**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/21351/2018

**THE IMMIGRATION ACTS**

**Heard at: Field House** **Decision & Reasons Promulgated**
**On: 7 October 2019** **On 15 October 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**PRAISE KOTTEKUDY PAULOSE**

Respondent

**Representation:**
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr H Kannangara, instructed by Wise Legal Ltd

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Paulose's appeal against the respondent's decision to refuse his application for indefinite leave to remain and his human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Paulose as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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3. The appellant is a citizen of India born on 2 July 1988. He arrived in the UK on 21 May 2008 with entry clearance as a student valid until 31 December 2010. On 17 December 2010 he applied for leave to remain as a Tier 4 student. His application was refused, an appeal against that decision was allowed and his Tier 4 application was subsequently reconsidered and refused again on 16 July 2015. An appeal against that decision was dismissed and the appellant became appeal rights exhausted on 13 October 2017.

4. On 27 October 2017 the appellant applied, fourteen days out of time, for leave to remain on the basis of his family and private life. On 4 April 2018 he applied to vary that application to an application for indefinite leave to remain on the basis of ten years' long residence.

5. The appellant's application was refused on 5 October 2018. The respondent considered that the appellant did not have valid leave at the time he made his application for indefinite leave to remain and that his continuous residence was broken on 13 October 2017 when he became appeal rights exhausted. He therefore failed to meet the requirements for ten years' continuous lawful residence under paragraph 276B(i) of the immigration rules. The respondent noted with regard to Appendix FM that, although the appellant had mentioned a girlfriend in his application of 27 October 2017, he had provided only unsupported photographs as evidence and no other evidence of a relationship and he had made no mention of a partner in his settlement application. The respondent considered that the appellant did not meet the requirements of paragraph 276ADE(1) and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

6. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 17 May 2019 by Judge Munonyedi. The judge considered that paragraph 39E of the immigration rules applied and that, accordingly, as the appellant had made his application within fourteen days of his leave expiring, his application was considered as having been made in time and he was able to comply with the requirements of paragraph 276B. On that basis his removal from the UK would be disproportionate and in breach of Article 8. The judge allowed the appeal on human rights grounds.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had erred by considering that the appellant had made his application in time and that, in accordance with the case of Ahmed, R (on the application of) v The Secretary of State for the Home Department [2019] EWCA Civ 1070, he could not demonstrate ten years of continuous lawful residence. The judge's proportionality assessment was infected by the incorrect finding that the appellant met the requirements of the immigration rules and there was no proper assessment of proportionality.

8. Permission to appeal was granted in the First-tier Tribunal and the decision to that effect was sent to the appellant on 5 September 2019, together with the standard directions from the Upper Tribunal. The matter then came before me for a hearing.

9. Mr Clarke relied upon the decision in Ahmed in submitting that the judge was wrong to find that the appellant met the requirements of the immigration rules.

10. Mr Kannangara accepted that he was bound by Ahmed but submitted that the judge was not at fault as the judgment in that case post-dated the hearing before her. In the event that an error of law was found, however, he asked that the case be remitted to the First-tier Tribunal for the appellant's Article 8 claim to be considered.

11. I reminded Mr Kannagara of the Upper Tribunal directions issued with the grant of permission and the presumption that the decision would be re-made at the same hearing. I asked for clarification about the evidence in support of the appellant's human rights claim. Mr Kannangara confirmed that the only evidence before the First-tier Tribunal was the appellant's statement of 13 May 2019, that he had no further evidence or instructions from the appellant and that the appellant was not present to give oral evidence. He had no further submissions to make in the event that the decision was to be re-made by myself, but he repeated his request that the case be remitted to the First-tier Tribunal as the appellant had previously been pursuing his appeal on the basis of the long residence grounds. Mr Clarke was content for me to re-make the decision on the basis of the evidence available.

## Discussion and Conclusions

12. Whether or not the case of Ahmed was before the judge at the hearing, it pre-dated the date of her decision and was relevant to her decision-making. In any event the judge was clearly wrong to find that the appellant met the requirements of paragraph 276B on long residence grounds, for the reasons given by the Court of Appeal. The appellant's continuous lawful residence ended on 13 October 2017 when he became appeal rights exhausted. Paragraph 39E of the immigration rules did not operate so as to make the appellant's fourteen days of overstaying into lawful residence, as the judge wrongly believed that it did. Accordingly, from entering the UK on 21 May 2008 until the end of his leave on 13 October 2017 the appellant had not accumulated ten years of continuous lawful residence and could not meet the long residence requirements in paragraph 276B. The judge did not go on to consider the appellant's family and private life since she concluded that the immigration rules had been met and therefore there was no public interest in removing him from the UK. That conclusion, and the Article 8 assessment, were therefore plainly flawed and the judge's decision has to be set aside.

13. I do not agree with Mr Kannangara that the matter ought to be remitted to the First-tier Tribunal to enable the appellant to re-present his Article 8 claim. There is no evidence to suggest that there is any further meaningful fact-finding to be made in the appellant's case so as to justify such a course. The only evidence produced by the appellant before the First-tier Tribunal, just five months ago, was a witness statement which he adopted as his oral evidence.

The statement, dated 13 May 2019, referred to a relationship with a partner but there were no details and no accompanying evidence, despite the respondent noting the absence of such evidence in the refusal decision. The appellant mentioned his private life in his statement, but only in vague terms, referring to family and friends who were supportive. The appellant did not seek to adduce any further evidence for the hearing before me, despite the directions issued with the grant of permission expressly stating that there was a presumption that the re-making of the decision would take place at the same hearing and inviting an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for further evidence to be admitted. Mr Kannangara had no instructions from the appellant about further evidence to be submitted and the suggestion that there may be a case to present to the First-tier Tribunal was purely speculative. As for Mr Kannangara's submission that the appellant had previously only been relying upon paragraph 276B and had therefore not submitted further evidence in relation to his Article 8 claim, that cannot be correct as the appeal was against the respondent's decision of 5 October 2018 which considered Appendix FM, paragraph 276ADE(1) and exceptional circumstances outside the immigration rules and indeed the appellant addressed those issues in his grounds of appeal and statement.

14. In all the circumstances I see no reason for the matter to be remitted to the First-tier Tribunal and no reason why I am not able to re-make the decision myself.

15. There is no evidence of any relationship which meets the requirements of Appendix FM and there is nothing to suggest that there are any obstacles to the appellant's integration in India for the purposes of paragraph 276ADE(1) and certainly no very significant obstacles. Neither is there any evidence of compelling circumstances justifying a grant of leave outside the immigration rules. The appellant has had no leave to remain in the UK since 13 October 2017 and there is no reason why he cannot return to India and re-establish his private life in that country. His claim in regard to his relationship is vague and without any detail and no reason has been offered as to why that could not continue in India or why an entry clearance application could not be made if the relationship develops in the future. The public interest factors in section 117B of the Immigration, Nationality and Asylum Act 2002 do not apply in the appellant's favour and the respondent's decision is plainly a proportionate one. The decision does not breach the appellant's Article 8 rights and his appeal against the refusal of his human rights claim is accordingly dismissed.

## DECISION

16. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Paulose's appeal.

Signed:
Upper Tribunal Judge Kebede

Dated: 7 October 2019