Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28663/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 August 2014	**On 15 August 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR MOHAMAD MOOSID MOHAMEDHOSEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Lemer, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Mauritius who was born on 28 April 1964. In a letter dated 30 January 2013 solicitors applied on his behalf "for indefinite leave to remain in the UK or for discretionary leave in the UK for a further period of time on the basis of the applicant's established private life under Article 8 of the European Convention of Human Rights 1950". That application was refused by a decision dated 21 June 2013 and upon appeal

First-tier Tribunal Judge Gurung -Thapa dismissed the appeal under the Immigration Rules and under Article 8 ECHR.

2. The appellant sought permission to appeal that decision arguing three grounds and leave was granted to argue each of them. Ground 1 alleges an erroneous application of para 34G HC 395; Ground 2 alleges a flawed approach to Reg.5(3)a of the Immigration (Notices) Regulations 2003 and; Ground 3 that the judge displayed a flawed approach to the consideration of the respondent's delay in determining (the appellant's) entry clearance application.

3. The respondent filed a Rule 24 reply which submits that the First-tier Tribunal Judge directed herself appropriately.

4. I have before me all the documentation that was before the First-Tier Judge which included an appellant's bundle divided into four sections A – D inclusive.

5. It does not appear to be in issue that the appellant was granted entry clearance as a student and that he entered the United Kingdom on 28 July 2000. He was then granted further periods of leave to remain as a student until 31 October 2006. Thereafter he was granted leave to remain under the Science and Engineering Scheme until 2 June 2007.

6. What happened next is set out in paragraph 11 of the First-tier Tribunal decision. The issue arises as to whether the appellant made an application under the Highly Skilled Migrant Programme prior to the expiration of the appellant's leave on 2 June 2007. The judge was satisfied that a form produced clearly shows the Royal Mail posting date as 2 June 2007 and then goes on to state in paragraph 12 that "it appears this application was received by the Home Office on 5 June 2007 (this date was rubberstamped on the front of the form)". The judge then gave reasons for rejecting the appellant's assertion that the application was made prior to the expiration of his leave. In doing so I find that the judge erred. I confess that I do not understand fully what the judge has set out at paragraphs 13 and 14 of the determination. On the one hand the judge has accepted that the application form was posted on 2 June 2007 which, by reason of paragraph 34G of the Immigration Rules, meant that the application was made on that day. Albeit that it was the appellant's last date of leave to remain, rather than the first date on which he did not have leave to remain, his leave was extended by virtue of s.3C Immigration Act 1971. The judge in rejecting that the appellant had made his application prior to the expiration of his leave quoted paragraph 34H of the Rules which states:-

> "34H Applications or claims for leave to remain made before 29 February 2008 for which a form was prescribed prior to 29 February 2008 shall be subject to the forms and procedures as in force on which the application or claim was made."

Paragraphs 34G and 34H were inserted from 29 February 2008 i.e. after the application of 2 June 2007. The Judge may have assumed that there were no similar provisions in the rules or elsewhere prior to the coming into force of paragraphs 34G and 34H in February 2008 that helped the appellant and as a result concluded that the appellant was unable to show that his application was made prior to the expiration of his leave on 2 June 2007. However, the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 came into force on 2 April 2007. Regulation 5 of those Regulations refers to a form set out in Schedule 3 of those Regulations as being prescribed for an application for limited leave to remain in the United Kingdom as a Highly Skilled Migrant for the purposes of the Immigration Rules. That was the application made by the appellant. Under prescribed procedures at 16(2) (c) it states that:-

> "(c) In relation to an application for which a form is prescribed by Regulation 5, the application shall be sent by prepaid post or by courier to Work Permits (UK) and to the Border and Immigration Agency at the Home Office, and may not be submitted in person at a public enquiry office."

Regulation 17(2) of the same Regulation makes clear that the date on which the application is made is, in the case of an application sent by post, the date of posting.

There is nothing to indicate to me that those Regulations were ever put before the judge or that if they were any submissions were made in relation to them. Nevertheless the result is that I find that the judge erred in concluding that the appellant did not have statutorily extended leave after 2 June 2007.

However, matters do not end there because the appellant is claiming and needs to prove to the relevant standard that he has had ten years lawful residence in the United Kingdom. The Judge found for other reasons than the statutorily extended leave point that the appellant had not shown that he met the requirements of the Rules. This was because the continuity of residence was broken by reason of the appellant's absence from the United Kingdom for more than six months.

7. By a decision dated 19 June 2007 the application that was made on 2 June 2007 was refused, somewhat surprisingly not because it was said that the application was made out of time, but because the appellant did not meet the HSMP qualifying criteria. Although requests were made for reconsideration of that decision the refusal was maintained in decisions dated 6 September 2007 and 20 November 2007.

8. All of this was noted by the judge in paragraphs 16-18 of the determination. The judge concluded that she did not find that the respondent failed to make a valid decision in refusing the HSMP application. However, between the decisions of 6 September 2007 and 20 November 2007 is one dated 1 October 2007. That decision refers to the

appellant's representatives applying on his behalf for leave to remain in the United Kingdom as a Highly Skilled Migrant but the application was refused in view of the fact that the appellant's limited leave to remain had expired before making the application. It was then stated that because of this there was no right of appeal against the decision. That must be incorrect in view of my finding that the application should have been treated as having been made in time and the judge should have found likewise. At that point therefore although the appellant had been informed otherwise he should have been given a right of appeal against the decision of 1 October 2007.

9. Although the appellant complains in his statement at paragraph 7 that he has been trying, in vain, to obtain a complete copy of all the letters to and from the Home Office and other supporting documents from his previous solicitor it is nevertheless apparent from looking at the bundle that his representatives at the time were very active on his behalf. They could have taken steps to protect his position if they disagreed with the decision that the appellant had made his application for leave to remain under the HSMP out of time. This would most likely be carried out by seeking judicial review of the refusal to grant the appellant a right of appeal. For whatever reason this was not done. It may be that the solicitors and others whose advice the appellant sought thereafter advised him that ultimately he was in difficulty unless he could meet the criteria to show compliance with the requirements of the HSMP which at the time of the refusal decision of 19 June 2007 the respondent decided that he could not. I make no finding about this but then I do not need to because I am engaged in deciding whether the judge has erred in a material way.

10. At paragraph 11 of his statement the appellant blames his solicitor for his problems. He accuses him of being a "last minute man, not reliable and I was trapped in a situation with no income". It seems that the appellant then sought advice elsewhere and stated "After consulting some other immigration agencies I was advised to leave the UK as soon as possible. The reason given was to make the processing of the work permit quicker and all I had to do was waiting (sic) for my work permit". It appears therefore that even if his solicitor was as described the appellant sought and obtained advice from others and was advised to leave the country and did so voluntarily.

11. There then appears in the bundle a letter from the appellant to the "local enforcement office" dated 10 January 2008 which refers to a telephone conversation with an advisor (Rose). The appellant writes that he is voluntarily returning to Mauritius and has made a temporary booking for his departure for 16 January 2008. He seeks advice on the steps that he needs to follow to obtain the return of his passport. It seems that he experienced various difficulties and that he finally left the United Kingdom on 17 February 2008. The appellant states that he made it very clear to the officers that he had a pending application for a work permit and that he would be returning to the UK within some months. I note, however,

that by that date the final decision with regard to his HSMP application had been refused on 20 November 2007.

12. What is not in doubt is that the appellant left the United Kingdom and returned to Mauritius. At paragraph 22 of the determination the judge sets out the appellant's evidence that he was forced to drop the work permit sponsorship and apply for entry clearance as a student. On whatever date he applied for it he was refused entry clearance on 8 August 2008. The refusal letter has not been submitted but the appellant asserts that the Entry Clearance Officer gave a long list of reasons why the application was rejected. The appellant asserts also that there was poor consideration of his application the refusal of which contained a list of unsupported and unfounded allegations on his residence in the UK.

13. What happened next is that after review by the Entry Clearance Manager the original decision was withdrawn and a student visa was issued on 6 October 2008. There is apparently no formal document available detailing the ECM's reasons for granting entry clearance.

14. I fail to see that the judge erred in stating that she was not in a position to speculate as to why the ECM did not uphold the ECO's decision. The fact remains, as the judge pointed out, that continuity of residence was broken as the appellant was absent from the UK for more than six months.

15. Ground 3 of the application seeking permission to appeal submits that it was incumbent upon the judge to determine whether, on the balance of probabilities, she accepted that the original ECO decision had been flawed. However, it would be pure speculation to decide why the manager did not uphold the ECO's decision. Even supposing that the original decision was flawed I fail to see how that would entitle the appellant to claim 10 year's lawful residence in the United Kingdom when he left the country in the full knowledge that there could be no guarantee that any application made by him would either be successful or successful within any given period of time. Furthermore, he left the country expecting to make an application under one part of the Immigration Rules, it seems, and then submitted an entry clearance application as a student. He provides reasons for this which only go to show that it was not a mere formality that he would leave the country and be readmitted with a work permit soon after. Paragraph 14 of his statement: -- "I was forced to drop the work permit sponsorship, Visa logic reported it was extremely difficult to get all the required documents from the company to finalise my application and they relocated …"

16. The student application was subsequently successful but by then there had been a break in continuous residence in the UK for more than six months. Thereby the continuous lawful period of residence had been broken.

17. The guidance to caseworkers and it is just that – guidance - refers to discretion for breaks in lawful residence always being discussed with a

senior case worker. The guidance indicates to me that only if a case worker contemplates using his or her discretion that such a discussion would be required. Where discretion is not contemplated then the point does not arise.

Decision

18. Although there are errors in the judge's determination for the reasons that I have already given, on the particular facts those errors are not material such that the decision should be set aside and there is no other good reason why this appeal should be heard again.

19. There was no challenge to the Article 8 findings.

20. An anonymity direction has not been made previously and the circumstances do not appear to warrant one being made now so I do not make such a direction.

21. The First-tier Tribunal Judge's decision to dismiss this appeal under the Immigration Rules and on human rights grounds therefore stands.

Signed Date

Upper Tribunal Judge Pinkerton