary policy he said that the Secretary of State had decided it was inappropriate to apply the policy in the particular circumstances obtaining and that the tribunal had, as had been open to it, taken the same view. The reasoning, contained from paragraph 36 to paragraph 38 of the tribunal’s written reasons was legally sound. Mr Mills also informed me, by way of background, that the claimant had made a separate application for leave to remain which had been refused by the Secretary of State on 27 June 2018 and that the appeal he had made to the tribunal against that decision, and a subsequent application for permission to appeal, had both been unsuccessful. None of that was directly before me and has not impacted upon my decision but it was helpful of Mr Mills to bring it to my attention.
9. Turning then to the application which is before me, the policy the claimant sought to rely upon before the tribunal is to be characterised as a discretionary one. By that I mean if certain prescribed circumstances exist the Secretary of State permits himself but does not require himself to exercise discretion in an applicant’s favour.
10. The tribunal accepted much of what the claimant had to say as is apparent from its analysis which I have set out above. But, essentially, it seems to me that the primary point it was seeking to make was that the evidence before it did not demonstrate that the whole of the extensive gap of in excess of two years was solely attributable to the claimant’s difficulties with respect to his previous employer or, at least, it had not been demonstrated by evidence that they were. In other words, the tribunal was concluding that the claimant had not demonstrated that he could not, for example, have more assiduously pursued fresh employment with a potential new employer and so sought and obtained leave at an earlier stage than he did. It was open to the tribunal to reach that view and it was not required, as a matter of law, to divide up the gap and say that a certain proportion was and a certain

proportion was not attributable to the claimant's difficulties with his former employer. So, I conclude that the tribunal did not err in the manner in which it is suggested it did at ground 1.

11. As to ground 2, it is right to say that the tribunal did not undertake a thorough and holistic examination of all matters which might conceivably have had relevance to a broad-based Article 8 assessment. But the case had not been put to it in that way. The grounds of appeal to the tribunal did not raise general private life issues or any family life issues, they simply focussed upon the issue of fraud and the issue of the break in lawful residence. A document headed "Skeleton Arguments" was similarly framed. Against that background the tribunal was not required to initiate and undertake a broad-based holistic assessment for itself. It cannot be right for a claimant not to pursue arguments before the tribunal and then assert, when seeking to demonstrate that it made an error of law, that it did not deal with such assertions or arguments. So, ground 2 is not made out either.
12. In the circumstances I have concluded that the tribunal did not make an error of law and that its decision should stand. As to anonymity, I have not directed it. I was not asked to and there does not appear to be any proper basis for me to do so.

Decision

The First-tier Tribunal did not err in law. Accordingly, the claimant's appeal to the Upper Tribunal is dismissed.

Anonymity is not directed.

Signed:

Dated: 26 March 2019

Upper Tribunal Judge Hemingway